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BRAZIL – MEASURES AFFECTING IMPORTS OF RETREADED TYRES

Report of the Panel

TABLE OF CONTENTS

Page

I. INTRODUCTION 1
A. COMPLAINT OF THE EUROPEAN COMMUNITIES 1
B. ESTABLISHMENT AND COMPOSITION OF THE PANEL 1
C. PANEL PROCEEDINGS 1
II. FACTUAL ASPECTS 2
A. PRODUCTS AT ISSUE 2
B. MEASURES AT ISSUE 3
1. The Import prohibition on retreaded tyres 4
2. Fines on importation, marketing, transportation, storage, keeping or warehousing of retreaded tyres 4
3. State Law restrictions on the marketing of imported retreaded tyres 5
4. Exemption of MERCOSUR countries from the import ban and the fines 6
III. FINDINGS AND RECOMMENDATIONS REQUESTED BY THE PARTIES 7
IV. ARGUMENTS OF THE PARTIES 8
A. THE BAN ON THE IMPORTATION OF RETREADED TYRES 8
1. Article XI:I of GATT 1994 8
2. Article XX of GATT 1994 9
(a) Paragraph b) of Article XX 10
(i) Introduction 10
(ii) To protect human, animal, or plant life or health 11
Introduction 11
Policy objective 11
Factual description 13
Mosquito-borne diseases 14
The release of toxic chemicals and heavy metals into the environment 17
(iii) Necessity of the measure 18
Importance of the interests protected by the measure 19
Contribution of the measure to the end pursued 19
Whether the ban reduces the accumulation of waste tyres in Brazil 21
Data on retreading activities in Brazil 22
Suitability of Brazilian used tyres for retreading 25
Retreading rate of Brazilian tyres 28
The INMETRO technical note 83/2000 31

Imports of used tyres as a result of domestic court rulings 33
Whether the reduction of the accumulation of waste tyres can reduce risks to human life and health 36
In relation to dengue 38
In relation to tyre fires 40
Contribution of the import ban on retreaded tyres for commercial vehicles and aircraft 41
Quantification of the contribution 43
Impact of the measure on international trade 45
(iv) Existence of reasonably available alternatives 47
Burden of proof 47
Measures presented as alternatives 49
Measures to reduce the number of waste tyres 49
Measures to ensure that Brazilian tyres remain retreadable after use 50
Measures against imports of used tyres 51
Waste management measures 52
Controlled stockpiling and landfilling 52
Energy recovery and waste co-incineration 55
Activities of energy recovery and waste co-incineration 55
Safety of energy recovery and waste co-incineration 57
Emissions of dioxins, furans and other persistent organic pollutants (POPs) 58
Material recycling 61
Other measures 64
Resolution CONAMA 258/1999 and the Rodando Limpo programmes in various Brazilian states 64
Imposition of Fines 66
Combination of various disposal measures within a waste tyre management programme 67
Alternative measures and chosen level of protection 68
Other issues 70
The European Communities' management of waste tyres 70
Economic and environmental costs of disposal of waste tyres 73
(v) Conclusion on Article XX(b) 74
(b) Paragraph g) of Article XX 75
(c) Chapeau of Article XX 78
(i) A means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail 78
The MERCOSUR exemption 79
Tyres retreaded domestically 83
(ii) Disguised restriction on international trade 85

Objective of the import ban 85
Effects of the import ban 87
In relation to new tyres 87
In relation to used tyres 89
B. THE FINES ON IMPORTATION, MARKETING, TRANSPORTATION, STORAGE, KEEPING OR WAREHOUSING OF IMPORTED RETREADED TYRES 90
C. RESTRICTIONS ON THE MARKETING OF IMPORTED RETREADED TYRES AT STATE LEVEL 91
D. THE MERCOSUR EXEMPTION 95
1. Articles XIII:1 and I:1 of GATT 1994 95
2. Article XXIV 96
(a) Whether MERCOSUR meets the requirements of Article XXIV 97
(i) The notification requirement under Article XXIV:7 98
(ii) The requirements of Article XXIV:8(a) and 5(a) 99
(b) Whether the formation of the customs union would have been prevented if brazil were not allowed to introduce the measure at issue 102
3. Article XX(d) 107
4. The Enabling Clause 113
V. ARGUMENTS OF THIRD PARTIES 114
A. ARGENTINA'S ORAL STATEMENT 114
1. Conditions for the application of Article XX(b) 114
(a) Policy for the protection of human, animal or plant life or health 114
(b) The measure is "necessary" to protect human health and the environment 115
2. MERCOSUR and Article XXIV 116
B. AUSTRALIA'S ORAL STATEMENT 116
C. CHINA'S WRITTEN SUBMISSION AND ORAL STATEMENT 117
1. The product 117
2. Issues under Article XX(b) 118
3. The MERCOSUR exemption 118
4. Conclusion 119
D. CUBA'S ORAL STATEMENT 120
E. JAPAN'S WRITTEN SUBMISSION AND ORAL STATEMENT 121
1. Inconsistency of Brazil's import ban on retreaded tyres with Article XI:1 121
2. Inconsistency of the fines on importation, marketing, transportation, storage, keeping or warehousing of imported retreaded tyres with Article XI:1 or, in the alternative, Article III:4 121
3. Inconsistency of the restriction on the marketing for imported retreaded tyres at state level with Article III:4 122

4. Applicability of Article XX to Brazil's measures on retreaded tyres 122
(a) Applicability of Article XX(b) 122
(b) Applicability of Article XX(d) 124
(c) Applicability of the chapeau of Article XX 124
5. Brazil's limited exemption of MERCOSUR countries 125
(a) Inconsistency of the MERCOSUR exemption with Articles XIII:1 and I:1 125
(b) Brazil's limited exemption of MERCOSUR countries is not justified by Article XXIV 125
(c) Brazil's limited exemption for MERCOSUR countries is not justified by Article XX(d) 127
6. Conclusion 128
F. KOREA'S WRITTEN SUBMISSION AND ORAL STATEMENT 128
1. Brazil's import ban on retreaded tyres cannot be justified under Article XX(b) 128
2. Brazil's fines on importation, marketing, transportation, storage, keeping or warehousing of imported retreaded tyres cannot be justified under Articles XX(b) or XX(d) 129
3. The State of Rio Grande do Sul's prohibition on marketing of imported retreaded tyres cannot be justified under Article XX(b) 130
4. The MERCOSUR exemption from the import ban and fines cannot be justified under Articles XXIV:5 or XX(d) 130
5. Necessity requirement under Article XX(b) 131
6. Chapeau of Article XX 131
7. Conclusion 132
G. MEXICO'S ORAL STATEMENT 132
H. WRITTEN SUBMISSION AND ORAL STATEMENT OF THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU 132
1. Article XXIV 132
2. Article XX chapeau 135
3. Relationship between Article XXIV and Article XX Chapeau 136
I. THAILAND'S ORAL STATEMENT 137
J. UNITED STATES' WRITTEN SUBMISSION AND ORAL STATEMENT 137
1. Legal analysis of Article XX(b) 137
2. Brazil's reliance on Article XXIV is misplaced 139
3. The *Amicus Curiae* submission of Humane Society International 140
VI. INTERIM REVIEW 140
A. BRAZIL'S COMMENTS ON SECTION VII.A.2(A) OF THE INTERIM REPORT 141
1. Risks from the disposal of waste tyres 141
2. Contribution of the measure to the objective 141
3. Preliminary issue: retreaded tyres 142

4. Mosquito-borne diseases 142
5. Alternative measures 142
B. BRAZIL'S COMMENTS ON SECTION VII.A.2(B) OF THE INTERIM REPORT 142
VII. FINDINGS 143
A. THE BAN ON THE IMPORTATION OF RETREADED TYRES 143
1. Does Brazil impose an import prohibition on retreaded tyres inconsistent with Article XI:1 of GATT 1994? 144
(a) Portaria SECEX 14/2004 144
(b) Other measures 146
(i) Portaria DECEX 8/1991 148
(ii) Resolution CONAMA 23/1996 149
(c) Conclusion 150
2. Is Brazil's import prohibition justified under Article XX of GATT 1994? 150
(a) Is Brazil's import prohibition justified under paragraph (b) of Article XX? 151
(i) "To protect human, animal or plant life or health" 151
Preliminary issues 152
Risks posed to human life or health by the accumulation of waste tyres 154
Mosquito-borne diseases 155
Toxic emissions from tyre fires 160
Risks posed to animal or plant life or health arising from the accumulation of waste tyres 163
To protect human, animal or plant life or health 166
(ii) Is the measure "necessary" within the meaning of paragraph (b) Article XX? 168
Importance of the objective pursued 169
Trade-restrictiveness of the measure 171
Contribution of the measure to the objective 171
Contribution of the import ban to the reduction of the number of waste tyres 173
Substitution of new tyres for imported retreaded tyres 174
Substitution of retreaded tyres made from domestic used tyres for imported retreaded tyres 175
Contribution of the import ban to the reduction of the risks to human, animal and plant life and health 180
Conclusion 181
Availability of alternative measures 181
Approach by the Panel 181
Alternative measures identified by the European Communities 184
Reasonable availability of alternative measures to Brazil 184
Measures to reduce the number of waste tyres 184
Measures to improve the management of waste tyres 186

Resolution CONAMA 258/1999 and "Paraná Rodando Limpo" 186
Disposal methods 188
Conclusion on the necessity of the measure 199
(b) Is the measure applied consistently with the requirements of the chapeau of Article XX? 201
(i) General considerations 201
(ii) Arbitrary or unjustifiable discrimination 203
Is the import ban on retreaded tyres applied in a manner that results in discrimination? 203
Does discrimination arise from the exemption of imports of remoulded tyres originating in MERCOSUR countries from the import ban on retreaded tyres (the "MERCOSUR exemption")? 204
Does discrimination arise from the importation of used tyres through court injunctions? 205
Does discrimination arise from the absence of comparable measures in relation to new tyres? 206
Retreading of new tyres consumed in Brazil 206
Retreadability of new tyres sold in Brazil 207
Conclusion 207
Is the discrimination in the application of the measure "arbitrary" and/or "unjustifiable"? 207
Approach of the Panel 207
Is the discrimination arising from the MERCOSUR exemption "arbitrary" or "unjustifiable"? 209
Is the discrimination arising from the importation of used tyres through court injunctions "arbitrary" or "unjustifiable"? 214
Does the discrimination occur between countries where the same conditions prevail? 218
(iii) Is the measure applied in a manner that constitutes a disguised restriction on international trade? 219
Approach by the Panel 219
Assessment by the Panel 221
Imports of used tyres through court injunctions 226
The MERCOSUR exemption 227
(c) Overall conclusion 228
B. FINES ON IMPORTATION, MARKETING, TRANSPORTATION, STORAGE, KEEPING OR WAREHOUSING OF RETREADED TYRES 228
1. Preliminary issue: fines as an enforcement measure 228
2. Are the fines inconsistent with Article XI of GATT 1994? 230
3. Are the fines justified under Article XX of GATT 1994? 231
(a) Article XX(b) 231
(b) Article XX(d) 231
4. Conclusion 233
C. STATE LAW RESTRICTIONS ON THE MARKETING OF IMPORTED RETREADED TYRES 233

1. Preliminary issues 233
(a) Measures within the scope of the Panel's terms of reference 233
(b) State measures as a "measure" 235
(c) Relationship between the state measures and the federal measures 235
2. Are the state measures inconsistent with Article III:4 of GATT 1994? 237
(a) Marketing prohibition 237
(i) Like products 238
(ii) A law, regulation or requirement affecting the internal sale 238
(iii) Less favourable treatment 239
(b) Disposal obligations 239
(i) Like products 241
(ii) A law, regulation or requirement affecting the internal sale 241
(iii) Less favourable treatment 241
(c) Conclusion 241
3. Are the state measures justified under Article XX(b) of GATT 1994? 242
4. Conclusion 243
D. EXEMPTION OF MERCOSUR COUNTRIES FROM THE IMPORT BAN AND THE FINES 243
VIII. CONCLUSIONS AND RECOMMENDATIONS 245

ANNEX 1 RESPONSES OF PARTIES TO QUESTIONS FROM THE PANEL 247
I. FOLLOWING THE FIRST SUBSTANTIVE MEETING OF THE PANEL 247
A. THE PRODUCTS AT ISSUE 247
B. RETREADING ACTIVITIES IN BRAZIL 256
C. THE IMPORT PROHIBITION 263
D. ARTICLE XX(B) DEFENCE AND THE EXISTENCE OF ALTERNATIVE MEASURES 265
E. MEASURES AT STATE LEVEL 278
F. FINES 281
G. MERCOSUR EXEMPTIONS 282
H. REQUEST FOR SPECIFIC INFORMATION 291
II. FOLLOWING THE SECOND SUBSTANTIVE MEETING OF THE PANEL 291
A. GENERAL 291
B. TRADE DATA 306
C. IMPORT BAN 324
D. STATE MEASURES 358
E. EXEMPTIONS 358

ANNEX 2 RESPONSES OF BRAZIL TO QUESTIONS FROM THE EUROPEAN COMMUNITIES FOLLOWING THE FIRST SUBSTANTIVE MEETING 365

ANNEX 3 RESPONSES OF THIRD PARTIES TO QUESTIONS FROM THE PANEL FOLLOWING THE FIRST SUBTANTIVE MEETING..... 372

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Short Title	Full Case Title and Citation
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Argentina – Hides and Leather	Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather*, WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, 1779
Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
Canada – Autos	Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry* ("*Canada – Autos*"), WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, 2985.
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Short Title	Full Case Title and Citation
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EC – Tariff Preferences	Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R, adopted 20 April 2004, modified by Appellate Body Report, WT/DS/246/AB/R, DSR 2004:III, 1009
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Turkey – Textiles	Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products* ("*Turkey – Textiles*"), WT/DS34/AB/R, adopted 19 November 1999, DSR 1999:VI, 2345.
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US – Shrimp (Article 21.5 – Malaysia)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6481
US – Taxes on Automobiles	GATT Panel Report, *United States – Taxes on Automobiles*, DS31/R, 11 October 1994, unadopted
US – Tuna (EEC)	GATT Panel Report, *United States – Restrictions on Imports of Tuna*, DS29/R, 16 June 1994, unadopted
US – Tuna (Mexico)	GATT Panel Report, *United States – Restrictions on Imports of Tuna*, DS21/R, 3 September 1991, unadopted, BISD 39S/155
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton* ("*US – Upland Cotton*"), WT/DS267/AB/R, adopted 21 March 2005.
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323

ABBREVIATIONS USED IN THIS REPORT

ABR	Associação Brasileira do Segmento de Reforma de Pneus (Brazilian Association of the Retreading Industry)
CONAMA	Conselho Nacional do Meio Ambiente (National Council of the Environment, presided by the Ministry of the Environment)
DECEX	Departamento de Operações de Comércio Exterior (Department of Foreign Trade Operations, part of the Ministry of Development, Industry and Foreign Trade)
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EC	European Communities
GATT 1994	General Agreement on Tariffs and Trade 1994
IBAMA	Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis (Brazilian Institute of the Environment and of Renewable Natural Resources)
INMETRO	Instituto Nacional de Metrologia, Normalização e Qualidade Industrial (National Institute for Metrology, Standardisation and Industrial Quality)
MERCOSUR	Mercado Común del Sur (Southern Common Market)
MICT	Ministry of Industry, Commerce and Tourism
POPs	Persistent Organic Pollutants
SECEX	Secretaria de Comércio Exterior (Secretariat of Foreign Trade, part of the Ministry of Development, Industry and Foreign Trade)
TBR	Trade Barriers Regulation, Council Regulation (EC) No. 3286/94
UNECE	United Nations Economic Commission for Europe
EPA	Environmental Protection Agency (United States)
WHO	World Health Organization
WTO	World Trade Organization

I. INTRODUCTION

A. COMPLAINT OF THE EUROPEAN COMMUNITIES

1.1 On 20 June 2005, the European Communities requested consultations with Brazil under Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994") and Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU") regarding Brazil's imposition of measures that adversely affect exports of retreaded tyres from the European Communities to the Brazilian market.[1]

1.2 Consultations were held on 20 July 2005. These consultations have allowed a better understanding of the measures at issue and the respective positions but have not led to a satisfactory resolution of the matter.

1.3 On 17 November 2005, the European Communities requested the establishment of a panel. At its meeting on 28 November 2005, the Dispute Settlement Body ("DSB") deferred the establishment of a panel until a second request had been made by the European Communities.[2]

B. ESTABLISHMENT AND COMPOSITION OF THE PANEL

1.4 At its meeting on 20 January 2006, the DSB established a panel pursuant to the request of the European Communities in document WT/DS332/4, in accordance with Article 6 of the DSU.[3]

1.5 At that meeting, the parties to the dispute agreed that the panel should have standard terms of reference. The terms of reference are, therefore, the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by the European Communities in document WT/DS332/4, the matter referred to the DSB by the European Communities in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.6 On 6 March 2006, the European Communities requested the Director-General to compose the panel. On 16 March 2006, the Director-General composed the panel as follows:

Chairman: Mr Mitsuo Matsushita

Members: Mr Donald M. McRae
Mr Chang-Fa Lo

1.7 Argentina, Australia, China, Cuba, Guatemala, Japan, Korea, Mexico, Paraguay, Chinese Taipei, Thailand and the United States reserved their third-party rights.

C. PANEL PROCEEDINGS

1.8 On 22 June 2006, the Panel received an unsolicited *amicus curiae* brief from Humane Society International. On 4 July 2006, the Panel received another unsolicited *amicus curiae* brief from a

[1] WT/DS332/1 of 23 June 2005.
[2] WT/DS332/4 of 18 November 2005.
[3] WT/DS332/5 of 17 March 2006 and WT/DSB/M/203, p. 13.

group of organizations.[4] At the first substantive meeting, Brazil informed the Panel of its decision to include the two *amicus curiae* briefs as part of its exhibits.[5]

1.9 On 23 June 2006, the Panel received a letter from the Center for International Environmental Law ("CIEL"), requesting that the Panel consult with the parties to consider the possibility of web-casting the first substantive meeting of the Panel, to be held on 5-7 July 2006. Parties were invited to offer any views they might have in respect of this letter. In light of the views expressed by the parties, the Panel decided that the substantive meeting with the parties, as well as the related third-party session, would be held in closed sessions in accordance with the Working Procedures adopted by the Panel at the beginning of the proceedings.

1.10 The Panel met with the parties on 5-7 July 2006 and on 4 September 2006. The Panel met with third parties on 6 July 2006.

1.11 The Panel submitted the Interim Report to the parties on 12 March 2007. The Panel submitted the Final Report to the parties on 23 April 2007.

II. FACTUAL ASPECTS

A. PRODUCTS AT ISSUE

2.1 This dispute concerns retreaded tyres which are produced by reconditioning used tyres by stripping the worn tread from a used tyre's skeleton (casing) and replacing it with new material in the form of a new tread and, sometimes, new material covering also parts or all of the sidewalls.

2.2 Retreaded tyres can be produced through a number of different methods all encompassed by the generic term "retreading." These methods are: (i) top-capping, which consists in replacing only the tread; (ii) re-capping, which entails replacing the tread and part of the sidewall; and (iii) remoulding or "bead to bead" method, which consists of replacing the tread and the sidewall including all or part of the lower area of the tyre.[6]

2.3 There are different types of retreaded tyres which correspond to the different types of casings used to produce them, namely: passenger car retreaded tyres, commercial vehicle retreaded tyres, aircraft retreaded tyres and other. Under international standards, passenger car tyres may be retreaded only once.[7] By contrast, commercial vehicle and aircraft tyres may be retreaded more than once.

2.4 Under the Harmonized System nomenclature, retreaded tyres are classified under HS heading 4012 "Retreaded or used pneumatic tyres of rubber; solid or cushion tyres, tyre treads and tyre flaps, of rubber", and in particular under four sub-headings: 4012.11, which refers to retreaded tyres of a kind used on motor cars, including station wagons and racing cars; 4012.12, which includes the kind of retreaded tyres used on buses or lorries; 4012.13, which refers to the kind used on aircraft; and 4012.19, which comprises all other types of retreaded tyres. Consequently, for international trade purposes, retreaded tyres are to be distinguished from both used tyres and new tyres. Used tyres are

[4] The group of organizations was composed of: Association of Combats against POPs (ACPO); Association for the Protection of the Environment Cianorte (APROMAC); Center for Human Rights and Environment (CEDHA); Conectas Human Rights; Global Justice; Law for a Green Planet Institute; Center for International Environmental Law (CIEL).

[5] See Exhibits BRA-98 and BRA-99.

[6] See UNECE Regulation No. 108 (1998): Uniform Provisions Concerning the Approval for the Production of Retreaded Pneumatic Tyres for Motor Vehicles and their Trailers and UNECE Regulation No. 109 (1998): Uniform Provisions Concerning the Approval for the Production of Retreaded Pneumatic Tyres for Commercial Vehicles and Their Trailers, Exhibits EC-6 and 7 and BRA-2 and 3, para. 2.37.

[7] See UNECE Regulation No. 108 (1998), para. 6.2.

classified under the HS sub-heading 4012.20, whereas new tyres are classified under HS heading 4011.

B. MEASURES AT ISSUE[8]

2.5 On 17 November 2005, the European Communities requested the establishment of a panel in relation to the following measures of Brazil:[9]

(a) The imposition of an import ban on retreaded tyres, notably by virtue of Portaria 14 of 17 November 2004 of the Secretariat of Foreign Trade of the Brazilian Ministry of Development, Industry and International Commerce (SECEX) that prohibits the issuance of import licenses for retreaded tyres.

(b) The adoption of a set of measures banning the importation of used tyres, which are sometimes applied against imports of retreaded tyres. In a footnote to this paragraph, the European Communities identifies the following measures banning the importation of used tyres: Portaria No. 8 of the Department of Foreign Trade Operations (DECEX) of 13 May 1991; Portaria DECEX 18 of 19 July 1992; Portaria 138-N of the Brazilian Institute of the Environment and of Renewable Resources (IBAMA) of 22 December 1992; Portaria 370 of the Ministry of Industry, Commerce and Tourism (MICT) of 28 November 1994; Interministerial Portaria 3 of 12 September 1995 of the Ministry of Industry, Commerce and Tourism and of the Ministry of the Economy; Resolution 23 of the National Council of the Environment (CONAMA) of 12 December 1996, and CONAMA Resolution 235 of 7 January 1998.

(c) The imposition, by virtue of Presidential Decree 3919 of 14 September 2001, of a fine of 400 BRL per unit on the importation, as well as the marketing, transportation, storage, or keeping in deposit or warehouses of imported, but not of domestic retreaded tyres.

(d) The maintenance of measures at the level of Brazilian States which prohibit the sale of imported retreaded tyres. For instance, Law 12.114 of 5 July 2004 of Rio Grande do Sul which bans the commercialisation of used tyres, as which are considered *inter alia* retreaded tyres that have been manufactured outside of Brazil from the casings of used tyres and imported into Brazil.

(e) The exemption of retreaded tyres imported from other MERCOSUR countries from the import ban by means of Portaria SECEX 14 of 17 November 2004 and from the above-mentioned financial penalties by virtue of Presidential Decree No. 4592 of 11 February 2003, in response to the ruling of a MERCOSUR panel established at the request of Uruguay.

2.6 The European Communities also noted that for each of the measures referred to above, its request also covers any amendments, replacements, extensions, implementing measures or other related measures.

[8] The text of Brazilian laws and regulations is based on translations provided by Brazil in its exhibits as clarified in light of Brazil's answer to panel question No. 1. In its answer to this question, Brazil indicated, *inter alia*, that the Portuguese term "*reformados*" should be translated as "reconditioned or retreaded tyres", the term "*recauchutagem*" as "recapping", "*remoldagem*" as "remolding", and "*recapagem*" as "top-capping".

[9] WT/DS332/4.

1. The Import prohibition on retreaded tyres

2.7 In its first written submission, the European Communities identifies Article 40 of Portaria SECEX 14 of 17 November 2004 ("Portaria SECEX 14/2004") as the current legal basis of the ban on the importation of retreaded tyres in Brazil. Article 40 reads as follows:

> "Article 40 – An import license will not be granted for retreaded and used tyres, whether as a consumer product or feedstock, classified under NCM code 4012, except for remoulded tyres, classified under NCM codes 4012.11.00, 4012.12.00, 4012.13.00 and 4012.19.00, originating and proceeding from the MERCOSUR Member States under the Economic Complementation Agreement No. 18.
>
> Sole paragraph – Imports originating in and coming from MERCOSUR must comply with the technical regulations adopted by the National Institute for Metrology, Standardization and Industrial Quality (INMETRO) for the product in question and with the regulations under MERCOSUR rules of origin and regulations of the environmental authorities."[10]

2.8 Portaria SECEX 14/2004 was preceded by a number of regulations that previously prohibited the importation of retreaded tyres. These measures are:

(a) Portaria SECEX 8 of 20 September 2000, the first measure in Brazil explicitly banning the importation of "retreaded tyres" classified under heading 4012 of the MERCOSUR Common Nomenclature (NCM); and

(b) Portaria SECEX 17 of 1 December 2003, which replaced Portaria SECEX 8/2000, prohibiting the issuance of licenses for imports of retreaded tyres and excluding from this prohibition only the remoulded tyres originating in other MERCOSUR countries.

2.9 Before the importation of retreaded tyres was expressly banned by means of Portaria SECEX 8/2000, Brazil adopted several measures dealing with the importation of used goods, including used tyres. The European Communities indicated in its first written submission that these measures included the following:[11]

(a) Portaria DECEX 8 of 13 May 1991, in force in the version of Portaria MICT 370 of 28 November 1994, which prohibits the importation of used consumer goods, including 'used tyres', and

(b) Resolution CONAMA 23 of 12 December 1996, establishing that inert waste is free from import restrictions except for the importation of used tyres, which is therefore prohibited.

2. Fines on importation, marketing, transportation, storage, keeping or warehousing of retreaded tyres

2.10 On 14 September 2001, through Presidential Decree 3.919, Brazil amended Decree 3.179 of 21 September 1999, which provides for the specific sanctions applicable to conduct and activities harmful to the environment, and other provisions. The amendment introduced Article 47-A, which subjects the importation as well as the marketing, transportation, storage, keeping or warehousing of

[10] Exhibit BRA-84. See also Exhibit EC-29.
[11] European Communities' first written submission, footnote 34 to para. 59; Exhibits EC-31-33.

imported used and retreaded tyres to a fine of R$400/unit. Article 1 of Presidential Decree 3.919 provides:

> "Art. 1. The following article is added to Decree 3.179 of September 21, 1999:
>
> > 'Article 47-A. Importing used or retreaded tyres:
> >
> > Fine of R$ 400.00 (four hundred reais) per unit.
> >
> > Sole paragraph: The same penalty shall apply to whosoever trades, transports, stores, keeps or maintains in a depot a used or retreaded tyre imported under such conditions. (NR)'"[12]

3. State Law restrictions on the marketing of imported retreaded tyres

2.11 On 5 July 2004, Rio Grande do Sul issued Law 12.114, prohibiting the commercialization of imported used tyres within its territory, which includes imported retreaded tyres as well as retreaded tyres made in Brazil from imported casings. This Law, however, does not prohibit the marketing of retreaded tyres produced in Brazil from domestic casings. Article 1 of Law 12.114 reads:

> "Art. 1. It is forbidden to sell imported used tyres in the State of Rio Grande do Sul.
>
> Sole paragraph. An imported used tyre is considered for the purposes hereof as follows:
>
> > I – the simple carcass of the used tyre from any other country;
> >
> > II – the carcass of a used tyre that has been retreaded by top-capping, remoulding or recapping processes abroad and imported in this condition;
> >
> > III – the carcass of a used tyre from any other country and retreaded in Brazil by any of the industrial processes mentioned in the preceding item."[13]

2.12 On 28 November 2005, the state of Rio Grande do Sul amended Law 12.114 through Law 12.381, which allows the importation and marketing of imported retreaded tyres provided that the importer proves to have destroyed ten used tyres in Brazil for every retreaded tyre imported. Law 12.381, however, requires the destruction of only one used tyre per imported tyre in the case of imports of used tyre casings. Article 1 of Law 12.381 reads:

> "Article 1 – The sole paragraph of Article 1 of Law 12.114 of 5 July 2004, prohibiting the sale of used tyres imported into the State and from other sources becomes paragraph 1, and the following paragraphs 2 and 3 are added:
>
> §1° – …
>
> §2° – The following shall be permitted:
>
> > I – the import of a used tyre carcass where importers can demonstrate that they will collect on Brazilian territory and destroy, in an

[12] Exhibit BRA-72. See also Exhibit EC-34.
[13] Exhibit BRA-80. See also Exhibit EC-35.

> environmentally adequate manner, 1 (one) existing used tyre on the domestic territory for each used tyre carcass to be imported;
>
> II – the import of a carcass of a tyre retreaded by means of top-capping, remoulding, or recapping, outside of Brazil, where importers can demonstrate that they will collect within the domestic territory and destroy, in an environmentally-adequate manner, 10 (ten) existing used tyres within the domestic territory for each used tyre carcass to be imported.
>
> § 3º – tyre retreaders shall have the right to import one used tyre carcass for each used or retreaded tyre exported without having to comply with the environmental counterpart referred to in part I of paragraph 2 of this Article."[14]

4. Exemption of MERCOSUR countries from the import ban and the fines

2.13 After the adoption of Portaria SECEX 8/2000, the first measure explicitly banning the importation of "retreaded tyres", Uruguay requested, on 27 August 2001, the initiation of arbitral proceedings under MERCOSUR against this Brazilian measure. On 9 January 2002, the MERCOSUR arbitral tribunal decided that the import ban on retreaded tyres imposed by Portaria SECEX 8/2000 was incompatible with MERCOSUR Decision 22/2000, which requires MERCOSUR partners not to introduce new restrictions to commerce among themselves.

2.14 Following this arbitral award, Brazil eliminated the ban for remoulded tyres imported from MERCOSUR countries by means of Portaria SECEX 2 of 8 March 2002. Article 1 of Portaria SECEX 2/2002 provides:

> "Art. 1. The import license for remoulded tyres is hereby authorized, classified under NCM codes 4012.1100, 4012.1200, 4012.1300 and 4012.1900, when proceeding from MERCOSUR member States under the Economic Complementation Agreement no. 18."[15]

2.15 This exception was maintained in Portaria SECEX 17 of 1 December 2003, and it is currently contained in Article 40 of Portaria SECEX 14/2004, transcribed above.

2.16 Similarly, through Presidential Decree 4.592 of 11 February 2003, Brazil exempted retreaded tyres imported from other MERCOSUR countries from the financial penalties set out in Presidential Decree 3.919. Article 1 of Presidential Decree 4.592 reads as follows:

> "Article 1: Article 47-A of Decree 3.179 of 21 September 1999 shall apply with the addition of the following paragraph, and the current sole paragraph shall be renumbered as (1):
>
> > paragraph (2) – Imports of retreaded tyres classified under heading MCN 4012.1100, 4012.1200, 4012.1300 and 4012.1900, originating in the MERCOSUR member countries under Economic Complementation Agreement No. 18 shall be exempt from payment of the fine referred to in this Article."[16]

[14] Exhibit BRA-81. See also Exhibit EC-37 and its answer to panel question No. 63.
[15] Exhibit BRA-78. See also Exhibit EC-41.
[16] Exhibits BRA-79. See also Exhibit EC-42.

III. FINDINGS AND RECOMMENDATIONS REQUESTED BY THE PARTIES

3.1 The European Communities requests the Panel to find that:[17]

(a) Brazil has acted inconsistently with Article XI:1 of GATT 1994 by instituting and maintaining a prohibition and restriction other than a duty, tax or other charge on the importation of a product of the territory of another Member, made effective through import licences and other measures.

(b) Brazil has acted inconsistently with Article XI:1 and/or Article III:4 of GATT 1994 by instituting and maintaining a restriction other than a duty, tax or other charge on the importation of a product of the territory of another Member, made effective through a fine imposed on the importation of retreaded tyres in the amount of 400 BRL per unit.

(c) Brazil has acted inconsistently with Article III:4 and/or Article XI:1 of GATT 1994 by imposing a fine in the amount of 400 BRL per imported retreaded tyre that is marketed (sold), transported, stored, kept or kept in deposit or warehouses. Thereby, Brazil has failed to accord, to products of the territory of the European Communities imported into the territory of Brazil, treatment no less favourable than that accorded to like products of national origin in respect of laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

(d) Brazil has acted inconsistently with Article I:1 of GATT 1994 by eliminating the import ban and the above-mentioned financial penalties for retreaded tyres imported from other MERCOSUR countries, while maintaining those measures for other imports, notably from the European Communities. Thereby, Brazil has failed to accord an advantage granted, with respect to rules and formalities in connection with importation, and with respect to matters referred to in paragraph 4 of Article III, to products originating in other countries immediately and unconditionally to the like products originating in the territory of the European Communities.

(e) By applying the above-mentioned import ban on retreads as well as the financial penalty on every unit of retreaded tyres imported from the European Communities, but not to those imported from other MERCOSUR countries, Brazil acts inconsistently with Article XIII:1 of GATT 1994, because it applies a prohibition and restriction on the importation of a product of the territory of another Member, although the importation of the like product of all third countries is not similarly prohibited or restricted.

3.2 The European Communities also requests the Panel to recommend, in accordance with Article 19.1 of the DSU, that Brazil bring its measures into conformity with the covered agreements.[18]

[17] European Communities, Request for the establishment of a Panel, WT/DS332/4, paras. 11-15.
[18] European Communities' first written submission, para. 224.

3.3 In turn, Brazil requests the Panel to dismiss all the claims made by the European Communities in its first written submission and to find that:[19]

(a) Brazil's import ban on retreaded tyres (contained in Portaria SECEX 14/2004) is justified by Article XX(b) of the GATT because it is a measure necessary to protect human, animal and plant life and health.

(b) The anti-circumvention fines (applied pursuant to Decree 3.919 of 14 September 2001) are justified by Article XX(b) and (d) of the GATT because they are necessary to protect human and animal life and health and the environment, and to secure compliance with the import ban, which itself is not inconsistent with the GATT.

(c) The limited exemption of MERCOSUR countries from Brazil's import ban (made effective through Portaria SECEX No. 14 of 17 November 2004) is authorized by Article XXIV, because it was adopted pursuant to Brazil's obligations under MERCOSUR – a customs union that is consistent with Article XXIV.

(d) The limited exemption of MERCOSUR countries from the ban is also justified by Article XX(d), because it is necessary to secure compliance with Brazil's obligation under MERCOSUR, which itself is not inconsistent with the GATT.

(e) The state measure of Rio Grande do Sul (Law 12.114 of 5 July 2004) is justified by Article XX(b) of the GATT 1994 because it is a measure necessary to protect human, animal and plant life and health.

3.4 Brazil also states that in any event, it is not necessary for the Panel to reach an independent conclusion on the state measures because these measures do not have any independent legal effect.[20]

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments presented by the parties in their written submissions and oral statements are reflected below. This Part contains arguments of the parties as summarized in Parties' executive summaries and includes additional arguments taken from submissions and replies to questions as suggested by the Parties in their comments to this Part. Further arguments are contained in the replies and comments on replies annexed to the Panel report.

A. THE BAN ON THE IMPORTATION OF RETREADED TYRES

1. Article XI:I of GATT 1994

4.2 The **European Communities** submits that Article 40 of Portaria SECEX 14/2004 provides that no import licences shall be granted for the importation of retreaded tyres into Brazil; however, such import licences are necessary in order to import retreaded tyres into Brazil. Therefore, the European Communities claims that Portaria SECEX 14/2004 prohibits the importation of retreaded tyres of any other WTO Member, including the European Communities, into Brazil. Accordingly, the European Communities claims that Brazil imposes a prohibition on the importation of retreaded tyres

[19] Brazil's first written submission, paras. 190 and 191.
[20] Brazil's second written submission, para. 199.

incompatible with Article XI:1 of GATT 1994.[21] The European Communities notes that Brazil has not contested that its import ban on retreaded tyres violates Article XI:1.[22]

4.3 **Brazil** claims that Article XX exceptions "relate to *all* of the obligations under the General Agreement,"[23] and thus allow Brazil to maintain the ban even if it is prima facie inconsistent with Article XI:1.[24] Brazil submits that the European Communities questions the right of Brazil to adopt a ban that seeks to avoid the generation of unnecessary dangerous waste and reasonably deal with the disposal challenge – even though it recognizes the adverse health and environmental effects caused by waste tyre accumulation and disposal.[25]

2. Article XX of GATT 1994

4.4 **Brazil** claims that the ban on retreaded tyres is justified by Article XX(b) of GATT 1994.[26] Brazil submits that a Member invoking Article XX(b) must show: (i) that the measure falls within the scope of paragraph (b); and (ii) that the measure is applied in a manner that is consistent with the chapeau of Article XX.[27] Brazil claims that it meets that burden of proof.[28]

4.5 Brazil recognizes and shares the systemic concern that findings upholding an import ban, when necessary, should not lead to abuse of the general exceptions of Article XX. Because of the unique facts of this case, however, Brazil argues that there is no risk that a finding in favour of the ban could serve as a basis for other Members to invoke Article XX to justify an import ban that is not a legitimate measure necessary to protect human health and the environment.[29]

4.6 Brazil argues that this dispute presents a number of complex legal issues as well as fundamental facts that underlie those issues.[30] First, Brazil contends that this dispute cannot be seen outside its broader context: it involves legitimate concerns about health and environment issues, particularly sensitive for developing countries.[31] Brazil argues that the market for retreaded tyres in developed countries is small and getting smaller and the number of undesirable tyre casings that must be disposed of is getting higher. Brazil submits that consumers in developed countries tend to look with disfavour on retreaded tyres, considering them to be less safe even though retreaded tyres must be made to exacting safety applications. Brazil submits further that consumers in developing countries, including Brazil, are very price-oriented and therefore are more likely to buy retreaded tyres than consumers in the developed world.[32] Moreover, Brazil explains that from an exporting country point of view, every exported casing and every exported retread is a disposal problem also to be exported. Brazil stresses, on the other hand, that from an importing developing country point of

[21] European Communities' first written submission, executive summary, para. 18.
[22] European Communities' first oral statement, executive summary, para. 1.
[23] Appellate Body Report on *US – Gasoline*, at 24 (emphasis added).
[24] Brazil's first written submission, executive summary, para. 18; Brazil's first oral statement, executive summary, para. 12.
[25] Brazil's first written submission, executive summary, para. 2.
[26] Brazil's first written submission, executive summary, para. 17; Brazil's first oral statement, executive summary, para. 11.
[27] See Appellate Body Report on *US – Gasoline*, at 20.
[28] Brazil's first written submission, executive summary, para. 18; Brazil's first oral statement, executive summary, para. 12.
[29] Brazil's first oral statement, executive summary, para. 22.
[30] Brazil's first oral concluding statement, executive summary, p. 5.
[31] Brazil's first oral concluding statement, executive summary, p. 5.
[32] Brazil's first oral concluding statement, executive summary, p. 6.

view, along with the retreaded tyres comes the disposal problem. Brazil argues that it has enough disposal problems and does not need to import more.[33]

4.7 Second, Brazil stresses the necessity to protect life and health.[34] However, Brazil contends that while it is often easy to identify the steps that must be taken to protect health and the environment, it is not always easy to take them. Brazil argues further that the "polluter pays" principle may be a sound environmental principle, but the reality is that most polluters do not want to pay, and frequently they are in a position to delay – or entirely block – measures intended to protect health and the environment. Brazil is no different from any other country in this regard. Brazil argues that there are those in Brazil who want to import retreaded tyres and who want to import casings and they have strong allies and advance their interests through the political process and the judicial system. Brazil submits that the European Communities tried to convey to the Panel the false idea that Brazil has a permissive attitude towards the imports of used tyres.[35]

4.8 The **European Communities** claims that the import ban cannot be justified under Article XX. It also claims that it is well-established case-law that the burden of proof in relation to any defence based on Article XX rests on the responding party, in this case Brazil.[36]

(a) Paragraph b) of Article XX

(i) Introduction

4.9 **Brazil** claims that the import ban is justified by Article XX(b) because it is a measure necessary to protect human life and health and the environment and it protects Brazil's public and the environment from dangers caused by waste tyres.[37] Brazil argues that the import ban avoids the unnecessary generation of additional tyre waste, and its accumulation and disposal, which presents well-recognized dangers to public health and the environment.[38]

4.10 The **European Communities** argues that the import ban does not fulfil the conditions of Article XX(b).[39] The European Communities argues that it is for Brazil, as the WTO Member invoking an exception to its WTO obligations, to demonstrate that the requirements of Article XX(b) are met.[40] The European Communities submits that according to the Panel Report in *US – Gasoline* and Panel and Appellate Body Reports in *EC – Asbestos*, the party invoking Article XX(b) must prove, first, that the policy pursued falls within the range of policies designed to protect human life or health, and, second, that the inconsistent measures for which the exception is invoked are necessary to fulfil the policy objective.[41] The European Communities contends that the general explanations provided by Brazil as well as the facts on record do not fulfil these two requirements.[42] According to the European Communities, the present proceedings have shown that Brazil has failed to discharge this burden with respect to every single requirement of Article XX(b).[43] The European Communities

[33] Brazil's first oral concluding statement, executive summary, p. 6.
[34] Brazil's first oral concluding statement, executive summary, p. 6.
[35] Brazil's first oral concluding statement, executive summary, p. 6.
[36] European Communities' first written submission, executive summary, para. 19.
[37] Brazil's first written submission, executive summary, para. 18; first oral statement, executive summary, para. 12.
[38] Brazil's first written submission, executive summary, para. 1. Brazil notes that it uses the term "environment" to refer to "animal or plant life or health" within the meaning of Article XX(b) and "health" to refer to human life or health.
[39] European Communities' first written submission, executive summary, para. 20.
[40] European Communities' second oral concluding statement, executive summary, para. 7.
[41] European Communities' first written submission, executive summary, para. 20.
[42] European Communities' first written submission, executive summary, para. 21.
[43] European Communities' second oral concluding statement, executive summary, para. 7.

recalls the Appellate Body's statement in *EC – Asbestos* that the words "policies designed to protect human life or health" imply the existence of a health risk.[44]

(ii) To protect human, animal, or plant life or health

Introduction

Policy objective

4.11 **Brazil** claims that the import ban is designed to reduce waste tyre volumes, and by so doing, to reduce the incidence of cancer, dengue, reproductive problems, environmental contamination, and other associated risks.[45] Brazil further claims that the ban falls squarely "within the range of policies designed to protect" human health and the environment because it is designed to avoid the unnecessary generation of tyre waste, and consequently, reduce the health and environmental risks that flow from waste tyre accumulation and disposal.[46]

4.12 Brazil claims that no one questions that waste tyres are a considerable environmental burden, and the fewer of them around, the better.[47] Brazil argues that waste tyre accumulation threatens public health and the environment because waste tyres:[48] (i) fuel epidemics of mosquito-borne diseases; and (ii) release toxic chemicals and heavy metals into the environment.[49] Brazil also submits that accumulated tyres must be collected and disposed of because they fuel mosquito-borne diseases and create fire hazards.[50] Concerning the European Communities' claim that Brazil never explained the risks to animal or plant health or life resulting from the accumulation of waste tyres, Brazil directs the European Communities' attention to the submission of the Humane Society, which was incorporated into the record as Exhibit BRA-98.[51]

4.13 Brazil states that because waste tyre disposal presents health risks that cannot be eliminated, only non-generation of waste tyres allows Brazil to achieve its chosen level of protection.[52] Brazil argues[53] that the import ban is necessary because it prevents the unnecessary generation of a dangerous waste and, consequently, reduces the risks of its disposal.[54]

4.14 Brazil notes that the European Communities also admits that "waste tyres ... pose a significant environmental and public health problem in Brazil".[55] Brazil submits that the parties agree that the accumulation of waste tyres presents risks to human health and the environment and that measures to reduce the accumulation of tyre waste are legitimate responses to these risks.[56] Brazil also submits

[44] European Communities' first written submission, executive summary, para. 20.
[45] Panel Report on *US – Gasoline*, at para. 6.20.
[46] Brazil's first written submission, executive summary, para. 20; first oral statement, executive summary, para. 13; second oral statement, executive summary, para. 20.
[47] Brazil's first oral statement, executive summary, para. 4.
[48] Brazil's first written submission, executive summary, para. 3; first oral statement, executive summary, para. 4.
[49] Brazil's first written submission, paras. 22-37.
[50] Brazil's first oral statement, executive summary, para. 4.
[51] Brazil's second oral concluding statement, executive summary, para. 8.
[52] Brazil's second written submission, paras. 6 and 43.
[53] Brazil's first written submission, paras. 1, 6, 17 and 19.
[54] For more information on risks associated with disposal, see Section IV.A.2(a)(iv) "Existence of Reasonably Available Alternatives".
[55] European Commission, Directorate General-Trade, *Examination Procedure Concerning an Obstacle to Trade, Within the Meaning of Council Regulation (EC) No 3286/94, Consisting of Trade Practices Maintained by Brazil Affecting Trade in Retreaded Tyres, Report to the Trade Barriers Regulation Committee 13* (2004) (Exhibit EC-2). Brazil's first oral statement, executive summary, para. 7.
[56] Brazil's second written submission, executive summary, para. 1.

that the European Communities has recognized that "measures designed to prevent the incidence of [diseases such as cancer and dengue] do potentially fall within the scope of Article XX(b)"[57] and that[58] "measures aiming to reduce the accumulation of waste tyres *can constitute a legitimate response to health problems arising from waste tyres*".[59]

4.15 In other words, it is Brazil's view that the European Communities does not dispute that Brazil can – in conformity with its WTO obligations – pursue a waste tyre reduction policy to minimize the risks associated with waste tyres, including the imposition of a ban on imports of retreaded tyres. Brazil contends that the European Communities' claims that (i) Brazil is pursuing a goal other than health and environmental protection, and (ii) that Brazil's waste tyre management policy is not the most appropriate means of achieving its stated goal, are unfounded.[60]

4.16 Brazil recalls the Panel's statement in *EC – Asbestos* that "a policy that seeks to reduce exposure to a risk should fall within the range of policies designed to protect human life or health, insofar as a risk exists."[61] Brazil also recalls the Appellate Body's statements that WTO Members "have a large measure of autonomy"[62] to determine their own environmental policies, and that "the preservation of human life and health through the elimination, or *reduction*" of health risks is a value that is "both vital and important in the highest degree."[63]

4.17 The **European Communities** notes Brazil's claim that Article XX(b) is a provision that "preserves the ability of Members to prohibit imports that endanger human life or health and the environment". However, the European Communities argues that according to its wording, Article XX(b) covers only measures which are necessary to protect human, animal, or plant life or health. In turn, a measure designed to protect other concerns, including issues of environmental protection not related to human, animal or plant life or health, cannot be justified under Article XX(b).[64] The European Communities also points out that Brazil regularly and even primarily refers to issues of environmental protection without any direct link to human, animal or plant life or health.[65]

4.18 The European Communities is of the view that the analogy Brazil has attempted to draw with the prohibition of asbestos at issue in *EC – Asbestos* is entirely unfounded since asbestos fibres are immediately and directly harmful to human health, particularly as regards risks resulting from exposure to asbestos.[66] The European Communities argues that this is not comparable to retreaded tyres, which do not constitute any particular health risk.[67] The European Communities recalls that in *EC – Asbestos* the Appellate Body came to the conclusion that the objective pursued by the measure is the preservation of human life and health through the elimination, or reduction, of the well-known, and life-threatening, health risks posed by asbestos fibres. However, the European Communities

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[57] See European Communities' first oral statement, at para. 16.

[58] European Communities' answer to panel question No. 38 (emphasis added).

[59] Brazil's second written submission, executive summary, para. 4 (emphasis original).

[60] Brazil's second written submission, executive summary, para. 4.

[61] Panel Report on *EC – Asbestos*, at para. 8.186. Brazil's first written submission, executive summary, para. 20.

[62] Appellate Body Report on *US – Gasoline*, at 30.

[63] Appellate Body Report on *EC – Asbestos*, para. 172 (emphasis added). See also Panel Report on *Canada – Wheat Exports and Grain Imports*, para. 6.224 ("[P]rotection of human life and health against a life-threatening risk" prevails over commercial interests"). Brazil's first written submission, executive summary, para. 19.

[64] European Communities' first oral statement, para. 15.

[65] European Communities' first oral statement, executive summary, para. 3.

[66] European Communities' first oral statement, executive summary, para. 4; second written submission, executive summary, para. 4.

[67] European Communities' first oral statement, executive summary, para. 4.

argues that the present case is far removed from this situation as there are no "well-known and life-threatening health risks" posed by retreaded tyres. The European Communities therefore contends that it is for Brazil to establish how its measure contributes to the prevention of such risks, and the mere importance of the protection of life and health cannot absolve it from this task.[68]

4.19 The European Communities argues that it has already explained that the real aim of the import ban on retreaded tyres is not the protection of life and health but the protection of Brazil's domestic industry.[69]

Factual description

4.20 **Brazil** explains that retreading, a process that involves replacing the tyre's worn-out tread with a new tread, extends the tyre's lifespan by giving what would otherwise be a waste tyre an additional life. By retreading the tyres it consumes, Brazil claims that it directly reduces the number of additional waste tyres that would accumulate and which would have to be disposed of in its territory. Brazil is of the view that there is no effective disposal method to deal with over 40 million waste tyres generated every year in Brazil that is both environmentally sound and economically viable. Brazil submits that unlike new tyres, passenger car retreaded tyres – which in recent years comprised nearly all of European Communities' exports to Brazil – cannot be retreaded again and must be collected and disposed of in Brazil after just a single use. Brazil further submits that at the end of their useful life, these imported retreaded tyres – which cannot be retreaded again – become waste tyres that accumulate in Brazil by the millions.[70]

4.21 Brazil contends that the first written submission of the European Communities reveals a fundamental misunderstanding of what this case is about. Brazil explains that it prohibits imports of retreaded tyres not because they are somehow less safe, but because they have a shorter lifespan: passenger car retreaded tyres cannot be retreaded again and commercial vehicle retreaded tyres have fewer remaining lifecycles; thus, while retreaded tyres are not waste, they do become waste sooner. Brazil contends that the European Communities ignores the central issue: that the import ban avoids the unnecessary generation of dangerous tyre waste that must be disposed of in Brazil and, consequently, reduces the risks that flow from the accumulation and disposal of that waste.[71] Brazil contends that the European Communities agrees that retreading "prevent[s] a used tyre from being discarded needlessly."[72] However, Brazil claims that a country benefits from retreading *only* if it retreaded tyres consumed *within* its territory and that by retreading and exporting its tyres, the European Communities reduces its own waste burden, not Brazil's.[73]

4.22 The **European Communities** claims that Brazil has tried to create the impression that the present case is about human life and health and the environment. The European Communities contends that this is not correct, as the present proceedings concern a product, namely retreaded tyres.[74] The European Communities claims that there is no disagreement that retreaded tyres are new products which, when produced in accordance with the existing international standards, are as safe and durable as new tyres. The European Communities submits that tyre retreading is a mature and accepted technology, which is practiced in many countries worldwide, including in the

[68] European Communities' second written submission, executive summary, para. 4.
[69] European Communities' second oral statement, para. 10.
[70] Brazil's first written submission, executive summary, para. 1.
[71] Brazil's first oral statement, executive summary, para. 1.
[72] European Communities' first written submission, at para. 45.
[73] Brazil's first oral statement, executive summary, para. 2.
[74] European Communities' second oral concluding statement, executive summary, para. 8.

European Communities and Brazil. The European Communities also notes that retreaded tyres are traded, and there are accepted UNECE standards facilitating such trade.[75]

4.23 The European Communities argues that Brazil puts used and retreaded tyres in the same basket, while this case is only about retreaded tyres.[76] Moreover, the European Communities explains that there are no differences between retreaded tyres and new tyres that would be relevant for the question at issue. The European Communities further submits that neither of them spread diseases among countries and continents: both types of tyres are products the production of which involves the use of high temperatures, pressures and solvents, eliminate viruses, bacteria or insects.[77] Moreover, the European Communities argues that the risks produced by burning or disposed tyres might exist in relation to used or end-of-life tyres but are totally misplaced when referring to retreaded tyres, which are stored, sold and then installed in vehicles, in the same way as new tyres.[78]

Mosquito-borne diseases

4.24 **Brazil** notes that the European Communities has questioned the genuineness of the cited health risks and has even requested a confirmation that "dengue or malaria cases *in Brazil* are linked to the presence of waste tyres".[79] Brazil recalls the European Communities' acknowledgement, just two years ago, and in the context of this very dispute that[80] "[c]learly, waste tyres ... pose a significant environmental and public health problem in Brazil".[81] Brazil notes that these risks suddenly became less "clear" to the European Communities.[82]

4.25 Brazil explains that when discarded and stockpiled, tyres create ideal breeding grounds for mosquitoes that carry dengue, yellow fever, malaria, and other dangerous diseases. Brazil submits that research indicates that tyres may, in fact, be the mosquitoes' favourite breeding site. Brazil refers to a study of mosquito specimen in Londrina, State of Paraná which observed, for example[83], that "[t]ires have been a preferred breeding site", possibly because of their "similarities with tree holes".[84] Brazil also refers to a 1997 study that examined *aedes aegypti* colonization in the State of São Paulo and found that:[85]

> Positive larvae were collected ... mainly at tyre repair shops, tyre stockpiles and reprocessing units, ... and deposits. ... Tyres were the main culprits for the passive spread of mosquito, which occurs through intense tyre commerce ... With the

[75] European Communities' second oral concluding statement, executive summary, para. 1.
[76] European Communities' first oral statement, executive summary, para. 4. European Communities' second written submission, executive summary, para. 4.
[77] European Communities' first written submission, executive summary, para. 21.
[78] European Communities' first written submission, executive summary, para. 22.
[79] European Communities' questions to Brazil following the First Substantive Meeting of the Parties, question 12 (emphasis added).
[80] *Report to the Trade Barriers Regulation Committee 13* (2004) (Exhibit EC-2).
[81] Brazil's second written submission, executive summary, para. 5; Brazil's second oral statement, executive summary, para. 4.
[82] Brazil's second oral statement, executive summary, para. 4.
[83] João A. C. Zequi, *Imaturos de Culicidae (Diptera) Encontrados em Recipientes Instalados em Mata Residual no Munícipio de Londrina, Paraná, Brasil*, Revista Brasiliera de Zoologia, Volume 22, No. 3, at 657 (2005) (Exhibit BRA-113).
[84] Brazil's second written submission, executive summary, para. 7.
[85] Brazil's second written submission, executive summary, para. 6.

> presence of mosquitoes that transmit both dengue and yellow fever, the region began to undergo the risk of epidemics.[86]

4.26 Brazil submits that transportation of waste tyres also spreads mosquitoes and, with them, diseases. However, in some cases, transportation cannot be avoided, as for example in the Amazon region, which has only few disposal facilities because of its fragile ecosystem. Brazil notes the European Communities' argument that in regions, such as the Amazon, the import ban will not make a difference because (i) few people live there, producing little waste; and (ii) tyres will be disposed of after a single use because such regions have no retreading industry.[87] Brazil claims that the argument is clearly flawed: the Amazon's population is over 20 million (with 14 million living in cities), and the region has some 119 retreaders.[88] Brazil notes that the risks of waste tyre transportation are well recognized.[89] One of the examples Brazil cites in support is a Japanese study that states:

> "In the northernmost limit of the mosquito, Higashiyama located on the eastern side of Tohoku district, there is a cement plant in which used tires are used for fuel and raw materials. These tires, which could be infested with mosquitoes, are frequently transported from large cities nearby. It has been shown that this kind of economic activity has a strong connection to the spread of *Ae. albopictus*."[90]

4.27 Brazil submits that three out of four dengue types co-circulate in Brazil today, which increases the likelihood of complications and the introduction of type 4 is a great threat.[91] Brazil also explains that because of their shape and presence in rainy locations, tyres contribute to the proliferation of mosquitoes that carry dengue. Brazil's National Program for Dengue Control, which works to identify the mosquito-breeding sites and educate the population, recognizes deposits of tyre waste as "strategic points", and inspects and fumigates them.[92] Based on his personal experience and on the results obtained so far in the National Dengue Control Program, Dr. Giovaninni Evelim Coelho from Brazil's Ministry of Health states that the import ban is necessary to prevent the spread of the disease and removing the ban will greatly increase the risk of epidemics.[93]

4.28 Over the last decade, Brazil submits that it has suffered from severe epidemics of dengue, a disease that the World Health Organization (WHO) has recognized as "a major international public health concern"[94], and which is a viral disease that can cause high fever, muscle and joint pain, haemorrhage, circulatory failure, and even death in the event of complications.[95] Brazil submits that waste tyres fuelled Brazil's dengue epidemic, which peaked first in 1998 with 528,388 cases, and again in 2002 with 794,000 cases. Brazil explains that it collected discarded tyres and fumigated tyre stockpiles in the course of its R$4.5 billion (US$2 billion) dengue-control effort, but these measures

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[86] Francisco Chiaravalloti Neto, Ph.D., *Descrição da Colonização de Aedes Aegypti na Região de São José do Rio Preto, São Paulo,* Revista da Sociedade Brasileira de Medicina Tropical, Volume 30, No. 4 (1997) (Exhibit BRA-109).

[87] European Communities' answer to panel question No. 47.

[88] Brazil's second written submission, executive summary, para. 8.

[89] Brazil's second written submission, paras. 28-31 (Exhibits BRA-119, 120, 121, 122).

[90] Exhibit BRA-120, cited in Brazil's second written submission, para. 29.

[91] Brazil's first oral statement, executive summary, para. 5.

[92] Brazil's first oral statement, executive summary, para. 6.

[93] Brazil's first oral statement, executive summary, para. 8.

[94] World Health Organization, *Guidelines for Treatment of Dengue Haemorrhagic Fever in Small Hospitals,* (ix) (1999) (Exhibit BRA-14).

[95] See World Health Organization, *Dengue and Dengue Haemorrhagic Fever* (2002) (Exhibit BRA-13).

can only mitigate, not eliminate, the risks.[96] Brazil submits that between 1998 and 2002, 70 per cent of the reported dengue cases in the Americas occurred in Brazil.[97]

4.29 Brazil submits that the European Communities has requested a confirmation that the dengue epidemic in Brazil is indeed linked to the presence of waste tyres. In its second written submission, Brazil notes that it provided several studies that confirm this well-recognized fact. Brazil also notes that one such study[98], conducted in the State of São Paulo, found positive larvae mainly at tyre shops and stockpiles, and noted that tyres were the "the main culprits" for the spread of mosquitoes, and that the presence of mosquitoes created the risks of dengue and yellow fever epidemics.[99]

4.30 Brazil contends, contrary to the European Communities' suggestion that dengue had nothing to do with tyres, allegedly because the import ban did not produce an immediate reduction in dengue[100], that the progression of the epidemic depends on many factors in addition to the waste tyre volumes, such as prevalence of other containers, transportation of mosquitoes to new areas, and introduction of new types of the dengue virus. Brazil explains that an import ban by itself cannot solve the dengue problem, but it plays an important part in the solution. Brazil submits that the WHO and the government of the United States both advise targeting waste tyres.[101] Brazil notes that the European Communities, in the alternative, blames Brazil's dengue problem on the historic waste tyre accumulation. However, Brazil points out that new volumes also contribute to dengue because tyres must be stockpiled before disposal and sometimes must be transported. Finally, in addition to the import ban, Brazil submits that it is collecting tyres, teaching the public about dengue prevention, and carrying out mosquito surveillance.[102]

4.31 Moreover, Brazil submits that mosquitoes that breed in tyres also transmit yellow fever, which is, with its high fatality rate (over 33% in Brazil since 1999), significantly more dangerous than dengue.[103] Brazil explains that thus far yellow fever in Brazil has been confined to sparsely populated areas, but the risk of urbanization, aided by waste tyre accumulation and transportation, is real.[104]

4.32 The **European Communities** notes that Brazil has incorrectly claimed that the European Communities itself recognised the public health risks of waste tyre accumulation in Brazil in the Trade Barriers Regulation Committee (TBR) Report issued by the European Commission.[105] The European Communities contends that this report does not refer to public health risks of waste tyres generally, but to risks arising from tyres that "litter the countryside", i.e. to risks arising from improperly managed tyres.[106]

4.33 The European Communities argues that from Brazil's submissions, it is not possible to understand how the life and health of plants are at risk due to mosquito-borne diseases, and Brazil has

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[96] Brazil's first written submission, executive summary, para. 4.

[97] Brazil's first oral statement, executive summary, para. 6.

[98] Francisco Chiaravalloti Neto, Ph.D., *Descrição da Colonização de Aedes Aegypti* (Exhibit BRA-109).

[99] Brazil's second oral statement, executive summary, para. 3.

[100] European Communities' second written submission, para. 58.

[101] Exhibit BRA-149 and Exhibit BRA-20.

[102] Brazil's second oral statement, executive summary, para. 20.

[103] Brazil's first written submission, executive summary, para. 5; first oral statement, executive summary, para. 7.

[104] The WHO counts Brazil among a handful of countries in the Americas with the greatest risk of yellow fever. See World Health Organization, *Yellow Fever* (2001) (Exhibit BRA-22). Brazil's first written submission, executive summary, para. 5.

[105] Exhibit EC-2.

[106] European Communities' second oral statement, executive summary, para. 5.

never explained the animal species that are in danger of being infected by mosquitoes breeding in waste tyres.[107]

The release of toxic chemicals and heavy metals into the environment

4.34 **Brazil** submits that the European Communities has argued that the risks of waste tyre accumulation and disposal are essentially make-believe. Brazil notes that the European Communities has questioned the dangers of tyre fires and has even requested a confirmation of "their real negative effects on health" in Brazil. Brazil submits that the European Communities has argued that tyre fires are low-risk because they are difficult to ignite, yet the United Kingdom's own Health Protection Agency[108] has explained that the major hazard of tyre dumps is the toxic releases during fires, noting that "[a]rson is a common problem; the cause of over half of the fires in the United Kingdom."[109] Brazil submits that the emissions from tyre fires cause premature mortality, reduced lung function, suppression of the immune system, kidney problems, learning disabilities, partial blindness, respiratory problems, heart and chest problems, and cancer.[110]

4.35 Brazil argues that this case turns mostly on facts, which the European Communities has persistently chosen to either misrepresent, minimize, or outright ignore. For Brazil, another example of the European Communities' reckless disregard of the facts in this case is its suggestion that the risk of tyre fires in Brazil is – for some unexplainable reason – less probable in Brazil than in the United Kingdom, Canada, or the United States; or that leaching of dangerous substances from tyre waste is less likely to occur in Brazil than in other parts of the world. Brazil argues that there may be many differences between the European Communities and Brazil, but it is safe to assume that the way natural laws apply in their respective territories is not one of them. Brazil notes that the European Communities' logic is that unless a Member has the misfortune of experiencing, first-hand, a particular environmental or sanitary catastrophe, it does not have the right to take preventive action; that clearly cannot be the case.[111]

4.36 The **European Communities** claims that Brazil has never made any effort to explain the negative consequences of tyre fires on the life and health of animals and plants in Brazil.[112] Moreover, the European Communities submits that the fire risks described by Brazil appear to be related to an incorrect management of end-of-life tyres, as explained in a document prepared in December 1999 by a Technical Working Group of the Basel Convention.[113]

4.37 **Brazil** argues that the European Communities' claim that fires are but a consequence of improper management has no merit.[114] Brazil argues that the Basel Tyre Guidelines state that even with proper control, stockpiling "can be used only for temporary storage before an end-of-life tyres [sic] is forwarded to a recovery operation," and that "landfilling and stockpiling are the least desired options."[115]

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[107] European Communities' second oral statement, executive summary, para. 6.
[108] Health Protection Agency (UK), *Chemical Hazard and Poisons Report,* 8 (2003) (Exhibit BRA-10).
[109] Brazil's second oral statement, executive summary, para. 2.
[110] Brazil's first written submission, executive summary, para. 6.
[111] Brazil's second oral concluding statement, executive summary, para. 3.
[112] European Communities' second oral statement, executive summary, para. 6.
[113] European Communities' first written submission, executive summary, para. 22.
[114] See European Communities' first written submission, at para. 103. Brazil's second written submission, executive summary, para. 9.
[115] Brazil's second written submission, para. 63 (Exhibit BRA-40).

(iii) Necessity of the measure

4.38 **Brazil** recalls the Appellate Body's statement that "determination of whether a measure, which is not 'indispensable', may nevertheless be 'necessary'" involves "weighing and balancing a series of factors"[116], including: (i) the importance of the interests protected by the measure; (ii) the contribution of the measure to the end pursued; (iii) the trade impact of the measure; and (iv) the existence of reasonably available alternative measures.[117]

4.39 Brazil argues that the ban is necessary because no other measure can prevent the unnecessary generation of waste tyres. Brazil submits that the required weighing and balancing of factors (interest protected, necessity, trade impact, and availability of alternatives) clearly demonstrates that the ban is necessary.[118] Brazil has established that: the ban protects interests that are vital and important in the highest degree; no reasonably available alternative to the ban exists; it does not restrict trade unfairly; it makes a significant contribution to the goal pursued; and therefore, it is necessary within the meaning of Article XX(b).[119]

4.40 Brazil also argues that the strength of one factor may compensate for the relative weakness of another factor. Brazil refers to the Appellate Body's statement in *EC – Asbestos* that[120] "[t]he more vital or important the common interests or values pursued, the easier it would be to accept as 'necessary' measures designed to achieve those ends."[121] While the analysis does not stop at the interest protected, Brazil argues that the protection of human health and the environment is an interest so fundamental, that it weighs substantially in favour of a finding of necessity.[122]

4.41 Should it be accepted, for the sake of argument, that retreaded tyres pose a risk to human health, the **European Communities** argues that Brazil has still to prove that the import ban is necessary to protect human health, as interpreted by the Appellate Body in *Korea – Various Measures on Beef*, *EC – Asbestos* and *Mexico – Taxes on Soft Drinks*.[123] The European Communities further argues that it cannot be maintained that the measure is "necessary" for the purposes of protecting human life and health.[124]

4.42 The European Communities also recalls the Appellate Body's statement that the determination of whether a measure is "necessary" involves a process of "weighing and balancing" a number of factors: first, the importance of the interests protected by the measure; second, the contribution of the measure to the end pursued; third, the impact of the measure on import trade; and, fourth, the existence of alternative measures.[125] The European Communities also notes the Appellate Body's confirmation in *Korea – Various Measures on Beef* that "necessity" is a high standard located

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[116] Appellate Body Report on *Korea – Various Measures on Beef*, para. 164; See also Appellate Body Report on *US – Gambling*, para. 323; Appellate Body Report on *EC – Asbestos*, para. 172.

[117] See Appellate Body Report on *Korea – Various Measures on Beef*, at para. 164; Appellate Body Report on *EC - Asbestos*, at para. 172; Panel Report on *Canada – Wheat Exports and Grain Imports*, at para. 6.223, Appellate Body Report on *US – Gambling*, at paras. 306, 307; Appellate Body Report on *Dominican Republic – Import and Sale of Cigarettes*, para. 69.

[118] Brazil's first oral statement, executive summary, para. 14; second oral statement, executive summary, para. 5.

[119] Brazil's second written submission, executive summary, para. 11.

[120] Appellate Body Report on *EC – Asbestos*, at para. 172. See also Appellate Body Report on *Korea – Various Measures on Beef*, at para. 162.

[121] Brazil's first written submission, executive summary, para. 21.

[122] Brazil's second oral statement, executive summary, para. 5.

[123] European Communities' first written submission, executive summary, para. 23.

[124] European Communities' second oral concluding statement, executive summary, para. 8.

[125] European Communities' first oral statement, executive summary, para. 2; second written submission, executive summary, para. 1.

considerably closer to the pole of "indispensable" than to that of "making a contribution to". In the present case, the European Communities is of the view that Brazil has not even demonstrated that its ban is making a contribution to the prevention of public health problems.[126]

4.43 Moreover, the European Communities contends that Brazil is not correct to state that "the strength of one factor may compensate for the relative weakness of the other". The European Communities argues that Brazil seems to hope that the mere invocation of human life and health would be enough to render its measure immune to further legal scrutiny. However, for the European Communities, the process of weighing and balancing must be carried out taking into account all relevant factors, not just the objectives stated by Brazil.[127]

Importance of the interests protected by the measure

4.44 **Brazil** claims that it has demonstrated – and the European Communities has not contested – that the interests protected by the import ban (protection of human, animal, and plant life and health) are fundamental; indeed, so fundamental, that they weigh substantially in favour of the necessity of the measure.[128] Brazil argues that the ban seeks to protect human health and the environment[129], values that are "both vital and important in the highest degree."[130] Because the import ban is designed to achieve these policy goals, Brazil claims that the ban is "necessary."[131]

4.45 The **European Communities** contests that these interests are protected by the import ban and also claims that the ban was adopted with the objective of protecting the manufacturers of new and retreaded tyres located in Brazil and not human, animal or plant life and health.[132]

Contribution of the measure to the end pursued

4.46 **Brazil** states that the contribution of the import ban lies in the fact that it prevents the unnecessary generation of additional waste tyres that must be collected and disposed of in Brazil and thereby reduces the health and environmental dangers caused by waste tyre accumulation and disposal.[133] Brazil states that unlike new tyres, retreaded tyres are shorter-lifespan products that become waste sooner. This is so, Brazil explains, because imported passenger car retreaded tyres cannot be retreaded again,[134] and imported commercial vehicle retreaded tyres have fewer remaining lifecycles.[135]

4.47 Brazil argues that only non-generation of waste tyres, which requires an import ban on shorter-lifespan tyres, can achieve Brazil's chosen level of protection.[136] To be justified under Article XX(b), Brazil is of the view that the measure must "contribute, *at least to some extent*,"[137] to addressing the health concerns, and "[t]he greater the contribution, the more easily a measure might

[126] European Communities' second oral concluding statement, executive summary, para. 8.
[127] European Communities' second written submission, executive summary, para. 3.
[128] Brazil's second written submission, executive summary, para. 12.
[129] Brazil's first written submission, executive summary, para. 22; first oral statement, executive summary, para. 14.
[130] Appellate Body Report on *EC – Asbestos*, at para. 172. See also Panel Report on *Canada – Wheat Exports and Grain Imports*, at para. 6.224.
[131] Brazil's first written submission, executive summary, para. 22.
[132] European Communities' second oral concluding statement, executive summary, para. 8.
[133] Brazil's first written submission, para. 109.
[134] Brazil's second oral statement, para. 82 (Exhibit BRA-2, Exhibit EC-6).
[135] Brazil's second oral statement, para. 82.
[136] Brazil's second written submission, executive summary, para. 3.
[137] Appellate Body Report on *US – Gambling*, at para. 6.494 (emphasis added).

be considered 'necessary'."[138] For Brazil, the import ban contributes to protecting human health and the environment far more than just "to some extent" – no other practical alternative can prevent unnecessary creation of additional waste.[139] Brazil argues that the ban's contribution to achieving this goal is significant because no other practical alternative can prevent the unnecessary generation of tyre waste.[140] Brazil explains that the fact that not all tyres can be retreaded after their initial use does not undermine the ban's contribution because it is never possible to retread all tyres. Brazil points out that the goal is not to achieve the impossible (i.e., full retreadability), but to reduce waste to the greatest extent possible.[141]

4.48 The **European Communities** argues that Brazil must show that the import ban on retreaded tyres makes a contribution to the protection of human, animal or plant life or health. The European Communities claims that Brazil tries to avoid this question by engaging in speculation about why the European Communities wishes to export to Brazil. The European Communities points out that these comments are beside the point for the purposes of Article XX(b) and recalls that under WTO rules, it is not the exporting Member which has to justify why it exports a good; rather, it is for the importing Member to justify why it has decided to restrict imports.[142]

4.49 The European Communities claims Brazil has failed to demonstrate that the import ban on retreaded tyres makes a contribution to the protection of human, animal or plant life or health.[143] The European Communities argues that the importance of life and health by itself is not sufficient to establish that a measure is necessary for the purposes of Article XX(b); rather, a Member must also show that its measure contributes to the achievement of the stated goals, and is proportionate in this respect given notably its trade impact and the availability of other reasonably available alternatives.[144]

4.50 The European Communities recalls the Appellate Body's statement in *Korea – Various Measures on Beef*, that "a 'necessary' measure is … located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'".[145] In the view of the European Communities, the import ban does not even meet the threshold of "making a contribution to"; in any event, it is certainly far from being "indispensable".[146] The European Communities argues that the importation of retreaded tyres does not in any way increase the number of waste tyres to be disposed of in Brazil. For this reason, the European Communities claims that the import ban on retreaded tyres cannot be necessary for preventing any risks which might be associated with the disposal of waste tyres.[147]

4.51 The European Communities notes Brazil's claim that the import ban on retreaded tyres contributes to the protection of human life and health because it reduces the number of waste tyres in Brazil, which in turn could pose a problem to human life and health. However, the European Communities is of the view that the contribution alleged by Brazil is based on several assumptions which Brazil needs to prove: (i) that the ban reduces the number of waste tyres having to be disposed of in Brazil, and (ii) that such a reduction, even if it were established, reduces risks to

[138] Appellate Body Report on *Korea – Various Measures on Beef*, at para. 49.
[139] Brazil's first written submission, executive summary, para. 23.
[140] Brazil's first oral statement, executive summary, para. 14; second written submission, executive summary, para. 3.
[141] Brazil's first oral statement, executive summary, para. 14.
[142] European Communities' first oral statement, executive summary, para. 6.
[143] European Communities' second oral statement, executive summary, para. 7.
[144] European Communities' second written submission, executive summary, para. 2.
[145] European Communities' first oral statement, executive summary, para. 19; second oral statement, executive summary, para. 7.
[146] European Communities' first oral statement, executive summary, para. 19.
[147] European Communities' first written submission, executive summary, para. 24.

human life and health.[148] For the European Communities, the import ban does not even make a contribution to the reduction of the accumulation of waste tyres in Brazil, or to the reduction of any health problems associated therewith and in any event, the contribution is not significant.[149]

4.52 Moreover, the European Communities argues that even where a measure makes some contribution, it is necessary to assess the significance of this contribution in order to be able to properly conduct the process of "weighing and balancing" required under Article XX(b). The European Communities recalls that in *Dominican Republic – Import and Sale of Cigarettes* the Appellate Body held that the limited effectiveness of a measure was a relevant factor for concluding that the measure was not "necessary".[150]

Whether the ban reduces the accumulation of waste tyres in Brazil

4.53 **Brazil** argues that for every retreaded tyre that is not imported into Brazil, there is a higher likelihood that one more used tyre will be collected in Brazil, retreaded, and reused, thereby eliminating the risks of having to collect and dispose of one additional tyre. Brazil submits that more than 55 million used tyres were collected and retreaded in Brazil between 2001 and 2005. Had the import ban *not* been imposed, Brazil contends that millions of retreaded tyres would have entered Brazil to become waste after a single use, and millions of used tyres consumed in Brazil would *not* have been retreaded, exacerbating the waste tyre problem.[151] Brazil maintains that a high number of tyres used in Brazil are retreadable and are retreaded.[152]

4.54 Brazil argues that it has demonstrated that the import ban, in fact, reduces the amount of waste tyres that must be disposed of in Brazil. It notes that between 1999 and 2005, annual imports of retreaded tyres into Brazil fell from 18,455 tonnes to 1,727 tonnes. Brazil further notes that any reduction in the importation of shorter-lifespan products, such as retreaded tyres, necessarily also leads to a corresponding reduction in the volume of waste tyres generated in the importing country, and, consequently, a reduction in the associated health and environmental risks.[153]

4.55 Brazil further argues that because the ban on used tyres and the ban on retreaded tyres both make an independent contribution to the waste tyre reduction goals, imports of casings through preliminary injunctions do not negate the ban's contribution.[154] Brazil states that so long as it continues to retread the tyres it consumes, fewer imported retreaded tyres will mean more suitable casings and less waste. Brazil notes, however, that because eliminating used tyre imports would further reduce tyre waste, it has vigorously opposed the injunctions.[155]

4.56 According to the **European Communities**, Brazil has not demonstrated that the import ban on retreaded tyres reduces significantly the accumulation of waste passenger car tyres in Brazil.[156] The European Communities argues that an increase in the number of waste tyres to be disposed of in Brazil could result only if the sale of an imported retreaded tyre were to replace either (a) the sale of a new tyre, which will then be retreaded, or (b) the sale of a retreaded tyre made from a casing

[148] European Communities' second written submission, executive summary, para. 6.
[149] European Communities' second oral statement, executive summary, para. 8.
[150] European Communities' second written submission, executive summary, para. 5.
[151] Brazil's first written submission, executive summary, para. 23.
[152] Brazil's answer to panel question No. 107 (Exhibit BRA-162).
[153] Brazil's answer to panel question No. 140; Brazil's first written submission, paras. 6 and 109.
[154] For more information on the number of imported used tyres, see para. 4.65.
[155] Brazil's second written submission, para. 134.
[156] European Communities' first oral statement, executive summary, para. 8; second written submission, executive summary, para. 11; second oral statement, executive summary, para. 9; second oral concluding statement, executive summary, para. 9.

originating in Brazil. However, the European Communities claims that neither has been established by Brazil.[157]

4.57 Moreover, the European Communities submits that retreaded passenger car tyres produced in Brazil are made overwhelmingly from imported casings.[158] The European Communities argues that imported retreaded tyres will compete with domestically produced retreaded tyres.[159] The European Communities claims that an imported retreaded tyre will replace either a new tyre which will generally not be retreaded, or a domestic retreaded tyre which typically has been produced with an imported casing.[160] In either event, the European Communities is of the view that importation does not lead to an increase in the number of passenger car tyres arising in Brazil[161] and that the import ban does not contribute at all to the reduction of waste tyres accumulating in Brazil.[162]

4.58 The European Communities contends that Brazil claims, first, that Brazil retreads a comparatively high percentage of domestically-consumed tyres, and, second, that the ban has substantially contributed to the reduction of tyre waste by eliminating imports of used tyres that cannot be retreaded. The European Communities notes that the second argument is irrelevant for our case because the European Communities does not challenge the import ban on used tyres that cannot be retreaded, though one has to observe that the importation of used tyres has not been eliminated, but has skyrocketed.[163]

4.59 The European Communities notes that Brazil has exclusively relied on the fact that such tyres, unlike new tyres, cannot be retreaded again.[164] For the European Communities, this fact would only matter if passenger car tyres would be retreaded in Brazil to any significant extent.[165] The European Communities claims that only an insignificant percentage of passenger car tyres used in Brazil is actually retreaded.[166] The European Communities notes Brazil's claim that "for every retreaded tyre that is not imported into Brazil, there is one more used tyre that is collected in Brazil and retreaded". However, for the European Communities, this statement could be true only if 100 per cent of all new tyres consumed in Brazil were retreaded; this is not the reality in Brazil.[167]

Data on retreading activities in Brazil

4.60 **Brazil** contends that it has presented[168] hard suitability data, aggregated by Mazola – a company that selects casings for Brazil's leading tyre retailer, DPaschoal – which shows that about 30 per cent of Brazilian casings are retreadable[169], and Brazil's Exhibit BRA-95 also demonstrates that domestic casings are indeed being retreaded.[170] Brazil submits that an updated version of the report by

[157] European Communities' second written submission, executive summary, para. 11.
[158] European Communities' second written submission, executive summary, para. 12; second oral concluding statement, executive summary, para. 9.
[159] European Communities' second written submission, executive summary, para. 12.
[160] European Communities' second written submission, executive summary, para. 12; second oral concluding statement, executive summary, para. 9.
[161] European Communities' second oral concluding statement, executive summary, para. 9.
[162] European Communities' second written submission, executive summary, para. 12.
[163] European Communities' second oral statement, executive summary, para. 10.
[164] European Communities' first oral statement, executive summary, para. 8; second written submission, executive summary, para. 11; second oral concluding statement, executive summary, para. 9.
[165] European Communities' second oral concluding statement, executive summary, para. 9.
[166] European Communities' second oral concluding statement, executive summary, para. 9.
[167] European Communities' first oral statement, executive summary, para. 8; second written submission, executive summary, para. 7, 11; second oral statement, executive summary, para. 9.
[168] See Brazil's answer to panel question No. 17. See also Brazil's first written submission, at para. 79.
[169] Brazil's answer to panel question No. 17; Brazil's first written submission (Exhibit BRA-93).
[170] Brazil's answer to panel question No. 20. Brazil's second written submission, para. 116 (Exhibit BRA-95).

the Brazilian Association of the Retreading Industry (ABR), which separates the data by tyre type, shows that most passenger car retreaded tyres are made from domestic casings.[171] Brazil claims that it has always produced more retreaded tyres than it has imported casings and that the gap necessarily has to have been filled by domestic casings. Brazil argues that under the most conservative scenario, which assumes that all imported casings were retreaded, some 70 per cent of passenger car retreaded tyres were made from domestic casings as recently as 2002. Brazil points out that the rate did not decline until 2004 and 2005, when very high numbers of casings were imported.[172]

4.61 The **European Communities** submits that Brazil tries to defend the supposedly high retreading rate of domestic casings, on two grounds: first, with the data aggregated by Mazola on unusable automobile tyres in Brazil, and, second, with the report provided by ABR, to prove that domestic casings are indeed being retreaded and that the European Communities overstates the extent to which Brazilian retreaders use imported casings.[173]

4.62 Concerning the *first argument*, the European Communities notes Brazil's claim that about 30 per cent of passenger car tyres in Brazil remain suitable for retreading. The European Communities submits that in support of this statement, Brazil has not been able to provide any other evidence than a table prepared by a private company, Mazola. However, it is not clear to the European Communities that this table indeed reflects only passenger car tyres, as Brazil claims, and how the term "unusable" is to be understood. The European Communities is of the view that it does not appear that this term only excludes tyres which are "retreadable", but rather it might also exclude tyres which can be used for other purposes, including mid-life tyres, or tyres than can be used for material recycling. The European Communities also remarks that Mazola collects used tyres left by customers at DPaschoal, which is the largest distributor of Goodyear tyres in Brazil. The European Communities submits that it is not clear to which extent figures collected in this context are representative for Brazil overall. Moreover, for the European Communities, information provided by a company associated with new tyre retailers does not appear credible for the purposes of the present proceedings.[174]

4.63 **Brazil** argues that the purported link between the interests of new tyre manufacturers and Mazola is too attenuated: The suitability figures that Brazil has introduced do not come from Goodyear, and not even from DPaschoal, but from Mazola – a third party with no direct link to the sales of new or retreaded tyres. Brazil adds that the 30 per cent suitability figure provided by Mazola offers a representative sample of the market at large. Brazil explains that Mazola has been selecting tyres suitable for retreading for the last 15 years – something it would not have been able to do had there not been suitable Brazilian casings.[175] Brazil also notes that the best testament to the retreadability of Brazil's tyres may be the fact that Brazilian retreaders have retreaded tyres since the 1950s, long before imported casings ever became available.[176]

4.64 Concerning the *second argument*, the **European Communities** points out that even if a small proportion of Brazilian passenger car tyres are retreadable, this does not mean that all of these tyres are as a matter of fact retreaded. The European Communities notes Brazil's claims that in 2005 "Brazilian retreaders processed about 18 million used tyres"[177] and that, according to information provided by ABR in 2005, Brazilian retreaders produced 18.7 million retreaded tyres.[178] However, the

[171] Exhibit BRA-157.
[172] Brazil's second oral statement, executive summary, para. 16.
[173] European Communities' second oral statement, executive summary, para. 11.
[174] European Communities' second written submission, executive summary, para. 15.
[175] Brazil's second oral statement, para. 73.
[176] Brazil's second oral statement, para. 74.
[177] European Communities' first oral statement, executive summary, para. 9.
[178] European Communities' second written submission, executive summary, para. 22.

European Communities notes that Brazil does not say from where these used tyres originate. As the European Communities has set out, Brazilian retreaders operate very largely with tyres imported from third countries: in 2005, Brazil imported, largely for the purposes of retreading, 10.5 million used tyres, out of which 8.4 million were from the European Communities.[179]

4.65 **Brazil** responds that the European Communities vastly overstates the extent to which Brazilian retreaders use imported used tyres in their production. It notes that between 2001 and 2005, more than 84 million tyres were retreaded in Brazil, but only 27 million used tyres were imported; not all of those imported used tyres were suitable for retreading, but even if they had been, some 57 million tyres (two-thirds) would have still been retreaded from domestic casings.[180]

4.66 In Exhibit BRA-162, Brazil provides calculations that compare Brazil's retread production with used tyre imports. The calculations set forth a conservative scenario, which assumes that *all* imported casings were retreadable and were, in fact, retreaded, as well as what Brazil calls a realistic scenario, based on the estimates by the Brazilian retreaders that only two-thirds of the imported casings are retreaded.[181] Brazil states that the figures show that regardless of the scenario, anywhere from 83 to 89 per cent of all retreaded tyres made in Brazil were made from domestic casings in 2001 and 2002. Brazil adds that according to the calculations, the overall retreading rate from domestic casings peaked in 2003 at some 44 per cent under the realistic scenario, or 35 per cent under the conservative scenario. To Brazil, this means that of all potentially retreadable used tyres in Brazil, as much as 44 per cent were not only suitable for retreading, but were, in fact, retreaded.[182]

4.67 The **European Communities** notes Brazil's argument that even if Brazil had retreaded all of the 10.5 million used tyres it imported in 2005, this still would have accounted for only 56 per cent of all tyres retreaded in Brazil.[183] However, the European Communities argues that Brazil overlooks that the number of 18.7 million retreaded tyres indicated by ABR is an aggregate number for truck, bus and passenger car tyres, out of these 18.7 million retreaded tyres, 7.9 million were truck/bus tyres and 10.8 million were passenger car tyres. As to the origin of the casings used, the European Communities notes that ABR indicates that 20 per cent of the truck and bus casings retreaded in Brazil are imported and 80 per cent are domestic. In contrast, for passenger car tyres, the European Communities submits that ABR indicates that "the large majority, but not the totality of passenger car casings reformed in Brazil are imported". The European Communities notes that this information thus fully confirms the European Communities' view that the retreading of domestic passenger car casings represents only a very small proportion of used car tyres arising in Brazil.[184]

4.68 The European Communities recalls that the ABR's report indicates that the large majority of passenger car casings retreaded in Brazil are imported. Therefore, in the European Communities' view, the evidence provided by Brazil shows the contrary of what Brazil pretends.[185]

4.69 **Brazil** first notes that the ABR report confirms that 80 per cent of truck and bus tyres were made with domestic casings in 2005. Brazil then notes that while the report estimates that the majority of the passenger car retreaded tyres were made with imported casings in 2005, this happened only because Brazilian retreaders were able to import a very high number of casings that particular year. Brazil argues that in the previous years, when used tyre imports were substantially lower,

[179] European Communities' first oral statement, executive summary, para. 9.
[180] Brazil's second written submission, para. 135 (Exhibit BRA-95).
[181] Brazil's second oral statement, paras. 57-62 (Exhibits BRA-94, 162).
[182] Brazil's second oral statement, para. 61.
[183] European Communities' second written submission, executive summary, para. 22.
[184] European Communities' second written submission, executive summary, para. 23.
[185] European Communities' second oral statement, executive summary, para. 11.

passenger car, truck and bus retreaded tyres in Brazil were made for the most part with domestic casings.[186]

4.70 Brazil argues that the ABR production data plainly demonstrates that a high proportion of passenger car retreaded tyres in Brazil is made from domestic casings. Brazil states that according to the ABR numbers, between 2001 and 2005, Brazilian retreaders produced some 43.7 million passenger car retreaded tyres, but during the same period these retreaders imported only 27.3 million casings. Brazil points out that the European Communities agrees that at least 15 per cent of the imports are discarded as "technical losses."[187] Brazil argues that even if the remaining 85 per cent were all retreaded (which, Brazil argues, is unlikely) and truck and bus tyres accounted for roughly 15 per cent of the imports, imported casings would have been used to produce just 19.8 million of the 43.7 million passenger car retreaded tyres made between 2001 and 2005. To Brazil, this means that at least 23.9 million, or 55 per cent of passenger car retreaded tyres made in Brazil necessarily had to be made from domestic casings.[188]

4.71 Brazil adds that from 2001 to 2003, before the imports of used tyres increased, this proportion was even higher. Brazil provides a table with these calculations from 2001 to 2005.[189] Brazil notes that the table shows that even under the most conservative assumptions, as much as 74 per cent of passenger car retreaded tyres in Brazil were made from domestic casings.

Suitability of Brazilian used tyres for retreading

4.72 **Brazil** submits that the European Communities incorrectly claims that the import ban does not reduce waste tyre volumes because tyres used in Brazil are not suitable for retreading.[190] Brazil argues that the European Communities has built its case on flawed conclusions and, sometimes, outright misrepresentations, as for example that tyres used in Brazil are not retreadable when, in fact, they not only are retreadable, but are in fact retreaded in high numbers.[191] Brazil wishes to recall that the rational explanation for the use of imported casings in lieu of domestic casings for retreading is not due to deficiencies in suitability of domestic casings, but rather to how cheap imported casings are, due to their negative value in Europe.[192] Brazil states that about 30 per cent of Brazilian casings are retreadable. Brazil points out that this retreadability level is quite high compared to the available figures for countries such as the United Kingdom, France, Australia, and the United States.[193]

4.73 The **European Communities** claims that Brazilian authorities have recognised that Brazilian passenger car tyres are generally no longer suitable for retreading after use, as is illustrated by the fact that Brazilian retreaders have to import foreign tyres as necessary primary matter.[194] The European Communities notes that Brazil has attempted to reject the relevance of the fact that Brazilian retreaders need to import foreign casings by claiming that foreign casings have "no value", or even "negative value"; this is manifestly untrue. The European Communities submits that a retreadable casing is a valuable resource for any retreader, which has a positive value, as it has been explicitly confirmed in a report by CEMPRE, a recycling initiative of Brazilian industry, and a

[186] Brazil's second oral statement, para. 56.
[187] Brazil's answer to panel question No. 105, citing European Communities' second oral statement, para. 33.
[188] Brazil's answer to panel question No. 105.
[189] Brazil's answer to panel question No. 105.
[190] Brazil's second written submission, executive summary, para. 31; second oral statement, executive summary, para. 16.
[191] Brazil's second oral statement, executive summary, para. 1.
[192] Brazil's second oral concluding statement, executive summary, para. 11.
[193] Brazil's second written submission, para. 116; Brazil's first written submission, para. 79.
[194] European Communities' first oral statement, executive summary, para. 9.

number of invoices documenting purchases of large quantities of casings by the biggest Brazilian retreader, BS Colway S.A. in Europe.[195]

4.74 Moreover, for the European Communities, there is no rational explanation for the considerable efforts spent by Brazilian retreaders on obtaining casings abroad other than the fact that these casings are not available in Brazil and this is a further illustration of the unsuitability of Brazilian casings for retreading.[196] The European Communities submits that Brazil has made an attempt to explain the import of casings providing two reasons: first, they are substantially cheaper than the domestic ones, and, second, the existence of an excess capacity in the Brazilian retreading industry. The European Communities notes that Brazil also claims that "the Federal Government has worked vigorously to safeguard the integrity of the ban" and has explained the judicial decisions issued in 2006.[197]

4.75 **Brazil** also notes that to the extent that there may be an apparent shortage in suitable domestic casings, that shortage is a reflection of excess capacity in the Brazilian retreading industry – not of low rates of suitability.[198]

4.76 Concerning the argument on the lower price, the **European Communities** argues that it is already a step back from the previous statements by Brazil that used tyres have a "negative value" in Europe. In any case, the European Communities argues that the imported casing price quoted by Brazil in its second written submission (US$3) is wrong because it does not reproduce the price reflected in Exhibit BRA-147, which is around US$7. The European Communities submits that this price should be incremented by 15 per cent (i.e. around US$1) to take into account the technical losses in retreading tyres from abroad, plus the cost for the import retreader to discard these unretreadable casings that have become waste tyres and the costs of obtaining courts injunctions. The European Communities submits further that the final price therefore appears to be higher than the average price of a domestic casing, according to the prices given by Brazil in its second written submission, which are US$7 to US$9.[199]

4.77 **Brazil** notes that in the European Communities, used tyres are a liability – the European Communities pays an average of €1.2 to dispose of a waste tyre. Brazil states that if exports to Brazil ended, many more used tyres would have to be disposed of in the European Communities at a higher cost.[200] Brazil adds that imported casings that begin with a negative value are substantially cheaper than domestic casings, and, in fact, the value of these casings is so low that the importers typically do not insure the shipments.[201]

4.78 Brazil argues that domestic casings are 2-3 times more expensive than imported casings.[202] Brazil points out that Brazilian retreaders estimate that the cost of a domestic casing is between US$7 and US$ 9.[203] At the same time, Brazil argues, the official figures (Exhibit BRA-158) indicate that an average final cost of an imported casing, which includes freight and taxes, is US$3.7.[204] Brazil explains that the figure includes commercial vehicle casings, which are far more expensive than

[195] European Communities' second written submission, executive summary, para. 21.
[196] European Communities' second written submission, executive summary, para. 21.
[197] European Communities' second oral statement, executive summary, para. 13.
[198] Brazil's second written submission, para. 119.
[199] European Communities' second oral statement, executive summary, para. 14.
[200] Brazil's second oral statement, para. 70.
[201] Brazil's second oral statement, para. 69 (Exhibit BRA-158).
[202] Brazil's second oral statement, para. 63.
[203] Brazil's second written submission, para. 117; Brazil's second oral statement, para. 63 (Exhibit BRA-147).
[204] Brazil's second oral statement, para. 63 (Exhibit BRA-158).

passenger car casings. Brazil further states that of this total amount, freight costs average a little more than one dollar, and that the legal costs involved in obtaining injunctions are very low.

4.79 The **European Communities** notes Brazil's argument that "collecting casings in Brazil is more burdensome and expensive than importing them", since used tyres have a "negative value" in Europe. However, it is not clear to the European Communities why it should be more burdensome to collect casings in Brazil rather than collecting them in Europe and shipping them several thousand miles to Brazil.[205] The European Communities also notes that the fact that the market share of retreaded tyres has declined in the European Communities and in other countries has nothing to do with these tyres being "inferior". Rather, for the European Communities this development is largely due to competition of increasingly cheap low-quality new tyres, some of which can no longer even be retreaded after use. The European Communities submits that Brazil also refers to the fact that the European Communities has a trade surplus in retreaded tyres. However, the European Communities points out that this is no reason under WTO law for restricting trade. In any event, it should be noted that the European Communities allows the importation of retreaded tyres.[206]

4.80 Concerning the argument relating to the currently unused capacity of the Brazilian retreading industry, the European Communities is of the view that it does not support the Brazilian argument because this capacity, which is idle at a time when 10 million casings are imported for retreading, confirms the low level of retreadability of Brazilian casings. The European Communities argues that there is no reason why the unused capacity should increase demand for imported casings, rather than domestic casings, if retreadable domestic casings were available in Brazil.[207]

4.81 With respect to excess capacity, **Brazil** points out that over the past several years, production of retreaded tyres has increased by 33 per cent and that it is possible, in principle, that retreaders now require more suitable casings than Brazil generates, even with its very high suitability levels, to sustain these higher production levels.[208] Brazil states that if Brazilian retreaders indeed cannot operate at full capacity on Brazilian casings alone, excess capacity is the only plausible conclusion because Brazil has already achieved some of the highest suitability and retreadability rates reported by any country – a third of the total waste arisings are retreaded according to the retreaders' numbers.[209] However, Brazil argues, it is the Brazilian retreaders that bear the risk of any excess increase in capacity. Brazil states that it has no interest in helping the retreading industry sustain its growth rates if it requires importing shorter-lifespan casings that will have to be disposed of in Brazil.[210]

4.82 Furthermore, the **European Communities** submits that it can be assumed that the sale of retreaded tyres, including both imported and domestic, will to some extent compete with the sale of new tyres. In this respect, the European Communities points out that the import ban would only make a contribution to the reduction of the number of waste tyres arising in Brazil if it could be shown that these new tyres are actually being retreaded after having been used. The European Communities argues that this depends on a number of factors: to which extent new tyres sold in Brazil are of a kind that is suitable for retreading after use; to which extent tyres are typically suitable for retreading after use in Brazil; and to which extent retreadable casings in Brazil are actually retreaded.[211]

4.83 The European Communities claims that it has provided evidence that certain types or brands of new tyres are not retreadable due to the quality or construction of the casing. Accordingly,

[205] European Communities' first oral statement, executive summary, para. 9.
[206] European Communities' first oral statement, executive summary, para. 7.
[207] European Communities' second oral statement, executive summary, para. 15.
[208] Brazil's second written submission, para. 119; Brazil's answer to panel question No. 106.
[209] Brazil's answer to panel question No. 96 (Exhibits BRA-92, 162).
[210] Brazil's second written submission, para. 119.
[211] European Communities' second written submission, executive summary, para. 13.

contrary to Brazil's reply to the Panel's question No. 12, the European Communities contends that it cannot be assumed that all new tyres sold in Brazil are necessarily of such a kind as can be retreaded after use. Moreover, the European Communities also notes that, contrary to what Brazil seems to assume, the observance of international standards for new tyres does not necessarily guarantee the retreadability of the product.[212]

4.84 **Brazil** notes that new tyres sold in Brazil (whether manufactured domestically or imported) are high-quality tyres that comply with strict technical and performance standards that are based on international standards. Brazil argues that tyres manufactured in accordance with these standards have the potential to be retreaded.[213] Brazil believes that this fact is best demonstrated by the high rate of retreadability in Brazil.[214] Brazil also notes that neither Brazil nor any other country, as far as Brazil understands, employs any measures "to prevent imports of cheap low quality new tyres." Brazil states that it is not aware of a means to distinguish between new tyres that are capable of being retreaded and those that are not before the tyres have actually been used.[215]

Retreading rate of Brazilian tyres

4.85 **Brazil** points out that the European Communities' entire case depends on it being able to demonstrate that new tyres used in Brazil cannot be retreaded again, and, therefore, present the same health and environmental risks as imported retreaded tyres. Brazil states that the European Communities has failed to prove this point.[216]

4.86 Brazil argues that, in contrast, it has demonstrated that tyres used in Brazil not only are retreadable, but have been and are being retreaded in high numbers.[217] Brazil states that the rate of retreading from domestic casings was 25 per cent in 2005 and 32 per cent in 2003 and 2004 under the realistic scenario, and 9 per cent in 2005 and 26 per cent in 2003 under the conservative scenario.[218] Brazil adds that, in comparison, Italy retreads just 14 per cent of its tyres; Germany, 11 per cent; United States, 9 per cent; Belgium and Sweden, 4 per cent; and Austria, Hungary, Czech Republic and Slovak Republic do not retread at all.[219]

4.87 The **European Communities** submits that confirmation for the view that the retreading of domestic passenger car casings represents only a very small proportion of used car tyres arising in Brazil, can also be found in a recent overview of the Brazilian tyre market, which indicates the rate of retreading of all types of tyres in Brazil in 2005 as 9.9 per cent (which is an aggregate figure including both car and truck tyres):[220] accordingly, given this very low rate of retreading of domestic passenger car tyres in Brazil, Brazil cannot claim that the importation of passenger retreaded tyres leads to any significant increase in the accumulation of waste tyres in Brazil.[221] The European Communities submits that since the retreading of truck tyres in Brazil occurs with a much higher frequency than for car tyres, this means that the effective retreading rate for passenger car tyres must lie appreciably below 9.9 per cent.[222]

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[212] European Communities' second written submission, executive summary, para. 14.
[213] Brazil's answer to panel question No. 12.
[214] Brazil's answer to panel question No. 91 (Exhibit BRA-162).
[215] Brazil's answer to panel question No. 91.
[216] Brazil's answer to panel question No. 107.
[217] Brazil's second oral statement, para. 4, Brazil's answer to panel question No. 107.
[218] Brazil's second oral statement, para. 60 (Exhibit BRA-162).
[219] Brazil's first written submission, para. 79 (Exhibit BRA-58).
[220] European Communities' second written submission, executive summary, para. 24; second oral statement, executive summary, para. 12.
[221] European Communities' second written submission, executive summary, para. 24.
[222] European Communities' second oral statement, executive summary, para. 12.

4.88 The European Communities submits that in its second oral statement, Brazil has presented tables concerning the rate of retreadability of Brazilian passenger car tyres, according to which a conservative estimate would be a rate of retreadability in 2005 of 9 per cent. For the European Communities, the methodology according to which this table has been prepared is not clear. Accordingly, on the basis of the data contained in the LAFIS report on "Brazil – Car Parts and Vehicles: Tyres" (Exhibit EC-92) which gives the rate of retreading as 9.9 per cent for passenger and truck tyres combined, the European Communities submits that the rate of retreading for passenger car tyres must be considerably lower than 9 per cent.[223]

4.89 **Brazil** also criticizes the European Communities' reliance on the LAFIS Report and the 9.9 per cent retreading rate that it allegedly contains.[224] Brazil points out that the actual reading of the report reveals that the number comes from the controversial IPT study, which accounted for just half of the total waste tyre arisings.[225] Brazil states that the study's methodology was so flawed that the author was requested to redo it. Specifically, Brazil explains that the study surveyed only "retailers and tire repair shops"[226] and did not account for retreadable tyres that were retained by owners even though they comprise a third of the total waste arisings. Neither did it account for a large part of commercial tyres because these tyres do not typically pass through the retailers or tyre repair shops.

4.90 Nevertheless, Brazil contends that should the European Communities choose to rely on this report, it should then also accept another one of the report's conclusions: that the rate of *technical suitability* is almost 50 per cent.[227]

4.91 The **European Communities** notes that Brazil has criticised the 9.9 per cent indicated in the LAFIS Report as based on "a controversial IPT study", and argued that this study reflects only the views of new tyre manufacturers. The European Communities notes that, strikingly, at the same time, Brazil asks the Panel to rely on the tables provided by the company Mazola, which is equally associated with the new tyre manufacturers and retailers. For the European Communities, it appears that Brazil regards studies only as controversial when they do not suit its purpose, whereas it would claim that all evidence submitted by itself is uncontroversial. The European Communities argues that the fact that Brazilian casings generally are not retreadable is also confirmed by Exhibit BRA-157, in which the ABR confirms that due to the conditions of the Brazilian roads, a great loss of casings occurs already in the original lifespan, leading to a lack of retreadable casings in Brazil.[228]

4.92 **Brazil** states that even in its criticism of Brazil's sources the European Communities is inconsistent: having just contested the reliability of the ABR report in its response to Panel question No. 107, the European Communities proceeds to cite the report in its response to the same question in support of its low suitability argument. Brazil points out, however, that Exhibit BRA-157, which the European Communities cites in support, is the updated ABR report.[229]

4.93 In addition, Brazil points out that the European Communities has offered no evidence in support of its argument of poor road conditions. Brazil also states that the European Communities misses an important point: regardless of the road conditions in Brazil's countryside, most tyres – and

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[223] European Communities' second oral concluding statement, executive summary, para. 10.

[224] For more information on the rate of retreadability, see Brazil's comment on European Communities' answer to panel question No. 107.

[225] Brazil's second oral statement, para. 72 (Exhibit BRA-159).

[226] Brazil's comment on the European Communities' answer to panel question No. 107, citing Exhibit BRA-159.

[227] Brazil's second oral statement, para. 72 (Exhibit BRA-159).

[228] European Communities' second oral concluding statement, executive summary, para. 12.

[229] Brazil's comment on the European Communities' answer to panel question No. 107, citing European Communities' answer to panel question No. 107 (Exhibit BRA-157).

especially passenger car tyres – are used in urban areas, where the roads are just as good as the roads in wealthier countries.[230]

4.94 The **European Communities** submits that to demonstrate that the import ban on retreaded tyres reduces the accumulation of passenger car waste tyres in its territory, Brazil has attached to its second written submission a study prepared by a Brazilian economist, Professor Nastari, President of Datagro Limitada. The European Communities argues that its assessment of this study shows that it is weak in terms of economics and full of inconsistencies because the basic data are used wrongly or wrong assumptions are made. The European Communities argues that one of the main weaknesses of the study is that it assumes a rate of actual retreading of domestic casings between roughly 44 per cent and 92 per cent in Brazil, which is far too high. The European Communities submits that this mistake in the size of a key variable, results in a gross overestimation of the contribution which retreading of domestic casings makes to waste reduction in Brazil, and accordingly an overestimation of the contribution which imports of passenger cars retreaded tyres would make to waste accumulation.[231]

4.95 In any event, the European Communities claims that a rate of retreading of 9 per cent, claimed by Brazil in its second oral statement, is already considerably lower than the original 30 per cent claimed by Brazil, let alone the even higher numbers used in the study prepared by Professor Nastari. To the extent that the table provided by Brazil indicates higher numbers for earlier years, the European Communities is of the view that this does not reflect the importations of used tyres into Brazil, but the fact that the Brazilian retreading industry is now operating in compliance with standards – Portaria INMETRO 133 – which impose exacting requirements on the quality of the casings to be used.[232]

4.96 **Brazil** argues that the European Communities' criticism of the expert study is most probably due to a partial and incomplete understanding of the demonstration presented in the diagrams that depict the hypothetical cases in which imports of retreaded and/or used tyres would be allowed. In addition, Brazil states that it has demonstrated in Exhibit BRA-162 that the vast majority of tyres retreaded in Brazil were made from domestic casings.[233]

4.97 Brazil argues that the evidence plainly demonstrates that the 9.9 per cent figure does not represent the actual rate of retreading, as the European Communities claims.[234] Brazil states that on the contrary, the rate of retreading for passenger car tyres, using only domestic casings, was, under the more realistic scenario, 25 per cent in 2005 and 32 per cent in 2003 and 2004.[235] Brazil points out that at least for the year 2005, Brazil used hard numbers – not assumptions – to arrive at the number of imported casings that were actually retreaded. Brazil states that this number was the 2005 destination estimate by BS Colway, cited in the "Raupp Opinion".[236] According to this number, Brazil states, of the 11 million casings that were imported into Brazil in 2005, only 7 million were used to make retreaded tyres in 2005. Therefore, Brazil states that the realistic scenario for 2005 is based exclusively on hard numbers, and contrary to the European Communities' suggestion,[237] at least 50 per cent of passenger car retreaded tyres necessarily had to have been made from domestic casings that year. Brazil concludes that this puts the rate of retreading for the passenger car tyres alone at 25 per cent for 2005 – substantially higher than the rate achieved by the European Communities itself.

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[230] Brazil's comment on the European Communities' answer to panel question No. 107.
[231] European Communities' second oral statement, executive summary, para. 16.
[232] European Communities' second oral concluding statement, executive summary, para. 11.
[233] For more detail on this aspect, see Brazil's answer to panel question No. 117 (Exhibit BRA-162).
[234] Brazil's comments on the European Communities' answer to panel question No. 107.
[235] Brazil's second oral statement, para. 60 (Exhibit BRA-162).
[236] Exhibit EC-22, p. 4.
[237] See European Communities' answer to panel question No. 107.

4.98 Finally, Brazil contests the European Communities' argument that the imports of used tyres into Brazil have increased because the stricter new regulation – Portaria INMETRO 133 – rendered Brazilian casings that were previously retreadable no longer suitable for retreading.[238] Brazil points out that the European Communities first made this argument only in its responses to the Panel's questions following the second meeting of the parties. Brazil notes that in its first written submission, the European Communities dedicated three paragraphs to the discussion of Portaria INMETRO 133 and its equivalent for commercial vehicles[239], but did not once suggest that the *portaria* created a shortage of suitable casings; in its second written submission, the European Communities did not mention the regulation at all.[240] Brazil argues that the European Communities' belated invocation of the *portaria*, at the close of the proceedings, should be seen for what it is – a last minute attempt by the European Communities to bolster its faltering argument.

The INMETRO technical note 83/2000

4.99 The **European Communities** argues that it has submitted evidence which proves that Brazilian tyres are not retreadable after use. According to Technical Note 83/2000 of the Brazilian standardisation authority, INMETRO, Brazilian tyres are generally no longer suitable for retreading after use, which explains why Brazilian retreaders have to import foreign tyres as necessary raw material for their business[241], and the use of Brazilian casings for retreading is not economically viable.[242] The European Communities notes that the same view has also been expressed by the Governor of the State of Paraná.[243]

4.100 **Brazil** argues that the European Communities' reliance on Technical Note INMETRO 83/2000, is misplaced for two reasons: it does not reflect INMETRO's position and it talks of *economic* viability, and not about availability of suitable casings.[244] Specifically, Brazil explains that the note's only function was to memorialize INMETRO's communications with representatives of Brazil's retreading industry. The views that the note reflects are not the official views of Brazil's authorities, as the European Communities suggests, but the views of the domestic retreaders.[245]

4.101 Brazil states that INMETRO took the unusual step of specifically repudiating the note because domestic retreaders used it in courts and in the media to support the low suitability argument, as does the European Communities.[246] According to Brazil, INMETRO has made clear that the note "had no validity whatsoever" and that any technical note is but an "opinion, not binding the Administration or private parties to its motive or conclusions, unless approved by ... Regulations."[247]

4.102 Finally, Brazil argues that the note did not mention suitability at all – it only stated that obtaining domestic carcasses was not *economically* viable. To Brazil, economic viability is not the same as the actual suitability of domestic casings – it merely refers to the higher costs of obtaining

[238] Brazil's comments on the European Communities' Responses to the Question 107.
[239] European Communities' first written submission, paragraphs 20-22.
[240] Brazil's comments on the European Communities' Responses to the Question 107.
[241] European Communities' second oral statement, executive summary, para. 9.
[242] European Communities' second written submission, executive summary, para. 16.
[243] European Communities' second written submission, executive summary, para. 16.
[244] For more information on Technical Note INMETRO 83/2000, see Brazil's answer to panel question No. 25.
[245] Brazil's answer to panel question No. 25 (Exhibit BRA-163).
[246] Brazil's answer to panel question No. 25 (Exhibit BRA-96).
[247] Brazil's answer to panel question No. 25 (Exhibit BRA-97).

domestic casings.[248] Brazil also notes that the Governor of Paraná did not confirm the alleged low suitability independently, but merely made a reference to the contested INMETRO note.[249]

4.103 The **European Communities** notes Brazil's argument that Technical Note 83/2000 speaks merely of "economic viability", but does not make a statement about the suitability of Brazilian casings. However, the European Communities submits that Brazil does not offer any explanation for this lack of economic viability, other than the lack of suitable casings. The European Communities is of the view that if the price of suitable casings is excessively high, this must be due to the fact that such casings are scarce. However, the European Communities contends that given the fact that Brazil itself claims that 40 millions of waste tyres arise every year in its territory, this scarcity would seem to indicate that only a very small proportion of these waste tyres seem to be suitable for retreading.[250]

4.104 The European Communities submits that Brazil has attempted to diminish the significance of the INMETRO Technical Note. First, the European Communities notes that Brazil claimed that the note "merely memorializes the position of the industry's stakeholders" and does not reflect INMETRO's position. However, the European Communities explains that the note is an official document issued by INMETRO, and is signed by three officials of INMETRO in that capacity. For the European Communities, if the note in addition reflects the position of industry stakeholders, this would seem to increase its relevance rather than diminish it.[251]

4.105 Second, the European Communities notes Brazil's claim that this note has been subsequently "revoked" by INMETRO through a technical note of 9 June 2005, because domestic retreaders used it in Court and in the media to support the low suitability argument, as the European Communities does now. The European Communities claims that the repudiation of the Note, which is made for the purposes of avoiding its use in litigation against the government, lacks all credibility. In any event, for the European Communities the Technical Note contains a statement of fact, the "repudiation" of which does not mean that the statement was wrong.[252]

4.106 According to **Brazil**, this particular note was issued by a committee of INMETRO, which consisted of various stakeholders, including industry representatives. Brazil notes that the final rule, issued by INMETRO itself made no mention of low suitability,[253] and, consequently, INMETRO's pronouncement on the subject, confirmed the suitability of domestic casings.[254]

4.107 Brazil clarifies that the repudiation of the note was not a revocation – the note could not have been revoked because it had no legal effect in the first place. Brazil uses the term "repudiation" to refer to the INMETRO's efforts to stop the misrepresentation and misuse of the note by Brazilian retreaders. Brazil states that it repudiated the note not to avoid its use against Brazil in the present WTO proceedings – as the European Communities claims[255] – but because domestic retreaders misused the note in injunction proceedings to argue that used tyre imports should be permitted because no domestic casings were available.[256]

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[248] Brazil's answer to panel question No. 25.
[249] Brazil's second oral statement, para. 71.
[250] European Communities' second written submission, executive summary, para. 19.
[251] European Communities' second written submission, executive summary, para. 17.
[252] European Communities' second written submission, executive summary, para. 18.
[253] Brazil's second oral statement, para. 64 (Exhibit BRA-164).
[254] Exhibit BRA-163.
[255] Brazil's second oral statement, paras. 65-66, citing European Communities' second written submission, para. 39.
[256] For a response to the European Communities' argument on the high comparative price of domestic casings contained in para. 4.103, see Brazil's arguments contained in para. 4.77.

Imports of used tyres as a result of domestic court rulings[257]

4.108 **Brazil** submits that it bans imports of not only retreaded, but also used tyres. Brazil explains that its reason is simple: used tyres will have to be discarded and disposed of either on arrival, or after a single use. Brazil argues that the prohibition also ensures that Brazilian retreaders process only casings collected in Brazil, thereby helping to solve the disposal problem of Brazil, not the disposal problem of other countries. Brazil submits that Brazilian retreaders have sought and, in some cases, have obtained preliminary injunctions that allowed some used tyres to come in spite of the ban. For these retreaders, Brazil explains that the legal fees are a small price to pay for foreign casings that are substantially cheaper – cheaper because in the European Communities they have no value. Brazil argues that they are a liability in the European Communities, not an asset, and one typically must pay to get rid of them.[258] Brazil notes that the European Communities has based its argument on claims made by Brazilian retreaders, who invoke low suitability to convince courts to authorize imports[259] and expend[260] "resources [to] obtain the right to import retreadable casings".[261] Brazil argues that the reason they do this is simple – imported casings are 2-3 times less expensive.[262]

4.109 While some tyres retreaded in Brazil have been made from used tyres imported through these preliminary injunctions, Brazil argues that it has successfully reversed the vast majority of injunctions in courts, and it is confident that injunctions will soon be denied *ad portas*.[263] Brazil explains that these preliminary injunctions were issued in *ex parte* proceedings. Brazil notes that when the government had an opportunity to present its case, the courts reversed their initial grant of the injunction in two-thirds of the cases. Brazil submits that on appeal the government prevailed in 92 per cent of the cases. With such an overwhelming precedent, Brazil is of the view that fewer and fewer Brazilian courts are issuing these injunctions. While some imports continue to come in as a result of the previously-issued orders, Brazil argues that the tide has now turned, ambiguities about the ban's legal effect have been all but removed, and the imports will soon end.[264]

4.110 Brazil stresses that circumvention of the import ban through preliminary injunctions is but a temporary phenomenon. For Brazil, a decision guided by what will soon become a non-factor would simply mean that once the imports stop a year from now, the Government of Brazil would have to come back to Geneva and repeat the same arguments.[265] Brazil notes the European Communities' claim that used tyre imports negate the contribution of the import ban.[266] Brazil argues that imports of casings through preliminary injunctions do not detract from the ban's contribution (and will soon end).[267] In Brazil's view, so long as Brazil continues to retread the tyres it consumes, fewer imported retreaded tyres will mean more suitable casings and less waste.[268] After all, it would be absurd to suggest that the WTO-compatibility of the French ban on imports of asbestos would be negated if a judge somewhere in France were to authorize a single importation of asbestos.[269]

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[257] Further arguments by the parties in relation to this issue are contained in paras. 4.186-4.189.
[258] Brazil's first oral concluding statement, executive summary, p. 2.
[259] Brazil's second oral statement, executive summary, para. 17.
[260] European Communities' answer to panel question No. 20, at para. 36.
[261] Brazil's second written submission, executive summary, para. 31.
[262] Brazil's second written submission, executive summary, para. 31; second oral statement, executive summary, para. 17.
[263] Brazil's first oral statement, executive summary, para. 14.
[264] Brazil's first oral concluding statement, executive summary, pp. 2-3.
[265] Brazil's first oral concluding statement, executive summary, p. 3.
[266] Brazil's second oral statement, executive summary, para. 21.
[267] Brazil's second written submission, executive summary, paras. 3 and 33.
[268] Brazil's second written submission, executive summary, para. 33; second oral statement, executive summary, para. 21.
[269] Brazil's second oral statement, executive summary, para. 21.

4.111 However, because eliminating used tyre imports would further reduce waste, Brazil explains that it has vigorously opposed the injunctions. As a result, Brazil argues that the trend has turned around. So far in 2006, Brazil submits that all High Court decisions and the vast majority of the lower court decisions came out against the injunctions.[270] Brazil submits further that the Federal Supreme Court is expected to uphold the import ban soon.[271] Brazil notes that the President of the Republic has authorized and the Solicitor General has filed a constitutional action in Federal Supreme Court on 21 September 2006.[272] Brazil explains that this challenge action, Allegation of Violation of Fundamental Precept, has the power to revoke all the judicial decisions that have allowed the importation of used tyres into Brazil and preclude future judicial decisions permitting new imports. Brazil stated that the preliminary injunction requested by the President in this action would be decided in a matter of days.[273]

4.112 Brazil stresses that the Brazilian Government is fighting each and every case to fully guarantee the effectiveness of the import ban. Brazil explains that the judiciary has been overwhelmingly successful in reversing those wrong decisions. However, Brazil's task has not been made easier by the willingness of others to export their tyre disposal problem to Brazil.[274]

4.113 Brazil submits that while the European Communities is eager to consider a counter-factual in the case of Brazil's new tyre industry – which proves nothing – it refuses to consider that same counter-factual in the case of used tyres. In other words, Brazil argues that while the European Communities argues that the import ban does not make a contribution because used tyres continue to be imported through the court injunctions, it refuses to consider how many more used tyres would be imported in the absence of the ban.[275] Brazil recalls a saying: "*Nemo auditur propriam turpitudinem allegans*" – One is not entitled to base a claim on its wrongdoing.[276]

4.114 The **European Communities** submits that Portaria SECEX 14/2004 bans the importation of used tyres in Brazil.[277] However, the European Communities submits that the importation of the tyres takes place despite the ban on the basis of court injunctions, which have been obtained by Brazilian retreaders.[278]

4.115 The European Communities argues that Brazil has not contested any of these essential facts.[279] The European Communities notes Brazil's confirmation that the main reason for the injunctions is that the import ban "restricts access to supplies of raw material necessary for domestic retreaders to carry on their business".[280] Brazil's defence has merely been that these injunctions have been "erroneous" and are opposed by the government.[281] The European Communities notes that Brazilian retreaders have confirmed that they need to import foreign casings in order to be able to conduct their retreading

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[270] According to Brazil, these decisions were issued in the following proceedings: AI 2005.02.01.001764-6; MS 2003.51.01.020151-7; MS 2001.02.01.033748-9; AI 2005.02.01.008437-4; MS 2004.70.01.010625-6/PR.

[271] Brazil's second written submission, executive summary, para. 33.

[272] Brazil's comments to the European Communities' answer to panel question No. 118 (Exhibits BRA-173, 174).

[273] For more details on the action at the Federal Supreme Court, see Brazil's comments to the European Communities' answer to panel question No. 118.

[274] Brazil's first oral concluding statement, executive summary, p. 6.

[275] Brazil's second oral concluding statement, executive summary, para. 6.

[276] Brazil's second oral concluding statement, executive summary, para. 7.

[277] European Communities' first oral statement, executive summary, para. 14.

[278] European Communities' first oral statement, executive summary, para. 14; second written submission, executive summary, para. 51.

[279] European Communities' second written submission, executive summary, para. 52.

[280] European Communities' second written submission, executive summary, para. 51.

[281] European Communities' second written submission, executive summary, para. 52.

business in Brazil. Moreover, the European Communities points to the considerable efforts which Brazilian retreaders have invested in order to gain the right, through judicial injunctions, to import casings into Brazil.[282] However, the European Communities argues that the relevant fact is that the importations are taking place, and are being allowed by Brazilian courts, for which Brazil is responsible under international law.[283]

4.116 The European Communities argues that under public international law, every State is responsible for the acts of its organs. The European Communities submits that as underlined by the Appellate Body, every WTO Member is therefore responsible for the acts of all emanations of all its departments of government, including its courts. Moreover, the European Communities argues that according to Exhibit BRA-86, it is explicitly acknowledged that at the point the appeal is decided, "imports are already authorized and can no longer be *de facto* reverted".[284]

4.117 The European Communities submits that Brazil has also tried to dismiss the large-scale importations of used tyres as a "temporary phenomenon" and claimed that "imports would soon come to a halt". In this respect, the European Communities recalls that future developments are of no relevance for the evaluation of the measure at issue in the present dispute, because the facts have to be assessed as they stood when this Panel was established. Moreover, it should be noted that the importation of used casings has been continuing since 2000, and that the numbers have been increasing steadily.[285]

4.118 In addition, the European Communities argues that it does not see the basis on which Brazil claims that the granting of injunctions be ended. The European Communities submits that Brazil referred to an unidentified court proceeding which is currently pending before the Brazilian Supreme Court, and indicated that "the Government anticipates that the Federal Supreme Court will put an end to the loophole that have [sic] allowed millions of used tyres to be imported into Brazil". The European Communities does not see how Brazil can make predictions as to how the Supreme Court will decide in the future. The European Communities notes that as the Appellate Body has confirmed in *US – Shrimp (Article 21.5 – Malaysia)*, speculation about the outcome of pending cases in national courts would be incompatible with the duty of Panels to make an objective assessment of the facts, as required by Article 11 of the DSU.[286]

4.119 Moreover, the European Communities argues that the question is not only whether new injunctions are being issued; as Brazil itself has noted, imports are also continuing "because some of the previously-issued injunctions remain in effect". The European Communities argues that Brazil has not explained how a reversal of the practice of Brazilian courts in the future would affect those injunctions which are in force and no longer subject to an appeal. The European Communities submits that, in this context, the Brazilian retreader Pneuback has obtained an injunction which entitles it to import used tyres as raw material for its retreading business. The European Communities submits that this injunction has been upheld by the Brazilian Supreme Court, and is now no longer subject to any further possibility of appeal. The European Communities further submits that the biggest Brazilian retreader, BS Colway had obtained a decision by the President of the Superior Tribunal of Justice of 12 December 2003 entitling it to import casings as indispensable raw material. The European Communities notes that the Superior Tribunal of Justice subsequently rejected three appeals by the government against the decision by President Naves. Moreover, the

[282] European Communities' second written submission, executive summary, para. 20.
[283] European Communities' second written submission, executive summary, para. 52.
[284] European Communities' first oral statement, executive summary, para. 14.
[285] European Communities' second written submission, executive summary, para. 53.
[286] European Communities' second written submission, executive summary, para. 54.

European Communities submits that in a decision of 22 May 2006, the Federal Regional Tribunal of the Second Region of Brazil confirmed the right of Colway to continue importing used tyres.[287]

4.120 The European Communities submits that Brazil has tried to liken its ban to the ban on asbestos at issue in the *EC – Asbestos* case by arguing that this ban would not have been negated if a "judge somewhere in France were to authorize a single importation" of asbestos. The European Communities claims that this scenario has nothing to do with the present case, where Brazil allows the importation of millions of used tyres, and in addition produces retreaded tyres itself. The European Communities does not believe that the ban on asbestos would have been upheld in similar conditions.[288]

4.121 **Brazil** notes the European Communities' argument that some injunctions have exhausted judicial review. However, Brazil explains that the case of Pneuback, which the European Communities cites as an example, is subject to further appeal, and is in fact being appealed. Meanwhile, Brazil notes that, in describing the BS Colway case, the European Communities completely ignored the substantive March 2006 ruling – in favour of the government – and noted only the subsequent stay pending the appeal.[289]

> Whether the reduction of the accumulation of waste tyres can reduce risks to human life and health

4.122 **Brazil** argues that its campaign against dengue, which designated tyre waste reduction as a key target, has been the primary reason for the declining incidents of dengue in recent years. Brazil makes the point that by shrinking the waste tyre volumes, the import ban reduces the amount of waste tyres that will be stockpiled or illegally dumped, and, consequently, reduces mosquito breeding grounds.[290]

4.123 The **European Communities** argues that even if Brazil had established that its ban makes a contribution to the reduction of waste tyres, this is not yet enough for Article XX(b). The European Communities is of the view that Brazil would also have to prove that this reduction in waste tyres leads to the reduction of problems for human life and health.[291] This also, the European Communities claims that Brazil has failed to show.[292] The European Communities contends that Brazil cannot simply evoke the existence of such health problems currently and it is not clear that there would be any additional impact on public health caused by the importation of retreaded tyres.[293]

4.124 As the European Communities claims to have shown that the human life and health problems to which Brazil has referred, e.g. dengue mosquitoes breeding in tyres, are first of all not exclusively due to waste tyres, and secondly, to the extent that they are, they are related to the millions of tyres which are, according to Brazil's submissions, littering the Brazilian countryside despite the ban.[294] The European Communities considers that only historic waste tyres (i.e. those discarded before the import ban on retreaded tyres was adopted) might continue producing health risks in Brazil.[295] For the European Communities, any health problems which might be caused by waste tyres in Brazil are not

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[287] European Communities' second written submission, executive summary, para. 55.
[288] European Communities' second oral concluding statement, executive summary, para. 19.
[289] Brazil's second oral statement, executive summary, para. 22.
[290] Brazil's second written submission, para. 123.
[291] European Communities' first oral statement, executive summary, para. 10; second written submission, executive summary, para. 30; second oral concluding statement, executive summary, para. 15.
[292] European Communities' second oral concluding statement, executive summary, para. 15.
[293] European Communities' first oral statement, executive summary, para. 10; second written submission, executive summary, para. 30.
[294] European Communities' second oral concluding statement, executive summary, para. 15.
[295] European Communities' second written submission, executive summary, para. 82.

attributable to the importation of retreaded tyres, but to the 100 million waste tyres scattered throughout the country, which are the heritage of an insufficient waste management policy.[296] The European Communities contends therefore that the import ban is not a necessary measure to put an end to those possible health risks.[297]

4.125 The European Communities claims that waste tyres management problems, such as large amounts of scattered tyres throughout the country and tyre fires, are not attributable to the importation of retreaded tyres because imports of retreaded tyres were banned in 2000 and the health problems continue.[298] The European Communities points out that it is not clear that any additional amounts of waste tyres which might be created by the removal of the ban would lead to an increase in the health problems referred to by Brazil.[299] The European Communities notes that Brazil reacts by alleging that "prohibiting retread imports clearly cannot eliminate the health and environmental harms *in their entirety* because tyre waste will continue to be generated". For the European Communities, it seems very difficult to reconcile this affirmation with the requirement, as declared by the Appellate Body in *Korea – Various Measures on Beef*, that the contribution of the measure has to be significant, this term meaning close to indispensable.[300]

4.126 The European Communities submits that the system established by Resolution CONAMA 258/1999 aims at putting an end to this historic problem, though the slow pace it establishes to collect waste tyres and its insufficient implementation weakens its efficiency.[301] The European Communities is of the view that this situation is irrespective of the number of retreaded tyres imported into Brazil. The European Communities submits that more imported retreaded tyres will not increment the risks described by Brazil, because these risks do not depend on the number of discarded tyres but on their correct management and other questions linked mainly to the health problems that Brazil is trying to solve.[302]

4.127 The European Communities claims that Brazil has not demonstrated that the import ban contributes significantly to the prevention of life and health problems in Brazil. To succeed in that demonstration, the European Communities submits that Brazil would have to prove that a possible increase in the number of waste tyres arising from imported retreaded tyres would also lead to an increase in the life and health problems arising from mosquito-borne diseases, tyre fires and toxic leaching from "stockpiled and illegally dumped tyres". The European Communities submits further that Brazil cannot simply evoke the existence of such health problems in order to justify the need for the import ban on retreaded tyres.[303]

4.128 **Brazil** argues that after suggesting that dengue has nothing to do with tyres, the European Communities turns around and says that in case it does, the blame lies not with new tyre accumulation, but with "the 100 million waste tyres scattered throughout the country, which are the heritage of an insufficient waste management policy."[304] Brazil argues that the argument is manifestly flawed. It explains that new tyre accumulation contributes to the volumes of waste tyres in the environment and correct management alone will not eliminate the risks in their entirety. Brazil states that even if it collected all of its waste tyres – and it is doing its best to do that – these tyres would still

[296] European Communities' second written submission, executive summary, para. 31.
[297] European Communities' second written submission, executive summary, para. 82.
[298] European Communities' first oral statement, executive summary, para. 10; second written submission, executive summary, para. 30; second oral statement, executive summary, para. 22.
[299] European Communities' second oral concluding statement, executive summary, para. 15.
[300] European Communities' second oral statement, executive summary, para. 22.
[301] European Communities' second written submission, executive summary, para. 31.
[302] European Communities' second written submission, executive summary, para. 32.
[303] European Communities' second oral statement, executive summary, para. 18.
[304] Brazil's second oral statement, para. 84, citing European Communities' second written submission, para. 55.

have to be transported to the disposal location and temporarily stockpiled until their disposal. According to Brazil, both the transportation and the stockpiling would involve risks of dengue. Brazil states that, in addition, collection does not eliminate disposal risks.[305]

In relation to dengue

4.129 **Brazil** contends that there are only a few legal issues that are in dispute in this case. Unfortunately for the European Communities, this case turns mostly on facts, which the European Communities has persistently chosen to either misrepresent, minimize, or outright ignore. Brazil submits that a good example – but certainly not the only one – is the European Communities' pretension that waste tyres are not an important factor in the spread of dengue.[306] Brazil notes that based on that patently wrong factual premise, the European Communities concludes that Brazil's import ban does not make a contribution to the protection of human health and the environment.[307]

4.130 Brazil submits that according to the European Communities tyre waste reduction may not actually help to combat dengue in Brazil. While Brazil agrees that eliminating waste tyres *alone* would not solve the dengue problem[308], Brazil states that waste tyres receive special attention because of their great potential for breeding and disseminating mosquitoes and to ignore them would be irresponsible.[309] Brazil further submits that while waste tyres are one of mosquitoes' most common breeding grounds, they are not the only ones. Brazil explains that this is why Brazil targets all of the key containers in its campaign against dengue. Brazil also promotes changes in the habits of its population through advertising and carries out mosquito surveillance.[310]

4.131 Brazil also explains that waste tyres receive special attention because they have a great potential for breeding and disseminating mosquitoes: of over one thousand Brazilian municipalities surveyed, waste tyres were the most important breeding place in a quarter of them, and either the second or third most important breeding place in the remaining municipalities.[311] For Brazil, to ignore waste tyres would be irresponsible.[312]

4.132 In relation to the dengue problem, the **European Communities** submits that Brazil has explained that dengue cases jumped from 107,168 in 2004 to 214,171 in 2005, five years after the adoption of the import ban on retreaded tyres. The European Communities argues that assuming that the average life of a passenger tyre is five years, the dengue cases should have dropped down in 2005 instead of increasing. In the same way, for the European Communities, the peak in imported retreaded tyres that occurred in 1998 should have produced an increase five years later, in 2003/2004, compared with the situation in the preceding years. The European Communities argues that the figures provided by Brazil show just the opposite.[313]

4.133 The European Communities claims that the incidence of dengue cases in Brazil is, therefore, not related to changes in the number of waste tyres present in Brazil, let alone to the number of imported retreaded tyres. Rather, it is the view of the European Communities that it must be assumed that the number of dengue cases must be related to other factors, such as viral patterns and behaviour,

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[305] Brazil's second oral statement, para. 84.
[306] Brazil's second oral concluding statement, executive summary, para. 2.
[307] Brazil's second oral concluding statement, executive summary, para. 2.
[308] See European Communities' first oral statement, at para. 47.
[309] Brazil's second written submission, paras. 124-125, 127.
[310] Technical Note No. 25/DIGES/SVS/2006, at Components 1-3 (Exhibit BRA-148). Brazil's second written submission, executive summary, para. 32.
[311] Brazil's second written submission, para. 127; Minister of Environment Marina Silva, initial statement by Brazil at the first substantive meeting of the parties, para. 6.
[312] Brazil's second written submission, para. 127.
[313] European Communities' second written submission, executive summary, para. 33.

or meteorological conditions.[314] Moreover, the European Communities submits that waste tyres, and less, therefore, those arising from imported retreaded tyres, are not the only element in dengue control, as it derives from the National Dengue Control Programme, adopted on 24 July 2002 by the Brazilian Health Ministry. The European Communities further submits that in its intervention before the Consumer, Environment and Minority Protection Committee on 14 April 2002 a representative of the Minister of Health explained that "even if we were to eliminate all tyres from Brazil we would still not prevent transmission of [dengue]" .[315]

4.134 The European Communities notes that Brazil submits a number of scientific papers that are mainly focused on the relation between tyres and breeding sites for mosquitoes which transmit dengue and yellow fever. However, the European Communities notes that these studies consider that waste tyres are not the only reason for the current epidemiological situation related to these two diseases in Brazil. The European Communities argues that there is even scientific evidence, attached to Brazil's submissions, demonstrating the importance of several other breeding sites. Moreover, the European Communities notes that the World Health Organization has confirmed that relatively small numbers of "key containers", which are not limited to waste tyres, may produce the great majority of the adult mosquitoes that trigger disease outbreaks. For the European Communities, this demonstrates that a reduction in waste tyres would not necessarily reduce the incidence of dengue.[316]

4.135 **Brazil** argues that the European Communities continues to embrace a simplistic view that a decrease in retreaded tyre imports should immediately reduce dengue and other risks. According to Brazil, it is elemental that the progression of the dengue epidemic depends on many factors, in addition to imports of retreaded tyres and the consequent increase in waste volumes. Brazil states that these factors include the prevalence of other key containers that breed mosquitoes, transportation of the mosquitoes to new areas, and introduction of new types of the virus. Brazil maintains that while prohibiting imports of the shorter-lifespan retreaded tyres cannot, by itself, solve the dengue problem, it does play a key role in the solution.[317]

4.136 Brazil points out that the WHO advises countries to target "key containers" because a "relatively small numbers of 'key containers' (e.g. *old tyres*, water storage containers) may produce the great majority of the adult mosquitoes that trigger disease outbreaks."[318] Brazil also notes that the US Center for Disease Control and Prevention likewise emphasizes that "infestation may be contained through programs of surveillance, removal of breeding sites (*especially tires*), interruption of interstate dispersal of tires, and judicious use of insecticides."[319]

4.137 Brazil adds that it is not sitting idly on the sidelines, waiting for the import ban to solve its dengue problem. Brazil says that it is actively collecting tyres that have been discarded in the environment: it has helped private companies set up tyre collection centres and launched a comprehensive campaign against dengue, which promotes habits that would reduce the number of all key containers used by mosquitoes.[320]

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[314] European Communities' second written submission, executive summary, para. 34.
[315] European Communities' second written submission, executive summary, para. 35.
[316] European Communities' second oral statement, executive summary, para. 19.
[317] Brazil's second oral statement, para. 83.
[318] Brazil's second written submission, para. 128, citing Exhibit BRA-149.
[319] Brazil's second written submission, para. 85, citing Exhibit BRA-20.
[320] Brazil's second written submission, para. 129 (Exhibit BRA-148).

In relation to tyre fires

4.138 **Brazil** explains that waste tyres in stockpiles and dumps often ignite, producing devastating consequences[321] for human health and the environment and generating pyrolytic oil and noxious plumes that contain hazardous chemicals and heavy metals.[322] Brazil also explains that accumulation of waste tyres in stockpiles and illegal dumps creates a risk of tyre fires and toxic leaching, which have substantial adverse effects on human health and the environment.[323] Brazil contends that tyre fires are difficult to extinguish and can burn for weeks, months, and even years – a fire in Powys, Wales[324] has been burning for 17 years.[325] In Brazil, the State of Minas Gerais alone has experienced 338 tyre-related fires since 2000.[326]

4.139 Concerning waste tyre fires on Brazil's territory, the **European Communities** claims that Brazil recognizes that it has no statistics;[327] Brazil only explained that tyre fires are a genuine threat in Brazil as they are elsewhere in the world.[328] However, the European Communities argues that as the Appellate Body declared in *US – Wool Shirts and Blouses*, the mere assertion of a claim cannot amount to proof. The European Communities argues further that risks from waste tyre fires depend very much on the location, dimension, distribution, and existence of fire prevention and extinction measures.[329] The European Communities considers that a reference to some specific cases of waste tyre fires that occurred in the past in the United States and the United Kingdom, or a general reference to waste tyres fires in Brazil without providing information on their location, origin/causes, dimension and duration and an assessment of their real negative effects on health, are not enough to meet the burden of proof that Brazil has under Article XX(b).[330] The European Communities argues that the risk of a fire occurring should be considered as low, taking into account that tyres are very difficult to ignite. The European Communities explains that the fact that, in the case of a fire, the negative consequences on health may be important does not imply that the risk of fire from waste tyres is high. Besides, for the European Communities, it should not be forgotten that there are means of minimising the negative consequences of a fire if the preventive measures to which the European Communities made reference in its first oral statement are taken.[331]

4.140 The European Communities submits that the problems which Brazil seems to have with tyre fires reflect difficulties of fighting the causes of such fires. The European Communities argues that even if it were the case that a certain incidence of such fires was statistically unavoidable, Brazil's problems again seem to be in the first place related to the lasting problem of waste tyres that are still not adequately disposed of. In such a situation, the European Communities is of the view that where Brazil incidentally has not been able to solve its problems in a measurable way six years after the

[321] See Environmental Protection Agency (US), *Air Emissions from Scrap Tyre Combustion (viii)* (1997) (Exhibit BRA-26).
[322] Brazil's first written submission, executive summary, para. 6.
[323] Brazil's second written submission, executive summary, para. 9.
[324] See Health Protection Agency (UK), *Chemical Hazard and Poisons Report 8* (2003) (Exhibit BRA-10).
[325] Brazil's first written submission, para. 34 (Exhibit BRA-10).
[326] Brazil's first written submission, executive summary, para. 6.
[327] European Communities' second written submission, executive summary, para. 36; European Communities' second oral statement, executive summary, para. 20.
[328] European Communities' second oral statement, executive summary, para. 20.
[329] European Communities' second oral statement, executive summary, para. 20.
[330] European Communities' second written submission, executive summary, para. 36; European Communities' second oral statement, executive summary, para. 20.
[331] European Communities' second written submission, executive summary, para. 37.

imposition of the import ban, it should not be allowed to maintain an import ban which makes no significant contribution to such solution.[332]

4.141 In respect of leaching of hazardous substances from tyres, the European Communities notes that a study attached by Brazil shows the results of the leaching behaviour under extreme conditions not corresponding to field trials. In any case, the European Communities argues that only trace quantities of cadmium and lead were found and the report admits that the amounts of zinc could result from surface contamination of the tyres. The European Communities argues that a second report, with very general observations in relation to field trials, shows that groundwater quality was not deteriorated. Moreover, the European Communities notes that Brazil has provided no explanations and evidence on leachate from waste tyres in its territory.[333]

4.142 **Brazil** states that it has provided information on tyre fires in the States of Paraná, Minas Gerais and in the Federal District.[334] Brazil explains that it has not been able to obtain information on tyre fires in other states because fire brigades of those states do not maintain records that distinguish between tyre fires and other fires. Brazil notes, however, that unavailability of these records does not mean that tyre fires do not occur in other states.[335]

4.143 Brazil argues that there is no need to assess the negative effect on human, animal or plant life or health of tyre fires specifically in Brazil because there is extensive evidence of the risks resulting from fires all over the world. Brazil states that fires in Brazil are no different from fires elsewhere.[336] Brazil states that the European Communities' argument is based on what is referred to as the problem of induction, *i.e.*, reasoning that just because experience shows that event A has always followed event B, it does not mean that it will do so again. Brazil argues that Governments cannot base their decisions on this reasoning: prudent governments believe that if stockpiles of used tyres can be set on fire by lightning or arson elsewhere, the same can happen in their territory; likewise, prudent governments also believe that if those fires emitted deadly pollutants elsewhere, the same will happen in their territory.[337] Brazil notes that it was aware of the devastating tyre fires in Wales, in California, in Ontario, and in many other locations, both in Brazil and in other countries.[338] Brazil adds that it was also aware of studies showing the toxic risks of such fires.[339]

4.144 Brazil states that no prudent government could or would have ignored such warnings with the unsound reasoning that, simply because tyres caught fire elsewhere, and simply because those fires emitted deadly toxins into the atmosphere elsewhere, there is no basis on which to conclude that the same could happen in its territory. Brazil concludes that it saw those warning signs and acted on them – responsibly and prudently.[340]

Contribution of the import ban on retreaded tyres for commercial vehicles and aircraft

4.145 **Brazil** argues that commercial vehicle retreaded tyres pose the same type of health and environmental risk as passenger car retreaded tyres.[341] Brazil explains that retreaded tyres in both categories have fewer remaining lifecycles and become waste sooner. Brazil adds that the level of risk from the commercial vehicle retreaded tyres is frequently higher than that from the passenger car

[332] European Communities' second written submission, executive summary, para. 38.
[333] European Communities' second oral statement, executive summary, para. 21.
[334] Brazil's answer to panel question No. 88; Brazil's first written submission, para. 36.
[335] Brazil's answer to panel question No. 88.
[336] Brazil's answer to panel question No. 88.
[337] Brazil's answer to panel question No. 88.
[338] Brazil's answer to panel question No. 88 (Exhibits BRA-10, 35, 36, 139).
[339] Brazil's answer to panel question No. 88.
[340] Brazil's answer to panel question No. 88.
[341] Brazil's answer to panel question No. 5.

retreaded tyres because (1) commercial vehicle retreaded tyres are substantially heavier and, thus, produce more waste, and (2) a commercial vehicle retread that is imported closer to the end of its useful life could have less than 20 per cent of its useful life left compared to the 50 per cent in the case of the passenger car retread.[342]

4.146 The **European Communities** argues that Brazil also bans retreaded tyres for commercial vehicles and for aircraft, which can be retreaded more than once[343], depending on the specific conditions of their use.[344] In fact, the European Communities makes the point that it is not even clear whether Brazil is invoking Article XX(b) in respect of these tyres.[345] The European Communities argues that Brazil has made no effort to demonstrate the effect of its ban as regards a reduction of the waste from truck and aircraft tyres.[346] However, for the European Communities a separate demonstration of the contribution of the import ban on truck and aircraft tyres would be most necessary, since such tyres can be retreaded multiple times, and therefore contribute less to the accumulation of waste tyres than passenger car tyres.[347] Moreover, the European Communities notes that Brazil refers merely to the fact that passenger car tyres "have made up nearly all of the European Communities' retread exports to Brazil in recent years".[348] However, the European Communities points out that it challenges Brazil's import ban on retreaded tyres as such and as a whole. It further argues that the WTO-compatibility of an import restriction does not depend on whether and in what quantity imports have taken place, or might take place if the ban was removed.[349]

4.147 The European Communities notes that it is true that the retreading of truck and also of aircraft tyres appears to occur in Brazil. However, the European Communities submits that this fact is more than offset by the fact that truck and aircraft tyres can be retreaded more than once, and in the case of aircraft tyres sometimes up to 10 times or more. Moreover, the European Communities remarks that truck and aircraft tyres are typically retreaded without any change in ownership.[350] Accordingly, the European Communities argues that trade in such tyres is not likely to occur at a large scale, and where it occurs, it is not likely to have a significant net impact on the amounts of waste tyres to be disposed of.[351] Finally, the European Communities submits that it seems that Brazil does not retread all of its truck and aircraft tyres.[352]

4.148 The European Communities argues that Brazil's arguments as regards tyres for commercial vehicles and aircraft are weaker than as regards passenger car tyres.[353] The European Communities points out that it is not clear why the importation of retreaded tyres for commercial vehicles and aircraft should increase the amount of waste tyres to be disposed of in Brazil. On the contrary, the European Communities submits that certain low-quality new truck tyres, even though conforming to the applicable technical regulations/standards, cannot be retreaded at all after first use. In this sense, the European Communities argues that the importation of a retreaded truck tyre made from a good-quality casing is even preferable, since such retreaded tyres can normally be retreaded again.[354]

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[342] Brazil's answer to panel question No. 5.
[343] European Communities' first oral statement, executive summary, para. 8.
[344] European Communities' second written submission, executive summary, para. 25.
[345] European Communities' first oral statement, executive summary, para. 8.
[346] European Communities' second oral statement, executive summary, para. 17; European Communities' second oral concluding statement, executive summary, para. 13.
[347] European Communities' second oral statement, executive summary, para. 17.
[348] European Communities' first oral statement, executive summary, para. 8.
[349] European Communities' first oral statement, executive summary, para. 8.
[350] European Communities' second oral concluding statement, executive summary, para. 13.
[351] European Communities' second oral concluding statement, executive summary, para. 13.
[352] European Communities' second oral statement, executive summary, para. 17.
[353] European Communities' second written submission, executive summary, para. 25.
[354] European Communities' second written submission, executive summary, para. 25.

4.149 The European Communities notes that Brazil has tried to defend its ban on truck and aircraft retreaded tyres by arguing that such tyres "nevertheless have fewer remaining lifecycles before they, too, must be collected and disposed of". However, for the European Communities this statement is largely conjectural, and does not allow evaluating the precise contribution made by Brazil's ban to the reduction of waste tyres. The European Communities recalls that there are no legal limits on the number of times a truck or aircraft tyre may be retreaded again. The European Communities submits that conservative estimates based on the practice of retreaders indicate that commercial vehicle tyres can be retreaded up to three or four times, whereas aircraft tyres can be retreaded up to eight times. However, the European Communities submits further that it is not excluded that in individual cases, a tyre can be retreaded even more frequently.[355]

4.150 The European Communities argues that Brazil is thus banning the importation of retreaded truck and aircraft tyres which have been retreaded only once, and can still be retreaded multiple times. The European Communities explains that such a ban does not make any demonstrable contribution to the reduction of the amount of waste tyres accruing in Brazil. The European Communities submits that this is all the more so since the proportion of Brazilian truck tyres actually retreaded still seems to be considerably below 100 per cent.[356]

4.151 The European Communities notes that Brazil has also referred to the fact that commercial vehicle tyres are substantially heavier than passenger car tyres, and thus produce more waste. The European Communities notes further that while it may be true that truck tyres (but not necessarily aircraft tyres) are heavier than passenger car tyres, it is also true that truck tyres typically reach a far higher mileage compared to passenger car tyres. Moreover, the European Communities submits that the number of truck tyres in Brazil appears to be far inferior to that of passenger car tyres. Accordingly, the European Communities argues that the assumption that truck tyres somehow create "more waste" than passenger car tyres is not accurate.[357]

4.152 Finally, the European Communities submits that Brazil imported basically no retreaded truck and aircraft tyres from the European Communities before the imposition of the ban. The European Communities notes that Brazil chose to impose a ban on these products even though there was hardly any trade, and therefore certainly no waste management problem created by such trade.[358]

4.153 **Brazil** notes that while it is certainly true that commercial vehicle tyres can be retreaded more than once, all things being equal, when imported, they will have at least one-fewer lifecycle remaining. Consequently, they too will turn into waste sooner than new tyres and augment Brazil's waste tyre burden.[359] Brazil argues that the harm is even greater when a commercial vehicle retread is imported close to its end of life, because it might have to be disposed of after a single use, whereas a new tyre could have served 3-4 lifecycles. Finally, Brazil notes that because a commercial vehicle tyre is substantially heavier than a passenger car tyre, it will produce exponentially more waste with every unused lifecycle than a passenger car tyre.

Quantification of the contribution

4.154 The **European Communities** notes Brazil's argument that it cannot be asked to quantify the reduction in the number of waste tyres accumulating in Brazil due to the import ban. The European Communities points out that in *EC – Asbestos* the Appellate Body was referring to the risks to human life or health as such and noted that where direct risks to human life and health are

[355] European Communities' second written submission, executive summary, para. 26.
[356] European Communities' second written submission, executive summary, para. 27.
[357] European Communities' second written submission, executive summary, para. 28.
[358] European Communities' second written submission, executive summary, para. 29.
[359] Brazil's second oral statement, para. 82.

concerned, it may not be possible to evaluate such risks in purely quantitative terms, such as numbers of persons dead or sick, or in terms of threshold values for exposure to certain substances. The European Communities is of the view that this has nothing to do with the present case, where, before even addressing the question of risks to human life and health, Brazil must prove its assertion that removing the import ban would result in "higher volumes of waste tyres" to be disposed of in Brazil. The European Communities notes that "higher volumes" is clearly a quantitative concept, and therefore requires a quantification of the volumes of waste tyres at issue.[360]

4.155 The European Communities notes Brazil's claim that there are 40 million tyres which become waste in Brazil every year and that there are currently "over 100 million waste tyres scattered around the country". The European Communities believes that if it is possible to provide this information, it must also be possible to provide information on by how many tyres the import ban reduces the number of waste tyres accruing in Brazil.[361] In the absence of this information, the European Communities does not see how the Panel could even begin to assess the contribution which the import ban might make to the prevention of risks for human life and health resulting from waste tyres. Clearly for the European Communities, such an assessment requires that the impact of the import ban is put into a relationship to the number of waste tyres already accumulating in Brazil.[362]

4.156 Overall, the European Communities notes that Brazil has resoundingly failed to quantify the contribution made by its ban to the reduction of waste tyres. In this context, the European Communities notes that Brazil still contests that it must proceed to such a quantification, and even argues that it is immaterial whether there are five hundred fewer waste tyres or five million. For the European Communities, this argument is manifestly wrong. The European Communities argues that imposing an import ban on retreaded tyres just because of five hundred waste tyres, when there are already 100 million of waste tyres in Brazil, would manifestly be disproportionate.[363]

4.157 The European Communities recalls that in response to the Panel's question No. 40 on how much less waste Brazil accumulates as a result of the import restriction, Brazil answered by simply recalling the numbers of retreaded tyres imported into Brazil per year. Accordingly, the European Communities argues that Brazil seems to maintain its untenable view that every imported retreaded tyre leads to an additional waste tyre to be disposed of in Brazil. With these statements, it is the European Communities' view that Brazil fails to discharge its burden of proof under Article XX as a justification under Article XX cannot be based merely on conjecture and untested assumptions.[364]

4.158 **Brazil** notes that the European Communities and some third parties have asked Brazil to quantify by how much the import ban reduces the waste tyre risks.[365] Brazil objects to the European Communities' argument that quantification of the contribution is "a necessary precondition in the contribution analysis required by Article XX(b)".[366] Brazil contends that it is common sense that while some risks can be easily quantified, others cannot; that is the reason why the Appellate Body in *EC – Asbestos* has recognized that "a risk may be evaluated either in quantitative or *qualitative* terms".[367]

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[360] European Communities' second written submission, executive summary, para. 8.
[361] European Communities' second written submission, executive summary, para. 9.
[362] European Communities' second written submission, executive summary, para. 10.
[363] European Communities' second oral concluding statement, executive summary, para. 14.
[364] European Communities' first oral statement, executive summary, para. 8; European Communities' second written submission, executive summary, para. 7.
[365] Brazil's first oral concluding statement, executive summary, p. 2.
[366] Brazil's second oral statement, para. 75, citing European Communities' second written submission, para. 30.
[367] Brazil's first oral concluding statement, executive summary, p. 2, citing Appellate Body Report on *EC – Asbestos*, para. 167 (emphasis added).

4.159 In the *EC – Asbestos* case, Brazil recalls that the Appellate Body categorically rejected the argument that a "quantification" of risks is necessary and made it clear that "there is *no* requirement under Article XX(b) ... to quantify, as such, the risk to human life or health."[368] For Brazil, there is absolutely nothing in the text of Article XX(b) that requires quantification, and the Appellate Body has explicitly held that there is "no requirement" to quantify the risk.[369] Brazil argues that this holding was in no way limited to concepts that are difficult to quantify. Brazil explains that the more waste tyres there are, the higher the risks. Brazil argues that these risks are reduced every time the generation of a waste tyre is avoided and it is immaterial for the analysis of the contribution under Article XX(b) whether there are five hundred fewer tyres or five million.[370]

4.160 Brazil states that when an imported retread displaces a Brazilian retread made from a domestic casing, one less suitable domestic casing will be retreaded, and when imported retreaded tyres displace new tyres, they increase the waste tyre volumes by about a third (Brazil's rate of retreading). Brazil states that waste reduction lies between these two points and, regardless of whether it is closer to one or the other, it is substantial. Brazil also explains that a more precise quantification of the waste reduction requires a complex calculation of price elasticities, which, as a practical matter, is impossible. According to Brazil, calculation of elasticities requires collection of detailed economic data that simply does not exist for this industry, or for many others. Brazil states, however, that it is obvious that imported shorter-lifespan retreaded tyres become waste sooner than new tyres, and thereby increase the waste volumes.[371]

4.161 While it is impossible to give the exact count of mosquitoes, dengue cases, tyre fires, or dioxins that every imported retread would create, Brazil is of the view that one fact remains self-evident: higher volumes of waste tyres bring about an increase in the risks that flow from their accumulation and disposal. For Brazil, the logic could not be more straightforward: if elimination of tyre stockpiles helps control mosquitoes and tyre fires, then the fewer waste tyres will mean less dengue and fewer fires; if waste tyre disposal harms public health and the environment, then fewer tyres disposed will mean less harm. In this context, Brazil refers to the British Environment Agency, which said that when it comes to dealing with tyre waste, the best one can do is "to prevent or reduce its production".[372]

4.162 Brazil argues that the import ban does precisely that – it prevents unnecessary generation of a dangerous waste and whether the imports involve passenger car, truck, or airplane retreaded tyres makes absolutely no difference. For Brazil, a retreaded tyre, no matter the type, will always have fewer remaining lifecycles and a shorter lifespan than a retreadable new tyre[373], and the fact remains that imports of retreaded tyres increase waste tyre volumes, and with them the associated risks. Brazil claims that without the import ban, Brazil could not effectively eliminate these risks.[374]

Impact of the measure on international trade

4.163 **Brazil** argues that, while the import ban, by definition, will always be restrictive, this does not make the measure unnecessary.[375] Brazil argues that what is relevant is that the ban's trade impact is

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[368] Brazil's first oral concluding statement, executive summary, p. 2, citing Appellate Body Report on *EC – Asbestos*, para. 167 (emphasis added).

[369] Appellate Body Report on *EC – Asbestos*, at para. 167.

[370] Brazil's second oral statement, executive summary, para. 19.

[371] Brazil's second oral statement, paras. 79-81 (Exhibit BRA-146).

[372] Environment Agency (UK), *Tyres in the Environment*, at § 4.4 (1998) ("*UK – Tyres in the Environment*") (Exhibit BRA-1). Brazil's first oral concluding statement, executive summary, p. 2.

[373] Brazil's first oral concluding statement, executive summary, p. 2.

[374] Brazil's first oral concluding statement, executive summary, p. 3.

[375] Brazil's first oral statement, executive summary, para. 15; Brazil's second written submission, executive summary, para. 30.

not unfair or inequitable, because Brazil's waste tyre program also imposes substantial burdens[376] on domestic manufacturers:[377] it subjects domestic tyre manufacturers and importers to costly disposal obligations[378] and significantly raises production costs for domestic retreaders by banning imports of foreign casings.[379] Moreover, Brazil argues that the unique facts of the present case justify Brazil's measures. Brazil points out that unlike other waste streams, tyres cannot be recycled into new tyres and cannot be landfilled. Brazil argues that because their disposal presents significant risks, the less tyre waste generated, the better.[380]

4.164 Brazil notes the European Communities' point that even though it has a tyre disposal problem, it has not found it necessary to impose an import ban. Brazil argues that what the European Communities conveniently leaves out – or overlooks – is that it does not have a significant market for retreaded tyres and, therefore, does not face imports of retreaded tyres. Brazil further argues that it is disingenuous for the European Communities, therefore, to suggest that the conditions prevailing in Brazil and in the European Communities are alike.[381]

4.165 Brazil also points out that a number of countries besides Brazil have restricted used and retreaded tyre imports. According to Brazil, Argentina, Bangladesh, Bahrain, Nigeria, Pakistan, Thailand, and Venezuela all prohibit imports of both used and retreaded tyres; Morocco, Macedonia, Saint Vincent and the Grenadines and Jordan demand previous import licenses for used and retreaded tyres.[382]

4.166 The **European Communities** argues that when assessing the necessity of the measure, the impact of the measure on the import trade is the most severe that a WTO Member can adopt[383], as the Appellate Body observed in *US – Gasoline*.[384] The European Communities argues that this characteristic makes it impossible to consider as "necessary" the measure challenged in this case.[385] The European Communities contends that this element is important in the weighing and balancing analysis to assess whether the import ban can be regarded as "necessary" for the protection of life and health.[386] The European Communities recalls the Appellate Body's statement in *Korea – Various Measures on Beef* that "a measure with a relatively slight impact upon imported products might more easily be considered as 'necessary' than a measure with intense or broader restrictive effects".[387] The European Communities argues that not only does Brazil not clearly reply to these arguments, but also the fact that its domestic producers may be required to comply with other costly obligations is irrelevant for the "necessity" test set out in *Korea – Various Measures on Beef*.[388] Moreover, the European Communities submits that Resolution CONAMA 258/1999 expressly includes imported retreaded tyres in the recovery programme and imposes on importers of retreaded tyres the highest disposal burden. The European Communities is also of the view that some extra costs incurred by the

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[376] See Brazil's first written submission, at para. 110; Brazil's first oral statement, at para. 52.

[377] Brazil's first written submission, executive summary, para. 24; Brazil's first oral statement, executive summary, para. 15.

[378] See Resolução CONAMA 258/1999, Art. 6 (Exhibit BRA-4).

[379] Brazil's first written submission, executive summary, para. 24.

[380] Brazil's second written submission, executive summary, para. 30.

[381] Brazil's second oral concluding statement, executive summary, para. 13.

[382] Brazil's first written submission, para. 67.

[383] European Communities' first written submission, executive summary, para. 28; European Communities' first oral statement, executive summary, para. 11; European Communities' second oral statement, executive summary, para. 23.

[384] European Communities' second written submission, executive summary, para. 40.

[385] European Communities' first written submission, executive summary, para. 28.

[386] European Communities' second written submission, executive summary, para. 40.

[387] European Communities' first written submission, executive summary, para. 28; European Communities' first oral statement, executive summary, para. 11.

[388] European Communities' first oral statement, executive summary, para. 11.

domestic industry in Brazil are not equivalent to an import ban. The European Communities explains that the protection created by Brazil's import ban has caused considerable harm to the retreading industry of the European Communities.[389]

4.167 The European Communities notes that the only reaction by Brazil concerning the impact on international trade in its first oral statement is that "in other cases, import bans have been found to be justified under Article XX". The European Communities argues that this reference to *EC – Asbestos* is incorrect, because it does not take into account that the measure in that case was not primarily an import ban, which is the only measure in the present case, but that it was a general ban on the product, including an internal prohibition on the production, processing and marketing, coupled with export and import bans. The European Communities explains that in contrast Brazil has banned imports of retreaded tyres, whereas both the domestic production and marketing, as well as the exportation of retreaded tyres, remain allowed.[390]

4.168 The European Communities submits that Brazil has taken the radical step of banning the importation of a product which it produces and exports itself, including to the European Communities. The European Communities points out that with this measure, Brazil is almost alone. The European Communities and the overwhelming majority of WTO Members do not restrict the importation of retreaded tyres, which are traded freely between many countries. The European Communities submits that following the two disputes initiated by Uruguay, this is the case even within MERCOSUR.[391]

4.169 The European Communities contends that due to the import ban, many European retreaders have lost an important market for their products. The European Communities submits that simultaneously, Brazil allows the importation of retreaded tyres from MERCOSUR countries, and the production in Brazil of retreaded tyres, most of which are produced with used tyres imported from the European Communities. Accordingly, retreaders of the European Communities have been injured twice. The European Communities explains that retreading firms are typically small and medium enterprises, which cannot easily adjust to the loss of an important market. The European Communities further submits that as a consequence, Brazil's ban has driven several firms into closure, or has forced them to cut jobs.[392]

(iv) Existence of reasonably available alternatives

Burden of proof

4.170 The **European Communities** claims that it is upon Brazil to prove that there are no reasonably available alternatives to the import ban on retreaded tyres.[393] The European Communities notes Brazil's claim that the burden of identifying a reasonably available alternative is incumbent upon the European Communities as complaining party and that the European Communities has not met this burden of proof. The European Communities contends that this claim is unfounded and relies on a distorted reading of the WTO case law. The European Communities recalls that in its Report in *US – Gambling*, the Appellate Body placed the burden of proof to demonstrate that an alternative is not reasonably available not on the complaining party, but on the responding party. The European Communities argues that the latter is only relinquished from the obligation to identify the

[389] European Communities' first oral statement, executive summary, para. 11.
[390] European Communities' second written submission, executive summary, para. 39.
[391] European Communities' second oral concluding statement, executive summary, para. 2.
[392] European Communities' second oral concluding statement, executive summary, para. 6.
[393] European Communities' first oral statement, executive summary, para. 19.

universe of alternative measures, which shall be advanced by the complaining party or may also be identified by the responding party.[394]

4.171 The European Communities argues that there are alternative measures to the import ban on retreaded tyres that Brazil could take to improve the management of waste tyres on its territory[395] and that the European Communities has presented several such alternatives in its first written submission and first oral statement.[396] The European Communities explains that further to measures to ensure and increase retreading, it has concentrated its arguments on three alternatives, each of them including several possibilities: controlled stockpiling and landfilling; energy recovery; and material recycling.[397] Moreover, the European Communities notes that Brazil has also referred in its first written submission to some alternatives.[398]

4.172 The European Communities contests Brazil's statement that the European Communities wishes to flood Brazil with waste tyres. To the extent that Brazil is referring to the exportation of retreadable casings, the European Communities notes that it has already explained that such casings are not waste, and that their importation is precisely for that reason, allowed by Brazilian courts. To the extent that Brazil refers to actual waste tyres, the legislation of the European Communities in fact prohibits the exportation of such tyres to countries which do not allow such imports. Moreover, the European Communities points out that it has not challenged Brazil's ban on the importation of used tyres.[399]

4.173 Therefore, the European Communities argues that the application of the Appellate Body's interpretation to the present case implies that the burden of proving that those alternatives are not reasonably available rests with Brazil.[400] The European Communities claims that Brazil has not met this burden[401] in relation to neither measures reducing the number of waste tyres in Brazil nor measures improving the management of waste tyres.[402] However, in order to assist the Panel in the resolution of the case, the European Communities develops further arguments to support the existence of waste tyres management activities that are WTO-consistent alternatives to the import ban.[403]

4.174 **Brazil** is of the view that the main point of disagreement between the parties is whether the ban is necessary to protect human health and the environment and this question comes down largely to whether there is a reasonably available alternative.[404] Brazil contends that an alternative measure is *not* "reasonably available" if it is merely theoretical, if it imposes an "undue burden," if it does not achieve the "desired level of protection,"[405] or if its result or outcome is uncertain.[406] Brazil argues

[394] European Communities' second written submission, executive summary, para. 42.
[395] European Communities' first oral statement, executive summary, para. 15; European Communities' second written submission, executive summary, para. 58.
[396] European Communities' second written submission, executive summary, para. 43.
[397] European Communities' second written submission, executive summary, para. 58.
[398] European Communities' second written submission, executive summary, para. 43.
[399] European Communities' second oral concluding statement, executive summary, para. 5.
[400] European Communities' second written submission, executive summary, para. 43; European Communities' second oral statement, executive summary, para. 27.
[401] European Communities' second written submission, executive summary, para. 44.
[402] European Communities' second oral statement, executive summary, para. 27.
[403] European Communities' second written submission, executive summary, para. 44.
[404] Brazil's first oral statement, executive summary, paras. 3, 15.
[405] Appellate Body Report on *US – Gambling*, at para. 308, citing Appellate Body Report on *EC – Asbestos*, paras. 172-174. See also Appellate Body Report on *Korea – Various Measures on Beef*, at para. 180.
[406] See Panel Report on *Mexico – Taxes on onSoft Drinks*, para. 8.188.

further that the complaining party[407], *i.e.* the European Communities, bears the burden of identifying a less trade-restrictive measure that is reasonably available.[408]

4.175 Brazil claims that the European Communities has not met its burden of proof because it has not identified a disposal method that is safe, adequate, and viable.[409] Moreover, Brazil submits that no third party has proposed a viable alternative to the ban on retreaded tyres for reducing the number of waste tyres that must be disposed of and that remains the case. Brazil notes that the European Communities has acknowledged that it has not had time to carry out a full assessment of the alternative measures. In addition, Brazil submits that some of the third parties made confused statements on this issue and in response to questions they replied that they would go back to capitals for further information.[410]

4.176 Brazil claims that the import ban is "necessary" because no alternative measure can eliminate the risks caused by the unnecessary generation of waste tyres[411] and no alternative to the import ban is reasonably available.[412] Brazil contends that while some disposal methods are less harmful than others, these methods cannot handle high volumes of waste tyres.[413]

Measures presented as alternatives

Measures to reduce the number of waste tyres

4.177 The **European Communities** argues that Brazil has not done all it could to reduce the number of waste tyres accumulating in Brazil.[414] The European Communities argues that, strikingly, Brazil does not even have a system of mandatory vehicle inspections in place which could contribute to ensuring that used tyres remain retreadable after their use. Even more strikingly, the European Communities submits that Brazil allows the importation of huge amounts of used tyres into Brazil, most of which are used for retreading, but some of which are even discarded immediately.[415]

4.178 **Brazil** submits that the import ban on retreaded tyres avoids the unnecessary generation of additional waste tyres and, therefore, reduces the volume of waste tyres that must be incinerated or disposed of through methods that pose health and environmental risks.[416] Brazil also argues that the incontrovertible fact is that the fewer tyres Brazil must dispose of, the better. Brazil contends that the import ban is the most important vehicle for increasing retreadability of local casings because imported retreaded tyres reduce the number of retreadable tyres in Brazil.[417] Brazil points out that imports of tyres that cannot be retreaded again "prejudice efforts to address the used tyre issue,"[418] as the British Used Tyre Working Group has recognized.[419] Brazil also notes that it has already

[407] See Appellate Body Report on *US – Gambling*, at para. 320.
[408] Brazil's second written submission, para. 39, citing Appellate Body Report on *US – Gambling*, para. 320.
[409] Brazil's first oral statement, executive summary, paras. 3, 15.
[410] Brazil's first oral concluding statement, executive summary, p. 1.
[411] Brazil's first written submission, executive summary, paras. 21, 25.
[412] Brazil's first oral statement, executive summary, para. 15.
[413] Brazil's first oral statement, executive summary, para. 15.
[414] European Communities' second written submission, executive summary, para. 45; European Communities' second oral statement, executive summary, para. 28; European Communities' second oral concluding statement, executive summary, para. 18.
[415] European Communities' second oral concluding statement, executive summary, para. 18.
[416] Brazil's second written submission, para. 6.
[417] Brazil's second oral statement, para. 52.
[418] Used Tyre Working Group (UK), *Sixth Report of the Used Tyre Working Group*, para. 11.5 (2003) (Exhibit BRA-55).
[419] Brazil's first written submission, para. 124, citing Exhibit BRA-55.

implemented a number of measures that encourage non-generation[420] and that it has a system of vehicle inspections.[421]

Measures to ensure that Brazilian tyres remain retreadable after use

4.179 The **European Communities** notes that one of the main obstacles to the retreading of domestic tyres in Brazil remains the low suitability of Brazilian passenger car tyres for retreading. Therefore, for the European Communities measures to ensure that Brazilian tyres remain retreadable after use constitute one reasonable alternative to reduce the amount of waste tyres in Brazil.[422]

4.180 The European Communities argues that Brazil could take further measures to reduce the number of waste tyres, such as: (i) measures to promote the use of retreaded tyres, e.g. in public procurement[423]; (ii) measures to reduce the use of tyres for individual transport, e.g. by promoting public transport[424] or campaigns on better driving habits[425]; and (iii) measures to ensure regular inspections of automobiles.[426] The European Communities contends that Brazil has so far not responded to these reasonable alternatives.[427]

4.181 The European Communities submits that one effective measure to be taken in this context are regular inspections of automobiles, including their tyres, since in this way it can be ensured that tyres are replaced before they reach or surpass the minimum thread depth, and thus at a time when they are typically still retreadable.[428] The European Communities notes that Brazil has referred to a draft bill (5.979/2001) which would replace state-specific vehicle safety requirements with national standards. Therefore, for the European Communities, Brazil recognises that it does not currently have a system of regular mandatory vehicle inspections in place. The European Communities submits that there is no system in place that would ensure that tyres are replaced before they become so worn that they can no longer be retreaded.[429]

4.182 The European Communities notes that Brazil merely argues that a system of mandatory inspections might be introduced in the future. At the point of time of the Panel's establishment, the European Communities submits that the establishment of a system of mandatory vehicle inspections is a reasonably available alternative, which has not been used by Brazil. For the European Communities, whether Brazil will implement such a system in the future is therefore irrelevant for the purposes of the present discussion.[430] The European Communities notes further that there is no guarantee that Brazil will indeed implement a system of mandatory inspections.[431] The European Communities submits that Brazil has provided no firm indication as to when the bill will be adopted, or as to when the mandatory inspection system would finally take effect throughout Brazil.[432]

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[420] Brazil's second written submission, para. 104.
[421] Brazil's answer to panel question No. 87 (Exhibits BRA-102, 167).
[422] European Communities' second written submission, executive summary, para. 45.
[423] European Communities' second written submission, executive summary, para. 57; European Communities' second oral statement, executive summary, para. 28.
[424] European Communities' second written submission, executive summary, para. 57; European Communities' second oral statement, executive summary, para. 28.
[425] European Communities' second oral statement, executive summary, para. 28.
[426] European Communities' second oral statement, executive summary, para. 28.
[427] European Communities' second written submission, executive summary, para. 57.
[428] European Communities' second written submission, executive summary, para. 46.
[429] European Communities' second written submission, executive summary, para. 47.
[430] European Communities' second written submission, executive summary, para. 48.
[431] European Communities' second written submission, executive summary, para. 49.
[432] See also para. 4.83.

4.183 **Brazil** submits that it has introduced demanding manufacturing standards for new tyres, which assure that more tyres remain suitable for retreading after the first use. Brazil explains that the National Code of Traffic (Law 9.503/1997) establishes a system of mandatory vehicle inspections in Brazil.[433] Brazil points out that the Code requires examination of the vehicle's safety, including tyres, and its compliance with emission rules. Brazil explains that under the law, states have the jurisdiction to develop and enforce safety standards and inspection procedures in their individual territories and, at present, that is what happens. Brazil further explains that the Legislature is currently considering a bill to establish uniform federal inspection standards (Bill 5.979/2001) (Exhibit BRA-167).[434]

4.184 Brazil also notes that the absence of nationwide rules at present does not mean that Brazilian states and municipalities cannot in the interim use local rules to carry out regular inspections – they can and they do. In addition, Brazil notes that the inspections are not limited to the annual inspections: vehicles are inspected when first licensed, when their ownership changes, and also when the vehicle owner moves to a different state. Brazil points out that according to the National Traffic Department, 30 per cent of the Brazilian automobile fleet is annually inspected because of a change in ownership or the owner's move to a different state.[435]

4.185 Brazil also notes that it is developing an annual vehicle inspection plan designed to increase the frequency of tyre replacement, and consequently the number of suitable casings.[436] Brazil notes that the European Communities proposes four alternatives to achieve the non-generation goal: "better vehicles maintenance," "educational campaigns on better driving habits," promotion of public transportation, and public procurement rules to encourage use of retreaded tyres.[437] Brazil submits that it has already implemented a number of measures that encourage non-generation: (i) a public transportation campaign is hardly necessary, however, in developing countries such as Brazil, where most of the population do not own cars and already use public transportation; and (ii) public procurement rules are also unnecessary because Brazil already has a substantial demand for retreaded tyres.[438] However, Brazil argues that these "alternatives" will not allow Brazil to achieve its chosen level of protection, because the goal is to prevent as much waste as possible and, without the ban, some waste that could have been prevented would not be prevented.[439] Therefore, Brazil argues that measures such as these complement the import ban, but they cannot replace it.[440]

Measures against imports of used tyres[441]

4.186 The **European Communities** argues that Brazil has not taken effective measures to prevent the constant and growing flow of used tyres into Brazil.[442] The European Communities claims that Brazil imports a growing number of used tyres.[443] In 2005 alone, the European Communities submits that Brazil imported a total of 10.5 million tyres from third countries, including 8.4 million from the

[433] Brazil's answer to panel question No. 87 (Exhibit BRA-102).
[434] Brazil's answer to panel question No. 87 (Exhibit BRA-167).
[435] Brazil's answer to panel question No. 87.
[436] Brazil's first written submission, executive summary, para. 14.
[437] See European Communities' answer to panel question No. 38; See European Communities' first oral statement, at para. 57.
[438] Brazil's second written submission, para. 104.
[439] Brazil's second written submission, executive summary, para. 29.
[440] Brazil's second oral statement, para. 51.
[441] Further arguments by the parties in relation to this issue are contained in paras. 4.108-4.121
[442] European Communities' first oral statement, executive summary, para. 13; European Communities' second written submission, executive summary, para. 50; European Communities' second oral statement, executive summary, para. 29.
[443] European Communities' first oral statement, executive summary, para. 13.

European Communities[444] and in the first seven months of 2006, another 4.5 million casings have been imported.[445] The European Communities contends that a large majority of these tyres are used for the fabrication of retreaded tyres in Brazil. However, unlike in the case of importation of retreaded tyres, the European Communities argues that a small proportion of the imported used tyres, because they are unsuitable for retreading or for other reasons, will get discarded immediately.[446] Accordingly, the European Communities submits that, following the logic of Brazil, the importation of used tyres should be prevented even more urgently than the importation of retreaded tyres.[447]

4.187 In response to Brazil's claims that the importation of used tyres will soon end, the European Communities submits that presently ongoing legislative developments are moving in the direction of permitting the importation of casings (and retreaded tyres). The European Communities contends that two such draft laws enjoy considerable support in Brazil's Federal Chamber and the Federal Senate, respectively. The European Communities further submits that draft law 203/91 was approved by the Special National Waste Policy Commission by a majority of 22 votes against 4 votes. The European Communities also submits that draft law 216/03 on 16 December 2005 was approved by the Federal Senate's Social Affairs Commission in a vote of 18 against one, with only one abstention.[448] The European Communities submits that Brazil only claims that "the Federal Government has worked vigorously to safeguard the integrity of the ban" and explains the judicial decisions taken in 2006.[449]

4.188 However, the European Communities contends that the reality is that injunctions are in force under which Brazilian retreaders continue to import casings for retreading in Brazil. For the European Communities, Brazil's assurances that Brazilian courts are no longer or, in the future, would no longer grant injunctions, and that the importation of casings would stop, remain contradicted by the facts. The European Communities notes that it has already provided evidence challenging Brazil's statement that all 2006 decisions in the High Court upheld the government's position. The European Communities argues that although Brazil stresses its judicial victories over several importers of used tyres, the biggest retreaders of the country continue to operate with the permission to import the casings needed for their production.[450]

4.189 **Brazil** submits that to further promote retreading of tyres it consumes it prohibits imports of used tyres, compelling its retreaders to process casings from domestic and imported new tyres collected within Brazil's territory.[451]

Waste management measures

Controlled stockpiling and landfilling

4.190 The **European Communities** understands controlled stockpiling as the activity consisting of storing waste tyres in adequate installations, which are designed to prevent fires and pests (including mosquitoes). The European Communities argues that stockpiling is different from "landfilling" in that the latter consists in discarding large amounts of waste tyres directly on or into the ground. The European Communities explains that landfilling has been normally done by tossing waste into piles, a method that requires little effort or handling by a site operator but also requires the most storage space

[444] European Communities' second written submission, executive summary, para. 50; European Communities' second oral statement, executive summary, para. 30.
[445] European Communities' second oral statement, executive summary, para. 30.
[446] European Communities' first oral statement, executive summary, para. 13; European Communities' second written submission, executive summary, para. 50.
[447] European Communities' first oral statement, executive summary, para. 13.
[448] European Communities' second written submission, executive summary, para. 56.
[449] European Communities' second oral statement, executive summary, para. 29.
[450] European Communities' second oral statement, executive summary, para. 30.
[451] Brazil's first written submission, executive summary, para. 14.

and where randomly stacked tyres are a greater fire risk because they expose more tyre surface area and create greater volumes or air between other tyres than other stacking methods.[452]

4.191 The European Communities further explains that waste tyres are stockpiled in several ways. The European Communities submits that besides the random stacks system, which is common in landfills but rarely used in controlled stockpiling because of storage space and handling requirements, the alternative methods of storing tyres at waste tyres facilities are: barrel stacks, laced stacks, bundling and shredding. For the European Communities, all these, to a different degree, take advantage of space, reduce interior spaces decreasing potential insect habitats and exposes less surface area of the tyres to a fire.[453]

4.192 The European Communities does not agree with Brazil's argument that stockpiling is a dangerous[454] and unsound disposal method because it poses substantial hazards[455], provides breeding grounds for mosquitoes and contaminates the soil through the leaching of hazardous substances. However, for the European Communities, this is a description of the hazards arising from improperly managed installations, which could be avoided by implementing properly the Basel Convention Technical Guidelines and the California Code of Regulations.[456] The European Communities notes that Brazil refers as evidence to some documents from the United Kingdom, France, the United States and the European retreaders. The European Communities argues that those documents do not refer to properly managed installations, but to illegal dumps or historic landfills. The European Communities is of the view that they cannot, therefore, serve to contradict the European Communities' position on this question.[457] Moreover, the European Communities claims that it has no relevance that the Basel Guidelines signal that stockpiling can be used only for temporary storage before a waste tyre is forwarded to a recovery operation.[458] The European Communities argues that stockpiling plays an important role acting as a buffer to other disposal operations and its duration and capacity can be adjusted to the specific needs of the relevant country.[459]

4.193 The European Communities argues that stockpiling allows the management of waste tyres in a controlled and surveyed manner, thus reducing, or even eliminating in well designed and managed installations, the risks arising from mosquitoes and fires. For the European Communities, relevant evidence of their non-dangerous nature is the fact that waste tyre stockpiling installations are not subject to compulsory environmental impact assessment in Brazil and under the only existing international agreement on environmental impact assessment: the Espoo Convention of 25 February 1991 on Environmental Impact Assessment in a Transboundary Context.[460]

4.194 **Brazil** claims that stockpiling is a dangerous practice that is no longer accepted as a legitimate waste tyre management solution. Brazil argues that stockpiling is not a disposal method at all because it does not eliminate tyre waste. In addition, Brazil submits that stockpiling presents a risk of mosquitoes, toxic leaching, and dangerous emissions during fires.[461] Brazil draws the attention of the Panel to Exhibit BRA-25, which contains images of tyre stockpiles and tyre fires and shows that

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[452] European Communities' second written submission, executive summary, para. 63.
[453] European Communities' second written submission, executive summary, para. 64.
[454] European Communities' second written submission, executive summary, para. 65.
[455] European Communities' first oral statement, executive summary, para. 16; European Communities' second oral statement, executive summary, para. 36.
[456] European Communities' first oral statement, executive summary, para. 16.
[457] European Communities' second oral statement, executive summary, para. 36.
[458] European Communities' second oral statement, executive summary, para. 36.
[459] European Communities' second oral statement, executive summary, para. 36.
[460] European Communities' second written submission, executive summary, para. 65.
[461] Brazil's first oral concluding statement, executive summary, p. 1; Brazil's second oral statement, executive summary, para. 10.

stockpiling is hardly safe. Brazil argues that the European Communities' cavalier treatment of these well-recognized risks exemplifies its treatment of all disposal alternatives.[462]

4.195 Brazil notes the European Communities' claim that these "hazards aris[e] from *improperly managed* installations" and refers the Panel to the management practices outlined in the Basel Tyre Guidelines and the California regulations.[463] Brazil notes that the European Communities says that the Basel Tyre Guidelines endorse stockpiling.[464] However, in reality, Brazil contends that the Basel guidelines are explicit that even with proper control, stockpiling "can be used only for *temporary* storage before an end-of-life tyres is forwarded to a recovery operation," and that "landfilling and stockpiling are the *least desired* options".[465] Moreover, Brazil submits that California's Tyre Recycling Act[466] names among its key objectives "[c]leanup, abatement, or other remedial action related to waste tyre *stockpiles*."[467]

4.196 Brazil notes that the European Communities points to a number of documents and reports that Brazil has supposedly misread.[468] Brazil submits some information on the content of those reports concerning stockpiling – a disposal method that is entirely environmentally sound, according to the European Communities:[469] (i) the British Environment Agency, in its publication "Tyres in the Environment" (Exhibit BRA-1), says that "[s]tockpiled tyres ... are a fire risk ..." and "[f]ires in the past have caused severe air and water pollution, so we need to reduce this risk"[470]; and (ii) the Basel Tyre Guidelines.[471]

4.197 Brazil submits that the environment agencies of the European Communities member States recognize the dangers of stockpiling and are working to eliminate stockpiles.[472] Brazil submits further that the United Kingdom, for example, has a Stockpile Working Group to provide guidance for clearance of stockpiles.[473] Brazil also notes that in the United States, most states prohibit new tyre stockpiles and require stockpile owners and operators to cease accepting new tyres and to develop plans to eliminate the stockpiles.[474]

4.198 The **European Communities** notes that controlled landfilling is also an alternative and that Brazil accepts landfilling of grinded or cut tyres, and, therefore, this must also be considered as an

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[462] Brazil's first oral concluding statement, executive summary, p. 1.

[463] European Communities' first oral statement, at paras. 74-75 (emphasis added).

[464] Brazil's second oral statement, executive summary, para. 10.

[465] *Basel Convention Technical Guidelines on the Identification and Management of Used Tyres*, pp. 11-12 (Exhibit BRA-40) (emphasis added). Brazil's first oral concluding statement, executive summary, p. 1; Brazil's second oral statement, executive summary, para. 10; Brazil's second written submission, executive summary, para. 21.

[466] *California Tyre Recycling Act of 1989*, California Public Resource Code Sec. 42885.5(b)(2) (emphasis added).

[467] Brazil's second written submission, executive summary, para. 21.

[468] European Communities' first oral statement, para. 72.

[469] Brazil's first oral concluding statement, executive summary, p. 1.

[470] Brazil's first oral concluding statement, executive summary, p. 1.

[471] See para. 4.195. Brazil's first oral concluding statement, executive summary, p. 1.

[472] See e.g., Ministère de l'écologie et du développement durable (France), *Réglementation de la collecte et de l'élimination des pneumatiques usagés*, 10 November 2005 (Exhibit BRA-135), *UK – Tyres in the Environment,* Foreword (1998) (Exhibit BRA-1); Health Protection Agency (UK), *Chemical Hazard and Poisons Report* 8 (2003) (Exhibit BRA-10). Brazil's second written submission, executive summary, paras. 2, 22; Brazil's second oral statement, executive summary, para. 10.

[473] The Environment Council, Stockpile Working Group, *Seeking Solutions for Waste Tyres: Informing the Environment Agency's Waste Tyres Program – Tyre Stockpile Paper* 23 (2004) (Exhibit BRA-136)

[474] See John Serumgard, *Internalization of Scrap Tyre Management Costs*, at 3 (1998) (Exhibit BRA-125), at 19. Brazil's second written submission, executive summary, paras. 22; Brazil's second oral statement, executive summary, para. 10.

alternative in Brazil to the import ban.[475] The European Communities submits that Article 1 of Joint Resolution SMA/SS 1/2002 of 5 March 2002 conditions final tyre disposal in waste landfills to previous decharacterization by grinding or cutting the tyre and to the previous mixing of these parts with household waste or its spread over the latter.[476] The European Communities submits that the penultimate recital of this Joint Resolution reminds that Resolution CONAMA 258/1999, stipulates that final disposal of waste tyres shall be carried out through environmentally sound measures. Consequently, for the European Communities, it has to be concluded that Brazil considers landfilling of shredded tyres as creating no environmental risks. The European Communities argues that the statement made by Brazil that "shredding of tyres … does not prevent potential leaching of harmful organic chemicals" and heavy metals contradicts its own legislation and must be considered unfounded.[477]

4.199 With respect to landfilling, **Brazil** is not sure what the European Communities means by "controlled" landfilling, but landfilling of any kind is prohibited in the European Communities since July 2006.[478] Brazil submits that both Brazil and the European Communities prohibit landfilling of tyres[479] because they damage the landfill's structure and can leach harmful contaminants into the environment.[480] Brazil is of the view that there is no good reason why Brazil should accept something that the European Communities has rejected. Brazil notes the European Communities' claim that Brazil permits landfilling, but the regulation the European Communities cites is a provisional state measure with no nation-wide application that was adopted in response to an acute dengue crisis in the state.[481]

Energy recovery and waste co-incineration

Activities of energy recovery and waste co-incineration

4.200 The **European Communities** contends that both parties in this dispute allow energy recovery through the co-incineration of waste tyres.[482] The European Communities submits that in Brazil, Resolution CONAMA 264 of 26 August 1999 is the relevant measure.[483] The European Communities submits that energy recovery is one of the best waste management practices mentioned in the OECD report on "Improving Recycling Materials".[484] The European Communities submits that the percentage of energy recovery from waste tyres has jumped in Europe from 11 per cent in 1994 to 30 per cent in 2003.[485]

4.201 The European Communities notes that Brazil has concentrated its arguments on co-incineration in cement kilns, though co-incineration can also take place in other installations, like paper mills or steel furnaces.[486] The European Communities contends that co-incineration of waste

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[475] European Communities' second written submission, executive summary, para. 66. European Communities' second oral statement, executive summary, para. 37.

[476] European Communities' second written submission, executive summary, para. 66.

[477] European Communities' second written submission, executive summary, para. 67.

[478] Brazil's second oral statement, executive summary, para. 10.

[479] See Golder Europe EEIG, *Report on Implementation of the Landfill Directive in the 15 member States of the European Union* 122 (2005) (Exhibit BRA-41).

[480] Brazil's first written submission, executive summary, para. 7.

[481] Brazil's second oral statement, executive summary, para. 10.

[482] European Communities' first oral statement, executive summary, para. 17; European Communities' second oral statement, executive summary, para. 37.

[483] European Communities' first oral statement, executive summary, para. 17.

[484] European Communities' second written submission, executive summary, para. 68.

[485] See figure 4.3 of the OECD report on "Improving Recycling Materials" contained in Exhibits EC-16 and BRA-58, p. 125. European Communities' first oral statement, executive summary, para. 17.

[486] European Communities' second oral statement, executive summary, para. 37.

tyres or tyre-derived fuel in different installations (cement kilns, pulp and paper mills, electric arc furnaces for the manufacture of high-carbon steel products, and utility and industrial boilers) is considered a safe activity throughout the world. For the European Communities, that explains its expansion in several countries, like the United States, Australia, Japan or the European Communities.[487]

4.202 The European Communities notes Brazil's acknowledgement that it has licensed some 46 companies to process waste tyres, and, presumably, several of them use waste tyres as fuel.[488] For the European Communities, it is regrettable that Brazil did not provide a useful answer to the second part of the Panel's question No. 43 (What types of disposal methods are used by the Brazilian companies that are authorized to process waste tyres in Brazil?) and refused to answer to the European Communities' question No. 17 (concerning the 46 companies authorised to process waste tyres).[489] The European Communities considers that the information requested is relevant to assess to what extent energy recovery is a reasonable alternative in Brazil, which the European Communities claims it is.[490]

4.203 The European Communities submits that the authorities in Brazil seem to encourage energy recovery as an alternative. In its response to the Panel's question No. 43, the European Communities notes that Brazil admitted that co-processing in cement kilns and co-processing with bituminous schist are disposal methods usually approved by state environmental authorities in the framework of the implementation of Resolution CONAMA 258/1999.[491] In any case, for the European Communities, it is clear that energy recovery plays already an important role in Brazil. The European Communities submits that the report "Panorama dos Resíduos Sólidos no Brasil" (Solid Waste Panorama in Brazil) states that, in 2004, 56,06 per centof waste tyres in Brazil were used to produce alternative fuel.[492] The European Communities has already explained that, in view of its capacities as country and its important participation in the cement and paper mills industries and energy, Brazil cannot claim to have difficulties in implementing energy recovery as an alternative measure. The European Communities points out that according to the World Bank country fiche, Brazil's industrial sector represents 40 per cent of its economy, and the publication "World Steel in Figures" by the International Iron and Steel Institute, ranks Brazil in the ninth post among the major steel-producing countries in 2005.[493]

4.204 **Brazil** argues that outside of landfilling, only incineration can handle the large existing volumes of waste tyres, but incineration produces harmful emissions that can cause cancer, as well as a variety of respiratory, reproductive, and immune system problems.[494] Brazil points out, for example, that the US EPA study found that a "well-designed, well-operated, and well-maintained combustion device" could mitigate the added harm from the TDF emissions; however, "it is not likely that a [well-designed] solid fuel combustor without add-on particulate controls could satisfy air emission regulatory requirements in the United States," and "there is serious concern that emissions [from poorly designed or primitive combustion devices] would be more like those of an open tire fire than a well-designed combustor."[495]

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[487] European Communities' second written submission, executive summary, para. 74.
[488] European Communities' first oral statement, executive summary, para. 17; European Communities' second written submission, executive summary, para. 75.
[489] European Communities' second written submission, executive summary, para. 75; European Communities' second oral statement, executive summary, para. 39.
[490] European Communities' second written submission, executive summary, para. 75.
[491] European Communities' second written submission, executive summary, para. 76.
[492] Exhibit EC-114.
[493] European Communities' second written submission, executive summary, para. 77.
[494] Brazil's first written submission, paras. 21, 44 (Exhibit BRA-48).
[495] Brazil's first written submission, para. 46 (Exhibit BRA-26).

Safety of energy recovery and waste co-incineration

4.205 **Brazil** argues that it is entitled to opt for the highest level of protection, and that is precisely what Brazil is doing.[496] Brazil explains that Brazil, the European Communities, and other WTO Members continue to incinerate tyre waste not because the practice is safe, but because landfilling and stockpiling are even more dangerous, and the less risky disposal methods cannot absorb the volumes generated.[497] Brazil argues that incineration of waste tyres in cement kilns and similar facilities does not allow Brazil to achieve its chosen level of protection.[498] Brazil claims that while there is clearly an overwhelming consensus on the dangers of incineration, Brazil needs only to show that it is relying, in good faith, on qualified and respected, even if divergent, opinion.[499] Brazil notes that the European Communities admits that[500] "some governments and scientific communities have expressed concern about incinerating waste tyres".[501]

4.206 The **European Communities** argues that Brazil distorts the European Communities' arguments in order to give the impression that co-incineration in cement kilns is dangerous. The European Communities notes that Brazil continues with the surprising affirmation that dumping is a less harmful disposal method than incineration. The European Communities contends that contrary to what Brazil claims co-incineration will continue to be used in the medium term until recycling is fully developed, especially in the current international scenario of petrol prices. For the European Communities, this explains why, in 2004, 56.06 per cent of waste tyres in Brazil were used to produce alternative fuel. Moreover, the European Communities notes that Brazil has not alleged that co-incineration is not an adequate system to eliminate tyres, as mosquito-breeding places, or to reduce open tyre fires.[502]

4.207 The European Communities argues that Brazil has not demonstrated either that co-incineration of waste tyres increases emissions of hazardous substances. The European Communities claims that all its evidence is based on studies issued ten years ago or more, precisely when the discussions to regulate co-incineration started, and the studies correspond to installations using old technology, like the wet cement kilns, or burning other fuels.[503]

4.208 **Brazil** states that the incineration was not safe ten years ago, and it still is not safe today. Brazil further argues that the studies provided by Brazil are the most recent studies available on the subject. Brazil states that the European Communities has only been able to provide one study that is more recent, which specifically addresses the safety of waste tyre incineration.[504] That very study, according to Brazil, reported significant increases in dioxin emissions during the incineration of waste tyres. Brazil also notes that a British report, dated 2002, prepared with the British Government's participation, observed that "public and regulatory concern over emissions makes consents [to incinerate tyres] difficult to obtain."[505]

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[496] Brazil's second oral statement, executive summary, para. 13.

[497] Brazil's second oral statement, para. 42.

[498] Brazil's second written submission, executive summary, para. 23.

[499] See Appellate Body Report,on *EC – Asbestos*, at para. 178. Brazil's second oral statement, executive summary, para. 13.

[500] European Communities' first oral statement, at para. 76.

[501] Brazil's second written submission, executive summary, para. 23; Brazil's second oral statement, executive summary, para. 13.

[502] European Communities' second oral statement, executive summary, para. 38.

[503] European Communities' second oral statement, executive summary, para. 39.

[504] Exhibit EC-86.

[505] Exhibit BRA-56, cited in Brazil's answer to panel question No. 123; Brazil's second oral statement, para. 35.

Emissions of dioxins, furans and other persistent organic pollutants (POPs)

4.209 **Brazil** notes that the European Communities concedes that[506] incineration "can lead to emissions of dioxins, furans and other persistent organic pollutants".[507] Brazil submits further that the European Communities yet argues that (i) safety of incineration is beside the point because Brazil permits it; and (ii) emission controls could make it safe.[508] Brazil claims that both arguments are flawed.[509]

4.210 *First*, Brazil and other countries permit incineration not because it is safe, but because other, less risky methods cannot absorb the existing volumes of tyre waste, even if used in combination. According to the European Environment Agency, incineration is appropriate only "if no other outlet is possible".[510] Brazil notes that the European Communities makes a half-hearted attempt at defending the safety of incineration. However, the studies it cites support Brazil's arguments.[511] Brazil submits that the study prepared for the cement industry describes tests conducted at 16 German kilns since 1989 and reports a 1,233 per cent to 3,900 per cent increase in dioxin emissions when tyres are burned.[512] Brazil notes that the study also acknowledges that burning alternative fuels, such as tyres, could result in release of heavy metals.[513] Brazil further notes that two other studies cited by the European Communities do not measure dioxin emissions at all, and one admits that tyre material in material recycling uses leaches lead, nickel, chromium and cadmium.[514]

4.211 Brazil argues that incineration produces harmful emissions (including dioxins, furans, and lead) that cause cancer, affect the immune system, and lead to reproductive problems.[515] Brazil notes that it has explained in detail why incineration of waste tyres is harmful, even under controlled conditions. Brazil submits that Ontario banned incineration until it realized that there was no other way to reduce stockpiling of its tyre waste. Brazil argues that not a single study introduced by the European Communities supports its ambitious claim that incineration is entirely safe – instead, the studies document increases in dioxin emissions and leaching. Brazil points out that if waste tyres were indeed the safe and valuable fuel that the European Communities claims they are, it would seem that they would be in high demand; however, they are not.[516] Brazil notes that cement kilns still charge gate fees to accept tyres and, as the British Used Tyre Working Group correctly points out, "[t]he speed of regulatory approval for cement works to consume used tyres as a replacement fuel has to date been extremely slow."[517]

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[506] European Communities' first oral statement, at para. 76.

[507] Brazil's second written submission, executive summary, para. 23; Brazil's second oral statement, executive summary, para. 13.

[508] See European Communities' first oral statement, at paras. 77-79.

[509] Brazil's second written submission, executive summary, para. 23.

[510] European Environment Agency, *Waste from Road Vehicles* 2 (2001) ("*EU – Waste from Road Vehicles*") (Exhibit BRA-108). Brazil's second written submission, executive summary, paras. 2, 24; Brazil's second oral statement, executive summary, para. 11.

[511] See European Communities' answer to panel question No. 48.

[512] Exhibit EC-86. See European Communities' answer to panel question No. 48.

[513] See European Communities' answer to panel question No. 48.

[514] See IVL Swedish Environmental Research Institute LTD, *LCA Utilization of Used Tyres* (Exhibit EC-87); Fraunhofer Institute Materialfluss und Logistik, Study on Cost-benefit Scenarios for Recycling in the EU 126 (Exhibit EC-62). Brazil's second written submission, executive summary, para. 25.

[515] Seymour Schwartz et al., *Domestic Markets for California's Used and Waste Tyres*, Attachment A: Environmental and Health Consequences from Using Tyres as Fuel; Health Risk Assessment 1 (1998) (Exhibit BRA-48). Brazil's first written submission, executive summary, para. 8.

[516] Brazil's second oral statement, executive summary, para. 11.

[517] Brazil's second oral statement, para. 42, citing Exhibit BRA-55.

4.212 Brazil submits that to downplay the risks of dioxins, the European Communities explains that "[d]ioxins are found widely in the environment and the main source of exposure is via diet."[518] However, Brazil notes that as the United States EPA explains in Exhibit BRA-31, dioxins enter the food chain from the emissions in the atmosphere, accumulate in the animal tissue, and are then passed on to the person who consumes the animal's meat. Brazil submits that the European Communities also argues that there is a tolerable exposure level, as established by the WHO.[519] Brazil submits further that however the United States Government report, cited by the European Communities, reveals that the United States EPA disagreed that such a threshold existed, and notes that the WHO recommended that "every effort ... be made to reduce exposure to the lowest possible level."[520] Brazil notes that, in addition, the same US report underlines that every time the WHO has returned to the issue, it has lowered the tolerable intake level for dioxins.[521] Finally, Brazil argues that the European Communities is flatly wrong when it states that dioxins are not one of the 12 POPs targeted for elimination under the Stockholm Convention; a quick look at the Annex C and Article 5 makes this clear.[522]

4.213 Brazil notes that the European Communities casually dismissed the hazards presented by a deadly chemical[523] by stating that dioxins are released from back-yard barbecues.[524] Brazil argues that the level of dioxins released from a cement kiln – even properly operated, state-of-the-art cement kiln – is far greater than the amount released from any barbecue. If the European Communities has contrary information, Brazil would be pleased to receive it.[525]

4.214 *Second*, Brazil contends that stricter emission standards can mitigate, but not eliminate the health and environmental harm caused by incineration.[526] Brazil further argues that such emission standards require cost-prohibitive upgrades.[527] Brazil submits that zero-level emissions, in principle, could eliminate the risks of incineration. However, Brazil argues that, in practice, demanding such standards will render incineration no longer technically or economically viable, and the waste previously incinerated will have to be landfilled or stockpiled, which is even more harmful. Brazil submits that because these risks are unavoidable, the only way to reduce them is to reduce the volumes of tyres that must be disposed of.[528]

4.215 Brazil argues that the decision on whether a steel mill or paper mill will use tyres as fuel is a decision that the private operator of the mill will make based on various economic variables, including the cost of the fuel (in the case of tyres, most charge a fee to accept the tyres to burn), plus the cost of the burning process. Brazil submits that the higher the restrictions on that process, the higher the cost of compliance. In Brazil's view, the result is that if Brazil set the emissions standards high enough to meet its desired level of protection, the cost of meeting those standards would be so high that the operators would choose an alternative source of fuel. Paragraph 49 of Brazil's first written submission provides an example of an European Communities member State, where the use of tyres as fuel declined after the emission standards were raised. Brazil noted that in Austria, the energy

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[518] European Communities' Second Written Submission, at para. 116.

[519] See European Communities' Second Written Submission, at para. 116.

[520] General Accounting Office (US), *Environmental Health Risks: Information on EPA's Draft Reassessment of Dioxins*, 27-28, 46 (2002) (Exhibit BRA-33).

[521] Brazil's second oral statement, para. 39.

[522] Brazil's second oral statement, executive summary, para. 12.

[523] Brazil's first oral concluding statement, executive summary, p. 2.

[524] Brazil's first oral concluding statement, executive summary, p. 1.

[525] Brazil's first oral concluding statement, executive summary, p. 1.

[526] OECD Environment Directorate, *Improving Recycling Markets* (2005) ("*OECD – Improving Recycling Markets*") (Exhibit BRA-58), at 140. Brazil's first written submission, executive summary, para. 8; Brazil's second written submission, executive summary, para. 25.

[527] Brazil's first written submission, executive summary, para. 8.

[528] Brazil's second written submission, executive summary, para. 26.

recovery market share declined from 70 to 40 per cent in 2000 after introduction of stricter environmental regulations.[529]

4.216 Brazil submits that the issue, therefore, is not whether Brazilian incinerators can afford the safest technology available to reduce emissions, but whether incineration of waste tyres would continue to make business sense if expensive investments were required, especially in developing countries like Brazil. Brazil points out that with the present state of technology, the fewer tyres are incinerated, the more tyres will have to be stockpiled and landfilled – at an even greater health and environmental cost.[530]

4.217 Brazil argues that the European Communities has built its case on flawed conclusions and, sometimes, outright misrepresentations, as for example the fact that it portrayed a deadly chemical - dioxin - as a benign substance. In addition, Brazil is of the view that by downplaying the risks of waste tyre accumulation and disposal in Geneva, the European Communities has contradicted its own environmental officials in Brussels.[531]

4.218 To respond to Brazil's arguments that energy recovery produces "dangerous, harmful emissions, even under its most controlled conditions", the **European Communities** notes that in its first oral statement several reasons to support this alternative were provided.[532] The European Communities notes that it is true that burning wastes – if not properly done – can lead to emissions of dioxins, furans and other POPs; however, the incineration or co-incineration of waste destroys POPs in the waste input. The European Communities submits that the practice of waste co-incineration can also be considered in the light of the Basel Convention, which adopted in 2004 General Technical Guidelines for the Environmentally Sound Management of wastes consisting of, containing or contaminated with POPs. The European Communities submits that cement kiln co-incineration is included in the guidelines as one appropriate technology for the destruction and irreversible transformation of the POPs content in waste.[533] The European Communities submits further that the technology and equipment for ensuring the respect of those emissions limits exists, and the Brazilian cement, steel and paper mills companies can surely afford the investments, if they have not done it yet. Brazil has submitted no evidence to the contrary.[534]

4.219 The European Communities submits that Brazil has acknowledged that stricter emissions standards will produce fewer emissions. The European Communities submits that, of course, emission limits are set up to protect human health and the environment against risks that are significant, not against those that are insignificant. The European Communities contends that our societies are very far away from the technological and economic levels ensuring zero risk. The European Communities has the strictest standards in the world: its dioxin emissions limits, for example, are five times lower than those in Brazil.[535] In the European Communities, incineration of tyres must meet at least the standards of the waste incineration Directive 2000/76/EC, which ensures a high level of health protection.[536]

4.220 The European Communities notes that Brazil reacted to the European Communities' arguments by saying that the European Communities was "casually dismissing the hazards presented by a deadly chemical" (dioxins). The European Communities notes that no arguments were advanced by Brazil in relation to the increased use of this alternative in the European Communities, Brazil and

[529] Brazil's second oral concluding statement, executive summary, para. 14.
[530] Brazil's answer to panel question No. 97.
[531] Brazil's second oral statement, executive summary, para. 1.
[532] European Communities' second written submission, executive summary, para. 68.
[533] European Communities' first oral statement, executive summary, para. 17.
[534] European Communities' second oral statement, executive summary, para. 40.
[535] European Communities' second oral statement, executive summary, para. 40.
[536] European Communities' first oral statement, executive summary, para. 17.

elsewhere and the positive role that cement kiln co-incineration of waste tyres plays in the destruction of the POPs content in waste.[537]

4.221 The European Communities explains that dioxins are formed in very small quantities when organic materials such as oil, wood, grease and plastics are burnt. The European Communities explains that the EC fiche on emission values from the group of activities to which cement clinkers belong shows that dioxin total emissions to air per year in the European Communities amount to 0.0322 kg, which represents 4 per cent of the dioxins emission in the European Communities. The European Communities notes that the WHO considers that TCDD (the most hazardous dioxin) does not affect genetic material and there is a level of exposure below which cancer risk would be negligible. The European Communities further submits that the WHO has recommended a monthly tolerable intake of 70 picograms per kilogram of body weight.[538]

4.222 Moreover, the European Communities stresses that Brazil has slipped into its submissions some inaccuracies on dioxins as hazardous substance; namely, the statements that dioxins are harmful no matter how small the amount and that the Stockholm Convention on POPs has listed dioxins among 12 contaminants targeted for elimination.[539]. The European Communities points out that dioxins do not form part of the 12 contaminants whose production, use and trade are prohibited or must be eliminated according to Article 3 of the POPs Convention. The European Communities explains that dioxins are included in Annex C to the Convention, with other chemicals whose total releases from anthropogenic sources must be reduced, according to Article 5 of the Convention, with the goal of their continuing minimization and, where feasible, ultimate elimination. Dioxins levels have been decreasing in recent years, mainly due to the reduction in emissions to the air from industrial installations. The European Communities is actively working on further reductions: Directive 2000/76/EC sets up 0.1 ng/Nm³ for incineration and co-incineration plants, compared to the 0.5 ng/Nm³ set up in the Brazilian Resolution CONAMA 316 of 29 October 2002 on procedures and criteria for the operation of thermal waste treatment systems.[540]

4.223 Finally, the European Communities notes that the reports mentioned by Brazil in its first written submission are not representative of the current situation of energy recovery as an alternative and, in some cases, the use by Brazil of those reports is biased. The European Communities argues that the most recent scientific evidence shows that incineration of waste tyres in cement kilns does not influence or affect the emissions of dioxins and furans, reduces SO_2 emissions and does not increment emissions for lead, nickel, chromium and cadmium.[541]

Material recycling

4.224 The **European Communities** contends that material recycling of waste tyres for different purposes is considered a safe activity throughout the world. For the European Communities, that explains its expansion in several countries, like the United States, Australia or the United Kingdom. The European Communities submits that authorities in Brazil also seem to encourage material recycling as an alternative. The European Communities notes that in its response to the Panel's question No. 43, Brazil states that the production of rubber asphalt and rubber products and appliances are disposal methods usually approved by state environmental authorities in the framework of the implementation of Resolution CONAMA 258/1999. The European Communities submits that according to a recent press article found on the website of the Brazilian Ministry of the Economy, the company "Ecovias" is applying rubber asphalt on 146 kilometres of road in São Paulo and the

[537] European Communities' second written submission, executive summary, para. 69.
[538] European Communities' second written submission, executive summary, para. 71.
[539] European Communities' second written submission, executive summary, para. 70.
[540] European Communities' second written submission, executive summary, para. 72.
[541] European Communities' second written submission, executive summary, para. 73.

company "Greca" one of its providers, with three asphalt installations in Rio Grande do Sul, Paraná and São Paulo, is constructing another one in Minas Gerais.[542]

4.225 The European Communities notes however that Brazil considers that material recycling is not an acceptable option. However, for the European Communities the reports attached as exhibits by Brazil show that material recycling or reuse is well expanded; this is reflected in figure 4.3 of the OECD report, which shows that recycling of waste tyres has jumped in Europe from 6 per cent in 1994 to 28 per cent in 2003.[543] The European Communities submits that Brazil repeats that material recycling is not always economically and technically viable, and can only absorb a fraction of the waste tyres arising in Brazil. The European Communities argues that Brazil insists in assessing this alternative in isolation.[544]

4.226 In any case, the European Communities is of the view that Brazil still has to explain its capacities in this respect and, more notably, to comment on the report "Panorama dos Residuos Sólidos no Brasil" (Solid Waste Panorama in Brazil) that states that, "[i]n 2004, of the 146 thousand tonnes of unusable tyres, ... 17.65 per cent [were] rolled into sheeting, [and] 19.65 per cent [used] for rubber goods and material".[545] Finally, the European Communities argues that among the environmental health actions foreseen in its chapter 5.1, the National Dengue Control Programme, adopted on 24 July 2002 by the Brazilian Health Ministry, refers to 100.000 grinders for shredding tyres, which will be provided to the municipalities to support the use of tyres as raw material for the construction of houses.[546]

4.227 The European Communities notes Brazil's claims that material recycling of rubber remains "largely experimental and their environmental impact unknown", that rubber-asphalt can cause occupational hazards and that civil engineering applications pose negative environmental effects. The European Communities claims that these claims are inaccurate. The European Communities notes that the report attached by Brazil to its first written submission concludes that "no definitive results were obtained indicating that rubber asphalt exposures are more hazardous than conventional asphalt exposures". The European Communities submits that, in regard to civil engineering, a report produced by HR Wallingford Ltd., in March 2005, for the United Kingdom Department of Trade and Industry and the Environment Agency explains the different re-uses of tyres in port, coastal and river engineering and concludes that the overall risk of damage to the environment and human health is expected to be reduced to low or to near zero.[547]

4.228 **Brazil** also argues that material recycling applications – though often safer – are not always the best solution. Brazil submits that an industry association[548] that supports material recycling nevertheless recognizes that "[e]ach potential civil engineering use brings with it a particular set of technical, environmental and economic constraints".[549] Brazil states, for example, that rubber asphalt has yet to gain wide acceptance and concerns about emissions during paving and resurfacing remain.[550] Brazil explains that material recycling is preferred to stockpiling and incineration because it is generally safer and extracts the greatest environmental benefit from the waste tyre, next to

[542] European Communities' second written submission, executive summary, para. 79.
[543] European Communities' first oral statement, executive summary, para. 18.
[544] European Communities' second oral statement, executive summary, para. 41.
[545] European Communities' second written submission, executive summary, paras. 80-81; European Communities' second oral statement, executive summary, para. 41.
[546] European Communities' second written submission, executive summary, para. 80.
[547] European Communities' second written submission, executive summary, para. 78.
[548] Serumgard, at 10 (Exhibit BRA-125).
[549] Brazil's second written submission, executive summary, para. 28.
[550] Brazil's first written submission, para. 55 (Exhibits BRA-1, 60, 62).

retreading. Brazil explains, however, that material recycling does not have the capacity to absorb the existing volumes.[551]

4.229 Brazil submits that the European Environment Agency, for example, advises member States that "[r]etreading and recycling of tyres should be encouraged and increased, in preference to combustion and energy recovery".[552] However, Brazil explains that material recycling cannot absorb the existing volumes. Brazil argues that in the European Communities, it helps dispose of just slightly over a quarter of the tyre waste.[553] Brazil submits that the European Environment Agency notes:[554] "*Too many tyres are still being landfilled or burnt*. ... [C]ompliance with the EC Directives on land-filling and waste combustion emissions will require considerable investment in new retreating and recycling facilities".[555]

4.230 Brazil submits further that because the vulcanization process that gives a tyre its rigid physical properties cannot be effectively reversed, true recycling is impossible.[556] Brazil explains that devulcanization is cost-prohibitive, results in pollution and produces poor-quality rubber with limited demand and applications – tyre manufacturers simply cannot recycle an old tyre into a new one.[557] Brazil explains that pyrolysis (self-contained breakdown of the tyre material in an oxygen-free environment) remains experimental and expensive.[558] Brazil contends that civil engineering uses, such as construction of artificial reefs and landfill lining, can help dispose of only a small fraction of the existing volumes and their environmental impact remains unknown. Brazil notes that adding shredded waste tyres to asphalt has yet to gain wide acceptance and concerns about emissions during paving and resurfacing remain.[559] Brazil submits that in the European Communities, rubber asphalt applications[560] help dispose of less than one per cent of waste tyres.[561]

4.231 Brazil notes the European Communities' argument that the report "Panorama dos Residuos Sólidos no Brazil" allegedly proves that Brazil successfully disposes of all of its tyres. Brazil states that all that the report does, however, is quote the highly controversial IPT study, commissioned by Brazil's new tyre manufacturers.[562] Brazil points out that the methodology of the IPT study was so flawed that the manufacturers requested that the study be redone.[563] Brazil explains that the problem with the report is that, while it accounted for the disposal of 100 per cent of the tyres that were in fact disposed of by the business entities surveyed, the quantity disposed of by these businesses was less than half of all waste tyre arisings in that particular year. In addition, Brazil states, according to the report, more than half of the tyres were incinerated, and incineration, as Brazil has explained, presents health and environmental risks.[564]

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[551] Brazil's second written submission, para. 94.

[552] *EU – Waste from Road Vehicles*, at 1 (Exhibit BRA-108).

[553] See European Communities' First Oral Statement, at para. 81.

[554] *EU – Waste from Road Vehicles*, at 3 (Exhibit BRA-108) (emphasis added).

[555] Brazil's second written submission, executive summary, para. 27. See also Brazil's comments on European Communities' answer to panel question No. 125 (Exhibit EC-84).

[556] See California Environmental Protection Agency (US), *Integrated Waste Management Board, Increasing the Recycled Content in New Tyres* 21 (2004) (citing Bridgestone/Firestone Corporation) (Exhibit BRA-59).

[557] Brazil's first written submission, paras. 52-53.

[558] See *OECD – Improving Recycling Markets* 132 (Exhibit BRA-58).

[559] See *UK – Tyres in the Environment* (Exhibit BRA-1).

[560] Serge Palard, BLIC, *Rubber Recycling Activities in Europe: Trends and Challenges*, Presentation at a meeting of the Canadian Rubber Association, 20 October 2004, at slide 13 (Exhibit BRA-60).

[561] Brazil's first written submission, executive summary, para. 7.

[562] Exhibit BRA-159.

[563] Brazil's second oral statement, para. 24 (Exhibit BRA-159).

[564] Brazil's second oral statement, para. 24.

Other measures

Resolution CONAMA 258/1999 and the Rodando Limpo programmes in various Brazilian states

4.232 The **European Communities** submits that the Brazilian legislation itself contains one alternative measure to the import ban on retreaded tyres:[565] the collecting and disposal system set up by Resolution CONAMA 258/1999, as amended in 2002[566], and makes it mandatory for domestic producers of new tyres and importers of new and retreaded tyres to provide for the safe disposal of waste tyres in specified proportions.[567] The European Communities is of the view that this disposal scheme, if it were enforced correctly, would eliminate the eventual health hazards created by waste tyres. The European Communities argues that schemes like this are even more effective than an import ban, since they cover all waste tyres. For the European Communities, this would also correspond to the modern waste management policies adopted around the world, where different types of recycling and recovery schemes have been established to limit or eliminate the landfilling or uncontrolled disposal of certain wastes.[568]

4.233 The European Communities claims that Brazil has not explained so far how waste tyre collection from consumers is organised in its territory. It seems to the European Communities that no obligations are imposed on garages or specialist tyre retailers to collect and correctly manage waste tyres in the replacement activities. The European Communities submits that Brazil has only referred to the system established by Resolution CONAMA 258/1999, which institutes an obligation on new tyres producers and importers and on importers of retreaded tyres. However, the European Communities argues that Brazil is not ensuring the correct implementation of the CONAMA scheme, as can clearly be deduced from the very high figures of incidents of non-compliance.[569]

4.234 Moreover, the European Communities submits that an alternative measure could consist in destroying waste tyres beyond the mandatory controlled disposal programme adopted by Resolution CONAMA 258/1999. Thus, in the State of Paraná, the European Communities notes that there is a voluntary multi-sector programme called "Paraná Rodando Limpo" ("Paraná Rolling Clean"), in which more than 10 million old tyres have so far been disposed of, thus eliminating the waste tyre problem in that State. The European Communities submits that equivalent programmes are now being implemented in Pernambuco and Paraíba. The European Communities argues that nothing prevents Brazil from applying to the whole Union a programme that has been put in place in several of its States.[570] The European Communities also notes that Brazil has not explained why these programmes could not be applied to the whole Union.[571]

4.235 The European Communities submits that tyre collection, transport and interim storage, are activities necessary to ensure the various recycling, recovery and other disposal practices. The European Communities argues that these activities should be carried out in a way ensuring that tyres are free of adult mosquitoes or their larvae and eggs. The European Communities submits that Brazil's own exhibits reflect the need to ensure a proper handling of tyres, where it is explained that

[565] European Communities' first oral statement, executive summary, para. 15.
[566] European Communities' first oral statement, executive summary, para. 15.
[567] European Communities' first written submission, executive summary, para. 25.
[568] European Communities' first written submission, executive summary, para. 26.
[569] European Communities' second written submission, executive summary, para. 61.
[570] European Communities' first written submission, executive summary, para. 27.
[571] European Communities' first oral statement, executive summary, para. 15.

tyres "should be properly discarded, covered or stacked in a shed … so that they cannot be filled with water".[572]

4.236 The European Communities argues that Resolution CONAMA 258/1999 and the import ban are measures having different objectives and are not, contrary to Brazil's opinion, "the complementary and indivisible foundations of the national strategy for waste tyre management". In reality, the European Communities is of the view that the import ban renders obsolete some of the obligations explicitly imposed by the Resolution CONAMA to collect and dispose of a certain number of waste tyres, namely those relating to the importers of retreaded tyres.[573]

4.237 Finally, the European Communities notes Korea's suggestion that Brazil could foresee retreading as a possibility to fulfil the obligations under Resolution CONAMA 258/1999.[574] In addition, the European Communities argues that imposing disposal obligations on the importers of retreaded tyres could be another alternative, provided that such disposal obligations are proportionate to the contribution that retreaded tyres make to the additional waste burden in Brazil. The European Communities argues further that this is already the case under Resolution CONAMA 258/1999, which imposes on importers of retreaded tyres the highest disposal burden. The European Communities contends that Brazil has not explained why proportionate disposal obligations are not a sufficient means of addressing any waste implications that imported retreaded tyres might have.[575]

4.238 **Brazil** notes at the outset that the alternative measure must be likely to secure the goals of the contested measure, yet do so in a manner that is less trade-restrictive.[576] Brazil notes that the European Communities has pointed to Resolution CONAMA 258/1999 as an alternative measure. Brazil explains, however, that Resolution CONAMA 258/1999 imposes the obligation on tyre manufacturers and importers of collecting and ensuring the "environmentally appropriate final disposal of unusable tyres in Brazil."[577] According to Brazil, the Resolution specifies that manufacturers and importers (or third parties contracted by manufacturers or importers) must collect and dispose of a certain number of waste tyres, in proportion to the number of imported or locally manufactured new tyres or imported reconditioned tyres.[578] Brazil notes that the Resolution does not specify which disposal methods are considered environmentally appropriate; it does identify, however, the methods that are prohibited (i.e., dumping of waste tyres in landfills, the sea, rivers, lakes or streams, derelict land or wetlands and open burning).[579]

4.239 Brazil states that Resolution CONAMA 258/1999 is but one component of Brazil's comprehensive waste management program, which complements – but cannot substitute for – the import ban.[580] Brazil points out that even when the collection and disposal methods conform to the environmental legislation in force, in accordance with Resolution CONAMA 258/1999, they pose health and environmental risks. Brazil notes that while effective and timely collection may help control mosquito-borne diseases, the collected tyres must still be disposed of – and there is no known completely safe way to do that with the volumes involved. For this reason, Brazil explains, although

[572] European Communities' second oral statement, executive summary, para. 35.
[573] European Communities' second oral statement, executive summary, para. 4.
[574] European Communities' second written submission, executive summary, para. 57.
[575] European Communities' second oral concluding statement, executive summary, para. 17.
[576] Brazil's first written submission, para. 112.
[577] Brazil's first written submission, para. 118 (Exhibit BRA-4).
[578] Brazil's first written submission, para. 118 (Exhibit BRA-4).
[579] Brazil's first written submission, para. 118 (Exhibit BRA-4).
[580] Brazil's first written submission, para. 118 (Exhibit BRA-4).

collection is a vital part of Brazil's program, it is not an "alternative" to the disposal or the non-generation of additional waste.[581]

4.240 Brazil explains that because the collection and final disposal of waste tyres have significant adverse effects on human health and the environment, Brazil's waste tyre management program emphasizes non-generation because to rely solely on collection and disposal of waste tyres would not as effectively avoid or mitigate the health and environmental risks. Brazil states that because the Resolution is a collection, the Resolution, by itself, does not achieve the desired level of protection sought by the import ban and it is therefore not an alternative measure that is "reasonably available" to Brazil.[582]

4.241 Brazil also adds that between the moment a waste tyre is collected and the moment it is disposed of, it must be transported (spreading diseases along the way) to a disposal facility, stockpiled (posing the risks of accidental fires, soil and water course contamination, etc.), and only then disposed of. Thus, even if huge strides were made in technology so that the harmful effects of the known disposal methods were eliminated, collection, transport and stockpiling themselves would pose health and environmental risks.[583]

4.242 The **European Communities** notes Brazil's claim that collection schemes, such as Resolution CONAMA 258/1999 and Paraná Rodando Limpo, are not alternatives because they are not non-generation instruments. For the European Communities, this reflects a fundamental misunderstanding by Brazil of the nature of the requirement about existing alternatives. The European Communities contends that these are not alternatives equal to a hypothetical non-generation waste measure (the import ban), but alternatives, even if they manage waste, which would allow Brazil to attain the same objectives it pretends to achieve with the import ban: the protection of life and health from mosquito-borne diseases, tyre fires and leaching.[584]

Imposition of Fines

4.243 The **European Communities** argues that Brazil's imposition of fines for the non-compliance with the CONAMA scheme is not a sign of serious enforcement, but the opposite. The European Communities submits that an official IBAMA press release of June 2005 gives evidence of fines against 8 companies. The European Communities further submits that the total amount of unfulfilled tyre disposal obligations is around 340 thousand tonnes, i.e. nearly 70 million waste (passenger) tyres. Therefore, the European Communities submits that these fines result in an amount of R$0.30 per tyre (R$60 per tonne), which is extremely low and much lower than the saving, namely the cost of disposal. In this context, the European Communities finds it interesting to note that the Senate draft 216/2003 proposes to increase this fine to R$400 per non-disposed tyre.[585]

4.244 Brazil notes the European Communities' suggestion to increase the fines for failure to satisfy the disposal obligations because it would allegedly cost tyre manufacturers less to pay the fine than to dispose of the required number of used tyres.[586] Brazil argues that the European Communities misunderstands the operations of fines: first, they are discretionary, and fines for the second offence may well be higher; second, they do not relieve the companies of having to satisfy the obligations.[587]

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[581] Brazil's first written submission, para. 120.
[582] Brazil's first written submission, para. 119.
[583] Brazil's first written submission, para. 121; Brazil's second written submission, paras. 26-31 (Exhibits BRA-119, 120, 121, 122).
[584] European Communities' second oral statement, executive summary, para. 32.
[585] European Communities' second written submission, executive summary, para. 62.
[586] See European Communities' second written submission, at para. 102.
[587] Brazil's second oral statement, executive summary, para. 15.

Brazil contends that the fines do not substitute for the obligations themselves because they are but a penalty for non-compliance.[588]

4.245 To reinforce the import ban on used and retreaded tyres, **Brazil** explains that it imposes a R$400 per unit fine[589] for importation of used and retreaded tyres, as well as marketing, transporting, and storing of such imports.[590] To stimulate tyre collection and disposal, Brazil submits that it has established rigid tyre collection and disposal obligations. Brazil requires manufacturers and importers of new tyres to collect and dispose of five scrap tyres for every four new or imported tyres. Brazil explains that the importers must also furnish appropriate disposal plans to receive import licenses.[591] Brazil claims that it has strictly enforced these obligations and has fined violators R$20.5 million (approximately US$8.8 million).[592]

Combination of various disposal measures within a waste tyre management programme

4.246 The **European Communities** argues that Brazil has not done all it could to improve the management of waste tyres in Brazil.[593] The European Communities submits that alternatives such as collection, controlled stockpiling, shredded tyres landfilling, material recovery and energy recovery, must form part of a policy scheme, a plan or a programme, to improve the management of waste tyres on its territory.[594] The European Communities claims that stockpiling, incineration and material recycling, plus landfilling in those countries accepting it, can play a relevant role in waste tyre management provided the existence of adequate waste tyre collection from consumers, as it has been underlined in the two reports by the Atech Group and by the United Kingdom Environment Agency and by Japan, in its submissions as third party in this case.[595]

4.247 The European Communities submits further that these alternatives cannot be organised in isolation or rejected one by one, as Brazil continues doing, just because each one does not ensure alone that all waste tyres are properly managed. The European Communities argues that all options should be implemented with a policy scheme, not in isolation, in order to ensure a sound management of waste tyres.[596] The European Communities notes Brazil's claim that it has a comprehensive waste tyre management policy, where it includes the import ban; however, it has attached no documents to prove it.[597] Moreover, the European Communities claims that Brazil has not explained yet whether such a scheme exists for the whole of its territory.[598]

4.248 **Brazil** explains that it has implemented a comprehensive management program to protect its population and its environment from the dangers caused by waste tyres. Brazil's ban on imports of used and retreaded tyres[599] is a central element of that program because it prevents creation of tyre waste.[600] Brazil submits that it classifies tyres as a "special" waste because they are difficult to collect and to dispose of. The waste tyre management policy is governed by the principles of non-generation,

[588] Brazil's second oral statement, para. 53.
[589] Decreto Presidencial 3.919/2001 (Exhibit BRA-72), amending Decreto Presidencial 3.179/1999, Art. 47-A (Exhibit BRA-73).
[590] Brazil's first written submission, executive summary, para. 10.
[591] See Resolution CONAMA 258/1999 (Exhibit BRA-4).
[592] Brazil's first written submission, executive summary, para. 11.
[593] European Communities' first oral statement, executive summary, para. 12.
[594] European Communities' second oral statement, executive summary, paras. 31, 33.
[595] European Communities' second written submission, executive summary, para. 60.
[596] European Communities' second written submission, executive summary, para. 59.
[597] European Communities' second oral statement, executive summary, para. 33.
[598] European Communities' second written submission, executive summary, para. 59.
[599] The ban is currently effected through Portaria SECEX 14/2004.
[600] Brazil's first written submission, executive summary, para. 10.

reduction, reutilization and recycling. Resolution CONAMA 258/1999 and the prohibition on used and retreaded tyres are two complementary and inseparable pillars of this policy.[601]

4.249 Brazil contends that its public authorities have helped private companies set up collection centres and stepped up their own collection efforts. However, collection by itself does not address the disposal problem. Brazil works actively to develop viable and safe disposal methods: it funds research on rubber asphalt, it has established emission rules for tyre incineration, it has licensed some 46 companies to process waste tyres, and its state-owned Petrobras is testing a pyrolysis unit.[602]

4.250 Brazil submits that as the European environmental authorities struggle with waste tyre disposal, the European Communities' representatives in Geneva seem to think that there is an easy answer: a combination of stockpiling, landfilling, material recycling, and cement kilns.[603] Brazil contends that the combination of stockpiling, incineration, and material recycling is not an alternative because material recycling has limited disposal capacity, and stockpiling and incineration are dangerous.[604]

4.251 Moreover, Brazil argues that the combination of the three disposal alternatives proposed by the European Communities does not enable Brazil to safely dispose of waste tyres: material recycling – the least risky of the three – cannot absorb the existing volumes – as the European Communities openly admits[605]; and the remainder must be incinerated or stockpiled, both of which are harmful. Brazil argues that it is thus impossible to dispose of waste tyres without producing adverse health and environmental effects.[606]

Alternative measures and chosen level of protection

4.252 The **European Communities** argues that Brazil has adopted a measure which, despite the existence of other available alternatives, unfairly and disproportionately burdens imported products compared to domestic products.[607] For the European Communities, most of the health risks to which Brazil refers arise from improperly discarded or managed tyres. The European Communities contends however that such risks can be avoided through the establishment of appropriate collection and disposal programmes.[608] The European Communities argues that to the extent that appropriate collection and disposal programmes are not properly enforced – and this is the sole responsibility of Brazil –, Brazil can therefore not justify the imposition of a ban on the products of other WTO Members.[609] Moreover, the European Communities is of the view that the evidence shows that Brazil greatly exaggerates the difficulties of waste tyre management in its territory.[610] Thus, the report "Panorama dos Residuos Sólidos no Brasil" (Solid Waste Panorama in Brazil) states that "[i]n 2004, of the 146 thousand tonnes of unusable tyres, 56.06 per cent were used to produce alternative fuels, 17.65 per cent rolled into sheeting, 19.65 per cent for rubber goods and material and 6.64 per cent for export".

4.253 The European Communities submits that it has shown that there are numerous alternatives for properly managing and disposing of waste tyres, including stockpiling, shredded tyres landfilling,

[601] Brazil's first oral statement, executive summary, para. 9.
[602] Brazil's first written submission, executive summary, para. 12.
[603] Brazil's second oral statement, executive summary, para. 10.
[604] Brazil's second written submission, executive summary, paras. 2, 13.
[605] Brazil's second oral statement, executive summary, para. 14.
[606] Brazil's second oral statement, executive summary, para. 14.
[607] European Communities' first oral statement, executive summary, para. 19; European Communities' second oral concluding statement, executive summary, para. 16.
[608] European Communities' second oral concluding statement, executive summary, para. 16.
[609] European Communities' second oral concluding statement, executive summary, para. 16.
[610] European Communities' second written submission, executive summary, para. 81.

material recycling, and energy recovery. The European Communities contends that Brazil's response to each of these alternatives has been to analyse and dismiss them one by one in isolation. However, as the European Communities has shown, the alternatives must be evaluated and implemented not in isolation, but as part of a coherent policy. Accordingly, the European Communities contends that a single alternative does not have to absorb all the waste tyres arising in Brazil.[611]

4.254 The European Communities claims that the alternatives that it has presented allow ensuring the objectives of protection of life and health from mosquito-borne diseases, tyre fires and leaching. For the European Communities, collection, controlled stockpiling, shredded tyres landfilling, material recovery and energy recovery, which will be applied to all waste tyres, not only to those arising from imported retreaded tyres, contribute importantly to the fight against diseases, tyre fires and leaching.[612]

4.255 **Brazil** is still waiting for someone to establish that there is an alternative way to reduce the level of tyre casings that must be disposed of in Brazil. Until they do, Brazil contends that the import ban remains necessary.[613] Brazil claims that its chosen measure – the import ban on the shorter-lifespan used and retreaded tyres – is the only known waste tyre management option that does not endanger human health and the environment because it prevents the unnecessary creation of additional waste tyres, thereby eliminating the adverse health and environmental effects of their collection and disposal.[614]

4.256 Because no known disposal method is simultaneously safe, adequate, cost-effective and economically viable to deal with the high volume of waste tyres, Brazil prohibits importation of the shorter-lifespan retreaded tyres to prevent the unnecessary generation of tyre waste.[615] Brazil contends that every known method capable of dealing with the existing volumes carries with it serious risks and adverse effects on human health and the environment.[616] Brazil argues that to this day neither Brazil nor any other country has discovered a safe, effective, and economical disposal method. Until such method emerges, Brazil contends that retreading of tyres that Brazil consumes and prohibiting imports of tyres that must be disposed of after a single use remains the only way to minimize the risks associated with waste tyre accumulation and disposal.[617]

4.257 Brazil claims that it cannot achieve the level of protection it has chosen without prohibiting imports of shorter-lifespan tyres because without the import ban, some generation of waste tyres that could have been prevented would not, in fact, be prevented.[618] Thus, in Brazil's view only non-generation of waste tyres, which requires an import ban on shorter-lifespan tyres, can achieve Brazil's chosen level of protection.[619]

4.258 Brazil argues that the alternatives suggested by the European Communities will not allow Brazil to achieve its chosen level of protection, which is to reduce the waste tyre risks to the *maximum extent possible*[620], and to do that Brazil must reduce the volumes of waste tyres generated as much as

[611] European Communities' second oral concluding statement, executive summary, para. 20.
[612] European Communities' second oral statement, executive summary, para. 33.
[613] Brazil's first oral concluding statement, executive summary, p. 1.
[614] Brazil's first written submission, executive summary, para. 9.
[615] Brazil's first written submission, executive summary, paras. 3, 7; Brazil's first oral statement, executive summary, para. 4.
[616] Brazil's first written submission, executive summary, para. 7.
[617] Brazil's first written submission, executive summary, para. 13.
[618] Brazil's second written submission, executive summary, para. 29. Brazil's second oral statement, executive summary, para. 14.
[619] Brazil's second written submission, executive summary, para. 2.
[620] Brazil's second written submission, executive summary, para. 2.

possible.[621] Brazil notes that because the disposal capacity of material recycling is limited, the European Communities advises Brazil to combine it with incineration and stockpiling.[622] However, Brazil is of the view that both incineration and stockpiling present significant risks.[623] Brazil argues that to limit these risks to the maximum extent possible, Brazil must prevent the unnecessary generation of tyre waste to reduce the volumes that must be incinerated.[624]

4.259 Brazil submits that collection and disposal obligations alone do not achieve the desired level of protection and are not an available alternative.[625] The obligations complement – but cannot substitute for – the import ban, because they do not help avoid generation of additional waste tyres that must be disposed of in Brazil.[626] Because transportation, stockpiling, and the eventual disposal present unavoidable health and environmental dangers, they cannot reduce the risks of waste tyre accumulation and disposal as effectively as the import ban does, and thus cannot achieve Brazil's desired level of protection.[627]

4.260 Brazil submits that it has demonstrated that the import ban is necessary within the meaning of Article XX(b) to reduce the accumulation of tyre waste and the associated risks because no reasonably available alternatives exist.[628]

Other issues

The European Communities' management of waste tyres

4.261 **Brazil** submits that in the European Communities itself: 20 per cent of the tyre waste continues to be landfilled, despite a formal prohibition; illegal dumping remains a big problem; funding for stockpile remediation is difficult to secure; the consumer demand for retreaded tyres remains low; and material recycling remains limited.[629] Brazil argues that the positions taken by the European Communities before this Panel contradict its statements made in Brussels, which support Brazil's position.[630]

4.262 Brazil submits that when the European Landfill directive prohibited landfilling of whole tyres from 2003 and shredded tyres from 2006, the European Environment Agency[631] expressed concern that some EU Members "still [had] to find alternative outlets for more than two thirds of their waste tyres to meet the target".[632] Brazil submits that in 2004, only nine of the EU 25 countries recovered at least 90 per cent of the annual arisings; the remaining 16 recovered less than 61 per cent, with seven of them recovering anywhere between zero and 25 per cent.[633] Brazil submits further that[634] today a

[621] Brazil's second written submission, executive summary, para. 29; Brazil's second oral statement, executive summary, para. 14.
[622] See European Communities' First Oral Statement, at para. 72.
[623] Brazil's second written submission, executive summary, para. 29.
[624] Brazil's second written submission, executive summary, para. 29.
[625] Brazil's first written submission, executive summary, para. 26.
[626] Brazil's first written submission, executive summary, para. 26.
[627] Brazil's first written submission, executive summary, para. 26.
[628] Brazil's first written submission, executive summary, para. 26; Brazil's second oral statement, executive summary, para. 14.
[629] See Brazil's second written submission, at paras. 94-98.
[630] Brazil's second oral statement, executive summary, para. 25.
[631] European Environment Agency, *Paving the Way for EU Enlargement* 27 (2002) (Exhibit BRA-127).
[632] Brazil's second written submission, executive summary, para. 16; second oral statement, executive summary, para. 7.
[633] European Tyre & Rubber Manufacturers' Association, *End-of-life Tyres: A Valuable Resource with a Wealth of Potential* (2006) ("*End-of-life Tyres*") (Exhibit EC-84) (Exhibit BRA-126), at 5.
[634] *End-of-life Tyres*, at 6 (Exhibit EC-84) (Exhibit BRA-126).

fifth of waste tyres in the European Communities are still landfilled.[635] Brazil submits that the Environment Agency notes that:[636] "[t]oo many tyres are still being land-filled or burnt" and that "compliance with the EC Directives ... will require considerable investment".[637] In light of this data, Brazil argues that it is hardly surprising to hear the Chairman of the British Environment Agency admit:[638] "[a]s a nation, we have a problem with the disposal of tyres".[639]

4.263 Brazil further submits that a report by the European Tyre and Rubber Manufacturers' Association provides that the enlarged European Union faces the "challenge of managing, in an environmentally sound manner, more than 3.2 million metric tons of used tyres,"[640] at the annual cost of at least €600 million, which translates into €1.2 per passenger car tyre equivalent. Brazil submits that the specific challenges include:[641] unavailability of landfilling, guaranteeing ecological treatment, promoting efficient and sustainable disposal solutions, remedying the historic stockpiles, and controlling exportation to low-income countries.[642]

4.264 Brazil submits that the United States faces similar challenges. Brazil notes that a rubber industry official[643] has remarked that "[the United States] is a fully developed economy, although to look at some experiences involving scrap tyres one might think otherwise".[644] Brazil notes that this data squarely contradict the European Communities' claim that the available disposal options, when "implemented within a policy scheme, not in isolation, [can] ensure a sound management of waste tyres."[645] Brazil argues that if this disposal capacity were indeed available, nothing should prevent the European Communities members from achieving full recovery.[646]

4.265 Brazil submits that the European Communities apparently considers exports a legitimate disposal alternative. Brazil notes that Exhibit EC-92 states: "In practice, there is still no economically viable way to reduce the dumping of used tyres ... . Thus, the cheapest solution in Europe has been to try to export them to developing countries".[647] Brazil notes that the European Communities considers[648] exports a legitimate means of reducing its waste tyre burden.[649] Brazil submits that within the European Communities, however, the British Used Tyre Working Group[650] has expressed consternation that tyres were being imported into the United Kingdom, "with the UK ultimately being responsible for their disposal," and expressed concern that "the UK is

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[635] Brazil's second written submission, executive summary, para. 16; Brazil's second oral statement, executive summary, para. 7.

[636] *EU – Waste from Road Vehicles* 3 (Exhibit BRA-108).

[637] Brazil's second oral statement, executive summary, para. 7.

[638] *UK: Clamping Down on Illegal Tyre Dumping*, Newsletter of the European Environmental Press, 4 September 2002 (Exhibit BRA-129).

[639] Brazil's second written submission, executive summary, para. 16.

[640] Exhibit EC-84. Brazil's second written submission, executive summary, para. 15; Brazil's second oral statement, executive summary, para. 7.

[641] *End-of-life Tyres*, at 4 (2006) (Exhibit EC-84) (Exhibit BRA-126).

[642] Brazil's second written submission, executive summary, para. 15; Brazil's second oral statement, executive summary, para. 7.

[643] See Serumgard, at 19 (Exhibit BRA-125).

[644] Brazil's second written submission, executive summary, para. 17.

[645] European Communities' first oral statement, at para. 72. See also European Communities' answer to panel question No. 46.

[646] Brazil's second written submission, executive summary, para. 18.

[647] Exhibit EC-92, p. 10.

[648] See Valerie L. Shulman, Ph.D., Secretary General of the European Tyre Recycling Association, at 29-30 (Exhibit BRA-9).

[649] Brazil's second written submission, executive summary, para. 19.

[650] Used Tyre Working Group (UK), *Sixth Report of the Used Tyre Working Group* 6 (2001) (Exhibit BRA-55).

continuing to be the tyre dump of Europe".[651] Brazil argues that its ban on used and retreaded tyres is based on this very concern: Brazil does not want to receive shorter-lifespan tyres and "ultimately [be] responsible for their disposal" and Brazil does not want to be "the tyre dump of Europe."[652]

4.266 Finally, Brazil points out that the European Communities dismissed the well-established environmental principle of non-generation as nothing more than a political statement.[653] In the same manner, Brazil submits that the European Communities dismissed the well-recognized risks of waste management and disposal.[654]

4.267 The **European Communities** notes that Brazil claims that a good illustration that the alternatives do not exist is the European Communities' continued challenges with managing its growing volumes of tyre waste. The European Communities argues that Brazil does not take into account that 6 European Communities member States already recycle and recover 100 per cent of their waste tyres. Moreover, the European Communities claims that it is not true that some 20 per cent of waste tyres are still being landfilled. This was the situation in 2004, two years before the complete landfilling prohibition entered into force. Furthermore, the European Communities points out that it has not adopted an import ban on retreaded tyres. Accordingly, the European Communities is not obliged to explain its waste tyres management policy or the policy of its 25 member States, which is not at issue in the present dispute.[655]

4.268 The European Communities contests Brazil's statement that the European Communities wishes to flood Brazil with waste tyres. To the extent that Brazil is referring to the exportation of retreadable casings, the European Communities notes that it has already explained that such casings are not waste, and that their importation is precisely for that reason, allowed by Brazilian courts. To the extent that Brazil refers to actual waste tyres, the legislation of the European Communities in fact prohibits the exportation of such tyres to countries which do not allow such imports. Moreover, the European Communities points out that it has not challenged Brazil's ban on the importation of used tyres.[656]

4.269 Brazil submits that the European Communities makes the point that even though it has a tyre disposal problem, it has not found it necessary to impose an import ban. Brazil responds that what the European Communities conveniently leaves out – or overlooks – is that it does not have a significant market for retreaded tyres and, therefore, does not face imports of retreaded tyres.[657]

4.270 Brazil points out that in Europe, most consumers have refused to purchase retreaded tyres, largely because they perceive retreaded tyres as inferior. Brazil notes that this perception remains in place even though retreaded tyres must comply with stringent quality controls comparable to the new tyre standards.[658]

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[651] Brazil's second written submission, executive summary, paras. 19- 20.

[652] Brazil's second written submission, executive summary, para. 20; Brazil's second oral statement, executive summary, para. 9.

[653] For examples of the European Communities' own policies on non-generation of waste, see Brazil's answer to panel question No. 37. See also, Brazil's comments on European Communities' answer to panel question No. 125 (Exhibit EC-84) and Brazil's answer to panel question No. 124.

[654] Brazil's first oral concluding statement, executive summary, p. 2.

[655] European Communities' second oral statement, executive summary, para. 34.

[656] European Communities' second oral concluding statement, executive summary, para. 5.

[657] Brazil's second concluding statement, para. 13.

[658] Brazil's first written submission, para. 62 (Exhibits BRA-2, 3, 58).

Economic and environmental costs of disposal of waste tyres

4.271 Moreover, **Brazil** argues that the disposal of waste tyres carries high economic and environmental costs. Brazil submits that the basic fact remains that waste tyres are a liability:[659]

> "At present, in most of the world, a basic fact of life about scrap tyres is that they are a waste material...; that is, it costs money to have them removed from the point of generation... . In addition to these direct management costs, scrap tyres can also generate indirect social costs...".[660]

4.272 Brazil explains that it authorizes certain disposal methods, but each method creates a new set of environmental problems. Brazil argues that incineration can handle large volumes of waste tyres, but it produces higher emissions of dioxins, furans, and heavy metals than conventional fuels. Brazil submits that the co-processing with bituminous schist, a form of pyrolysis, is still experimental, with unknown environmental impact and limited capacity. Brazil explains that rubber asphalt applications remain limited in Brazil, as in other countries and recycling involves high costs and produces low quality material with limited demand. Brazil submits that these disposal methods are all used in Brazil, but they are not, in any manner, alternative measures to the non-generation achieved by the import ban. Brazil further submits that beyond disposal, collection and transportation of used tyres are also a challenge because of Brazil's geographic characteristics.[661]

4.273 Brazil submits that the European Communities argues that waste tyres are a valuable resource. However, Brazil notes that, to quote the European tyre industry, they are, in fact, "waste with a negative value (collection and recovery/disposal cost)."[662] Brazil claims that the European Communities, in its arguments before the Panel, has constructed an alternate reality where waste tyres are a valuable resource, where waste tyre accumulation has no relation to disease, where dioxins are benign, and where a developing country like Brazil could safely dispose of all of its waste tyres if it only were as efficient and competent as the European Communities. For Brazil, the alternate reality the European Communities paints is wholly divorced from the real world.[663]

4.274 For the **European Communities**, the fact that all alternatives may have some environmental disadvantages is unavoidable, and not specific to waste tyres. The European Communities is of the view that there is hardly any waste which can be disposed of in a way which is environmentally entirely neutral. In addition, the European Communities submits that none of the disadvantages or costs to which Brazil has referred are so significant as to rule out these alternatives, as illustrated by the fact that all of the alternatives discussed are used in many countries, including in Brazil. Finally, for the European Communities these disadvantages or costs still would appear to be lower than the risks to human life and health resulting from improperly managed tyres.[664]

4.275 The European Communities argues that there are different options available also for developing countries, as explained in the OECD Report on Improving Recycling Markets, the Basel Convention Technical Guidelines on the Identification and Management of Used Tyres, the Report of the United Kingdom Environment Agency on Transport and Management of Waste Tyres and the report on Tyre Piles Fires, prepared by Environmental Engineering and Contracting, Inc.[665] Moreover, the European Communities notes that the OECD report on "Improving Recycling Materials" explains

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[659] Brazil's second written submission, executive summary, para. 14.
[660] Serumgard, at 3 (Exhibit BRA-125).
[661] Brazil's first oral statement, executive summary, para. 10.
[662] Brazil's second oral statement, para. 18, citing G. Paolo Giuliani, BLIC, *Management of End-of-Life Tyres: The Point of View of Tyre Manufacturers*, at 8 (2000) (Exhibit BRA-138).
[663] Brazil's second oral statement, executive summary, para. 25.
[664] European Communities' second oral concluding statement, executive summary, para. 21.
[665] European Communities' first oral statement, executive summary, para. 15.

that incineration, energy recovery, rubber recycling and retreading are best waste management practices for waste tyres.[666]

4.276 Besides, the European Communities claims that any measure establishing a scheme to ensure that waste tyres are disposed correctly would be coherent with Principle 16 of the Rio Declaration on Environment and Development. Indeed, waste tyre disposal schemes allow charging the environmental costs on the relevant operators/consumers, while ensuring, at the same time, a high level of environmental protection with no distortion of international trade.[667]

(v) Conclusion on Article XX(b)

4.277 The **European Communities** is of the view that the ruling of the present Panel will have considerable implications on how retreaded tyres will be regarded in the future. For the European Communities, if Brazil were to prevail with the argument that banning retreaded tyres is necessary to protect human life and health, other countries may equally feel encouraged to impose similar bans. The European Communities claims that this would mean that retreaded tyres would become a product which might be increasingly excluded from international trade and such a situation would be extremely harmful to the public perception of retreaded tyres. The European Communities considers that such a result would be diametrically opposed to the interests of environmental protection and responsible waste management.[668]

4.278 The European Communities also notes that Brazil's arguments concerning Article XX(b) have implications that go beyond retreaded tyres. The European Communities contends that contrary to the assertions of Brazil, retreaded tyres are not unique in having implications from the point of view of waste management. The European Communities notes that all products eventually turn into waste, and many products which are commonly traded today turn into waste which is as or even more problematic than waste tyres. The European Communities argues that if it were possible to ban the importation of products simply because of the fact that they eventually turn into waste which may be difficult to dispose of, then many products might in the future become affected by similar trade bans.[669]

4.279 The European Communities notes that Brazil admits that the general exceptions of Article XX should not be abused and that "the import ban does not restrict trade unfairly or inequitably". The European Communities notes further that the reason given by Brazil for this presentation is that the facts of this case are unique, because "tyres differ from most other waste streams".[670] The European Communities does not agree with this conclusion. The European Communities points out that the policy rationale that Brazil has applied to justify the ban could perfectly be used by other WTO Members to ban the importation of products with a shorter life than other competing goods that are also produced domestically.

4.280 The European Communities argues that international trade in cars, electric and electronic equipment, toys, furniture, clothing and other goods could thus be limited by an extended application of Article XX(b).[671] Moreover, the European Communities notes that similar arguments to those made by Brazil in respect of retreaded passenger car tyres could also be made with respect to other goods which have a perfectly predictable lifespan: WTO Members could decide to ban the importation of beverages bottled in plastic bottles rather than reusable glass bottles taking into

[666] European Communities' first written submission, executive summary, para. 26.
[667] European Communities' first written submission, paras. 138-139.
[668] European Communities' second oral concluding statement, executive summary, para. 3.
[669] European Communities' second oral concluding statement, executive summary, para. 4.
[670] European Communities' second oral statement, executive summary, para. 23.
[671] European Communities' second oral statement, executive summary, para. 24.

account that plastic bottles are also used by mosquitoes as breeding places and, if they burn, the smoke plume also contains hazardous substances.[672]

4.281 As for commercial and airplane tyres, the European Communities submits that these products do not have a predictable life span. Accordingly, the European Communities argues that if Brazil is allowed to ban imported truck and aircraft tyres, there is no reason why other Members could not ban low quality electronic goods on the basis that these are likely to have a shorter life span than high-quality ones.[673]

4.282 **Brazil** notes the European Communities' argument that waste tyres are no different from other products, and that, therefore, finding that Brazil's import ban is justified would pave the way for other WTO Members to abuse Article XX exceptions. Brazil contends that all the products pointed out by the European Communities are clearly distinguishable from waste tyres – i.e. the uniqueness of the product – because none of those products mentioned by the European Communities pose a similar set of collection and disposal problems. Brazil notes that for instance, unlike waste tyres, plastic bottles can be easily recycled. Brazil also notes that the European Communities has an end-of-life directive for cars; however even the European Communities does not have an end-of-life directive for waste tyres. Brazil explains that many internal discussions took place in Brazil on this issue to try and find a product that presents waste management challenges similar to those of waste tyres, but no such product could be found. Brazil notes that the European Communities also failed to do so.[674]

4.283 Brazil contends that the waste tyre problem is not black and white. For Brazil, every solution presents its own set of risks. The dilemma that Brazil faces is essentially this: does it risk exposing its population to dengue or to cancer? Brazil submits that choices such as this are best avoided, as much as possible, by avoiding the generation of tyre waste as much as possible. In Brazil's view, the import ban allows Brazil to accomplish this goal. Brazil argues that the Panel should, therefore, dismiss all of the claims made by the European Communities.[675]

4.284 Therefore, Brazil claims that the foregoing makes it clear that Brazil's import measures are "necessary" within the meaning of Article XX(b).[676]

(b) Paragraph g) of Article XX

4.285 **Brazil** does not rely on Article XX(g) as a possible defence for the import ban on retreaded tyres.

4.286 According to the **European Communities**, the import ban does not fulfil the conditions of Article XX(g). The European Communities argues that as a first condition, the ban would have to relate to the protection of "exhaustible natural resources". The European Communities argues further that it is for Brazil, as the defending party, to demonstrate that waste tyres, which are considered as inert waste by Article 4 of Resolution CONAMA No 23, cause pollution of specific exhaustible natural resources.[677]

4.287 The European Communities submits that the GATT Panel Report on *Canada – Herring and Salmon* was of the view that a measure must be "primarily aimed at" the conservation of exhaustible natural resources in order to fall within the scope of Article XX(g). The European Communities

[672] European Communities' second oral statement, executive summary, para. 25.
[673] European Communities' second oral statement, executive summary, para. 26.
[674] Brazil's second oral concluding statement, executive summary, para. 12.
[675] Brazil's second oral statement, executive summary, para. 26.
[676] Brazil's first oral statement, executive summary, para. 15.
[677] European Communities' first written submission, executive summary, para. 29.

submits further that this language was followed by three (unadopted) GATT reports (*United States – Tuna I* and *Tuna II*, and *United States – Taxes on Automobiles*) and by the Appellate Body in *United States – Gasoline*, where it also accepted a measure because it presented a "substantial relationship", which "cannot be regarded as merely incidentally or inadvertently aimed at the conservation of clean air". The European Communities notes that finally, in *United States – Shrimp*, the Appellate Body accepted a measure because there was "a close and real" relationship of means and ends and the measure was "reasonably related" to the protection and conservation of sea turtles.[678]

4.288 The European Communities claims that it is therefore clear that a measure which does not make a contribution to the achievement of the stated goal, namely the protection of natural exhaustible resources, cannot be regarded as "related to" the protection of natural exhaustible resources. Moreover, the European Communities contends that whether a measure is related to the protection of natural exhaustible resources must be established on the basis of objective and verifiable criteria, such as notably the actual effect of the measure, as it was confirmed by the GATT Panel report in the second *US – Tuna* case.[679]

4.289 The European Communities argues that the application of these interpretations of Article XX(g) to the case before the Panel can only result in the conclusion that the justification is not applicable to this case. The European Communities submits that retreaded tyres have the same useful life as new tyres, for which they are in fact substitutable. Accordingly, the European Communities submits further that retreaded tyres are neither used tyres nor waste tyres and, therefore, an import ban affecting them cannot be considered as having a substantial, close, real or reasonable relationship with the protection of the air, soil or water. The European Communities argues that retreaded tyres are new products and, if a import ban like the one being challenged in this case were to be considered justified under Article XX(g), that would imply giving to all WTO Members the authorisation to adopt bans on the importations of all kind of products, because all products ultimately become waste.[680]

4.290 The European Communities contends that the lack of relationship between the import ban and the protection of the environment is also evident because the ban does not have the effect of protecting the environment, to the extent that the latter is being threatened by the accumulation of waste tyres in Brazil. The European Communities argues that the import ban on retreaded tyres does not reduce the rate of this accumulation for the following two reasons: (i) imported retreaded tyres and domestic new tyres contribute equally to the accumulation of tyre waste, given that most new passenger tyres are not even suitable for retreading after a first life cycle on Brazilian roads and that not all retreadable passenger tyres are in fact retreaded in Brazil; and (ii) it can be assumed that practically every potential sale of an imported retreaded tyre is currently, due to the import ban, substituted by a sale in Brazil of a new (domestic or imported) tyre or of a domestic retreaded tyre, most likely manufactured from an imported used tyre, neither of which will, in the case of a passenger car tyre, be retreaded again. Thus, the European Communities is of the view that the import ban on retreaded tyres leaves unaffected the total tyre consumption and the rate of subsequent waste tyre accumulation.[681]

4.291 Furthermore, the European Communities argues that this lack of relationship between the import ban and the protection of exhaustible resources is more blatant in relation to tyres that can be retreaded several times (those used in commercial vehicles, buses, trucks, off-road vehicles, airplanes…). The European Communities explains that in those cases the retreaded tyres have a life time-span which does not primarily depend on the number of times they are retreaded but on the

[678] European Communities' first written submission, executive summary, para. 30.
[679] European Communities' first written submission, executive summary, para. 31.
[680] European Communities' first written submission, executive summary, para. 32.
[681] European Communities' first written submission, executive summary, para. 33.

concrete conditions and circumstances of use. However, for the European Communities, irrespective of these differences, the import ban adopted by Brazil applies to all types of retreaded tyres.[682]

4.292 Finally, the European Communities argues that confirmation that the import ban of retreaded tyres is not related to environmental protection can also be found in rulings, awards and submissions made by Brazilian and MERCOSUR authorities.[683] Thus, the European Communities explains that the first instance ruling of 22 July 2003 of the federal judiciary of Porto Alegre, issued in the case regarding the import ban on MERCOSUR retreaded tyres, states that the importation of these tyres is not more damaging to the environment than the marketing of new tyres, be they imported or locally produced and that such importation did not result in a higher consumption of tyres and was not significant for environmental risks, in particular the increase of waste tyres. The European Communities further submits that in the appellate decision adopted in August 2003 in the same lawsuit by the Chief Judge of the Federal Regional Court of the 4th Region, the judge upheld the first instance decision. Moreover, the European Communities notes that in this lawsuit, the Advocacia-Geral da União defended the lifting of the import ban on retreaded tyres from other MERCOSUR countries, *inter alia*, by arguing that the importation of retreaded tyres generated no environmental damage.[684]

4.293 The European Communities submits that the decision of the High Court of Justice ("Superior Tribunal de Justiça") of 12 December 2003, which permits the importation of used tyres in a procedure of interim relief, dismissed the Environment Ministry's claims that the importation of used tyres caused damage to public health and the environment, given that the importation of retreaded tyres from other MERCOSUR countries was permitted.[685]

4.294 Furthermore, the European Communities submits that Brazil raised no defence based on environmental justifications in the MERCOSUR case brought by Uruguay and decided by the MERCOSUR Arbitral Tribunal in its award of 9 January 2002. Finally, the European Communities notes that the ruling of the Permanent Appeals Tribunal of MERCOSUR 1/2005 in the dispute between Uruguay and Argentina states in its paragraph 17 that "the adopted ban has not reduced, objectively speaking, the concept of environmental damage applicable to the case" .[686]

4.295 The European Communities claims that the import ban on retreaded tyres does not fulfil, either, the second requirement laid down by Article XX(g), namely that it must be made effective in conjunction with restrictions on domestic production or consumption.[687] The European Communities argues that Brazil has not taken effective restrictions on the production in Brazil of new or retreaded tyres, not even as regards retreaded tyres produced from used imported tyres. The European Communities also argues that Brazilian courts have granted interim relief to national retreaders allowing them to import used tyres to keep running the production of retreaded tyres in Brazil. In this situation, the European Communities contends that domestic producers can continue their production of retreaded tyres using imported used tyres while tyres retreaded outside MERCOSUR cannot be imported into Brazil.[688]

4.296 The European Communities claims that Brazil has not adopted any obligation to retread new tyres produced in its territory once they have become used tyres, despite the fact that new tyres that will not be retreaded produce the same public health and environmental externalities as retreaded

[682] European Communities' first written submission, executive summary, para. 34.
[683] European Communities' first written submission, executive summary, para. 35.
[684] European Communities' first written submission, executive summary, para. 36.
[685] European Communities' first written submission, executive summary, para. 37.
[686] European Communities' first written submission, executive summary, para. 38.
[687] European Communities' first written submission, executive summary, para. 39.
[688] European Communities' first written submission, executive summary, para. 40.

tyres. Moreover, the European Communities argues that it also appears that Brazil is not taking any measures to ensure that new tyres used in Brazil remain suitable for retreading after use.[689]

4.297 Moreover, the European Communities claims that as in relation to the "human health" justification, disposal schemes such as Resolution CONAMA 258/1999 would be an alternative measure to the import ban, provided they are enforced correctly.[690]

(c) Chapeau of Article XX

4.298 **Brazil** claims that the manner in which Brazil applies the import ban is neither "arbitrary or unjustifiable discrimination," nor a "disguised restriction on international trade," and therefore the ban complies with the chapeau of Article XX.[691] Brazil claims further that the relevant question is not whether the challenged measure discriminates between like products based on origin, or whether it accords less favourable treatment to imports, but whether it is applied reasonably.[692]

4.299 The **European Communities** argues that the ban does not fulfil the two requirements of the chapeau of Article XX.[693] In other words, the European Communities claims that the ban at issue constitutes an arbitrary and unjustifiable discrimination between countries where the same conditions prevail and amounts to a disguised restriction on international trade.[694] The European Communities submits that in the *US – Gasoline* case, the Appellate Body stated that "the purpose and object of the introductory clauses of Article XX is generally the prevention of abuse of the exceptions of [Article XX]", and, in *US – Shrimps*, the Appellate Body added that the chapeau is: 1) a balancing principle to mediate between the right of a Member to invoke an Article XX derogation and its obligation to respect the rights of other Members; 2) a qualification making the Article XX exemptions limited and conditional; and 3) an expression of the principle of good faith in international law.[695]

(i) A means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail

4.300 **Brazil** is of the view that the relevant question is how the ban is applied.[696] Brazil argues further that the ban's application is reasonable, consistent, and predictable.[697] Brazil notes the European Communities' claim that the ban does not comply with the chapeau of Article XX because of the MERCOSUR exemption, imports of used tyres through injunctions, and the alleged benefit to Brazil's industry.[698] Brazil claims that this is not true as the import ban is not applied in a manner that constitutes "arbitrary or unjustifiable discrimination".[699]

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[689] European Communities' first written submission, executive summary, para. 41.
[690] European Communities' first written submission, executive summary, para. 42.
[691] Brazil's first oral statement, executive summary, para. 16; Brazil's first written submission, executive summary, para. 27.
[692] See Appellate Body Report on *US – Gasoline*, at 22. Brazil's first written submission, executive summary, para. 27.
[693] European Communities' first written submission, executive summary, para. 44; European Communities' second written submission, executive summary, para. 83; European Communities' second oral concluding statement, executive summary, para. 22.
[694] European Communities' first oral statement, executive summary, para. 20.
[695] European Communities' first written submission, executive summary, para. 44.
[696] See Appellate Body Report on *US – Gasoline*, at 23.
[697] Brazil's first oral statement, executive summary, para. 16.
[698] European Communities' First Written Submission, at para. 160.
[699] Brazil's second written submission, executive summary, para. 34.

4.301 The **European Communities** argues that at least two elements can explain the inconsistency of the ban adopted by Brazil with the first requirement of the chapeau: first, Brazil imports retreaded tyres from the other MERCOSUR countries; second, used tyres continue to be imported into Brazil. The European Communities argues that these two discriminations cannot be considered reasonable since the waste originating from these tyres imported into Brazil may produce the same health hazards as the waste from retreaded tyres imported from the European Communities and other WTO Members.[700]

The MERCOSUR exemption

4.302 **Brazil** argues that the exemption of MERCOSUR countries from the import ban does not constitute arbitrary or unjustifiable discrimination because Brazil introduced the exemption to comply with a ruling by an independent MERCOSUR tribunal and both the international and domestic law required such compliance.[701] Brazil argues that the European Communities is wrong to suggest that Brazil's compliance with its MERCOSUR commitments is in bad faith, or that Brazil has undertaken obligations under the MERCOSUR with the purpose of circumventing its obligations under the WTO.[702]

4.303 Brazil claims that the limited exemption of its MERCOSUR customs union partners from the import ban is also consistent with the chapeau because the regulation, on its face, establishes the exemption. For Brazil, if the chapeau did deal with the design of the measure, complying with an Article XXIV customs union obligation is certainly not arbitrary.[703] Brazil states that this is not a case where Brazil, on the books, bans *all* imports, but in practice, permits imports from the MERCOSUR partners. According to Brazil, the very language of the regulation that the European Communities challenges explicitly provides for the MERCOSUR exemption, which itself is permitted under Article XXIV and XX(d). Brazil argues that there is nothing arbitrary about applying the WTO-consistent law as it is written. Brazil also argues that even if the chapeau did deal with the design of the measure, complying with an Article XXIV customs union obligation is certainly not arbitrary.[704]

4.304 Brazil notes that the Appellate Body has explained that the standard of discrimination contemplated in the chapeau of Article XX is different from the standard of discrimination in the treatment of products under other substantive obligations of the GATT. In the view of Brazil, to apply the same standard of other substantive provisions – such as Articles I, III, XI, or XIII of the GATT – to the chapeau would be, in the words of the Appellate Body:

> "[T]o empty the chapeau of its contents and to deprive the exceptions in paragraphs (a) to (j) of meaning. Such recourse would also confuse the question of whether inconsistency with a substantive rule existed, with the further and separate question arising under the chapeau of Article XX as to whether that inconsistency was nevertheless justified."[705]

4.305 Brazil argues that in determining whether the import ban is discriminatory within the meaning of the chapeau, the relevant legal question is not whether the ban discriminates between like products based on origin, or whether it accords less favourable treatment to imported products than that accorded to like products of domestic origin. Brazil argues that those questions would be relevant only under Articles I:1 and III:4, respectively. To Brazil, the relevant legal issue is whether the

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[700] European Communities' first oral statement, executive summary, para. 21.
[701] Brazil's first written submission, executive summary, para. 28.
[702] Brazil's second written submission, executive summary, para. 34.
[703] Brazil's first oral statement, executive summary, para. 16.
[704] Brazil's first oral statement, para. 64.
[705] Appellate Body Report on *US – Gasoline*, at 23, cited in Brazil's first written submission, para. 133.

challenged measure is applied *reasonably*.[706] Brazil argues that the manner in which Brazil applies the import ban is reasonable, and in no way arbitrary or excessive. It is applied in strict observance of its express terms, contained in Portaria SECEX 14/2004.

4.306 The **European Communities** argues that the import ban on retreaded tyres adopted by Brazil is applied not only in a discriminatory way but also in a manner that is arbitrary and unjustifiable. The European Communities contends that the arbitrary and unjustifiable application of the ban derives from the fact that the importation of retreaded tyres into Brazil from non-MERCOSUR countries is banned, while it is accepted for the retreaded tyres produced in the other MERCOSUR countries. For the European Communities, this discrimination is not reasonable, and therefore arbitrary, because all retreaded tyres, irrespective of their country of origin, produce the same environmental externalities.[707]

4.307 The European Communities argues that the ban also discriminates "between countries where the same conditions prevail" as the Brazilian legislation treats differently retreaded tyres produced in the other MERCOSUR countries, which can be imported into Brazil, and those produced in the European Communities (or the rest of the WTO Members), to which the import ban applies.[708] Moreover, the European Communities submits that retreaded tyres from MERCOSUR countries are largely produced with casings imported from the European Communities or other non-MERCOSUR countries. Accordingly, from a waste management point of view, the European Communities is of the view that they are exactly identical to retreaded tyres produced in the European Communities.[709]

4.308 The European Communities argues that what is an arbitrary and unjustifiable discrimination must be established in relation to the objectives of the measure at issue, in the present case, the protection of human life and health. The European Communities notes that the stated objective of the measure is to prevent negative consequences for human life and health resulting from additional waste tyres. However, the European Communities is of the view that retreaded tyres from the European Communities and from other MERCOSUR countries, should pose identical risks from a waste management point of view. In addition, the European Communities contends that retreaded tyres from the European Communities and those from other MERCOSUR countries are both made from non-MERCOSUR casings. Consequently, the European Communities claims that the discrimination introduced by Brazil between MERCOSUR and non-MERCOSUR retreaded tyres is in every respect arbitrary and unjustifiable.[710]

4.309 The European Communities notes Brazil's claim that with this argument, the European Communities fails to distinguish between the "measure's design and its application". The European Communities notes further that in the view of Brazil, because the exemption of the MERCOSUR exports is contained in Article 40 of Portaria SECEX 14/2004, its "application" cannot be regarded as discriminatory. The European Communities submits that Brazil seems to believe that whereas the chapeau of Article XX forbids a discriminatory application of measures by the executive authorities of a WTO Member, it allows the legislator to oblige the executive authorities to apply such discrimination.[711]

4.310 The European Communities argues that this view is unsupported by case law and incompatible with the object and purpose of the chapeau of Article XX. The European Communities

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[706] Brazil's first written submission, para. 134, citing Appellate Body Report on *US – Gasoline*, at 22.

[707] European Communities' first written submission, executive summary, paras. 45, 47.

[708] European Communities' first written submission, executive summary, para. 45.

[709] European Communities' first written submission, executive summary, para. 45; European Communities' first oral statement, executive summary, para. 21; European Communities' second written submission, executive summary, para. 84; European Communities' second oral concluding statement, executive summary, para. 22.

[710] European Communities' second written submission, executive summary, para. 85.

[711] European Communities' second written submission, executive summary, para. 86.

contends that even where an application of a measure is mandated by law, it does not cease to be an application. Accordingly, the European Communities is of the view that if the law mandates an application which discriminates between countries where the same conditions prevail, then this application is contrary to the chapeau of Article XX. The European Communities argues that any other provision would make it very easy for any WTO Member to circumvent the requirements of the chapeau by simply providing for a discriminatory application in the law itself.[712] The European Communities contends that this is further reinforced by the fact that the "administration" of laws is already governed by Article X:3 (a), which requires that the administration of laws must be uniform, impartial and reasonable. The European Communities argues that this provision should normally exclude arbitrary and unjustifiable discrimination. Accordingly, the European Communities claims that the chapeau of Article XX cannot be read to merely refer to administrative, as opposed to legislative, discrimination.[713]

4.311 Moreover, the European Communities argues that the exemption of MERCOSUR countries from the import ban is not a reasonable justification, although, as Brazil asserts, it was made in compliance with its international obligations under the Treaty of Asunción and pursuant to an arbitral award of an international tribunal. Indeed, the European Communities argues further that what is an arbitrary and unjustifiable discrimination must be established in relation to the objectives of the measure at issue, that is, in this case, the protection of human life and health. For the European Communities, the existence of a regional agreement, to which Brazil is a party, cannot modify the meaning of the chapeau of Article XX.[714]

4.312 The European Communities submits that the existence of an international agreement, like the Treaty of Asunción, cannot justify the introduction of an unjustifiable and arbitrary discrimination contrary to the chapeau of Article XX. The European Communities argues that if Brazil's reasoning were accepted, it would be possible for WTO Members to discriminate in the application of measures taken under Article XX simply by concluding agreements with other WTO Members providing for the discriminatory application of such measures.[715]

4.313 **Brazil** argues that contrary to the European Communities' suggestion, WTO Members cannot justify otherwise inconsistent measures by simply concluding agreements with other Members that provide for discriminatory treatment. Brazil states that, first, the European Communities is assuming that Members would act in bad faith by trying to circumvent its obligations under the GATT by relying on an exception. However, Brazil notes that Members are presumed to act in good faith.[716] Brazil further states that the hypothetical agreement between the Members that the European Communities refers to would still have to meet the requirements of Article XXIV for it to justify discriminatory treatment that is contrary to Article I:1. Brazil notes that Article XXIV contains safeguards ensuring that only bona fide customs union parties could invoke the Article to justify prima facie discriminatory treatment. Brazil explains that in other words, in the European Communities' hypothetical, countries attempting to discriminate against other WTO Members would have to prove that they have liberalized substantially all trade among themselves and substantially harmonized duties and trade regulations for non-parties – all without raising outside trade barriers. By imposing such a high burden, Brazil argues, Article XXIV ensures against any potential abuse.[717]

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[712] European Communities' second written submission, executive summary, para. 87.
[713] European Communities' second written submission, executive summary, para. 88.
[714] European Communities' first oral statement, executive summary, para. 22.
[715] European Communities' second written submission, executive summary, para. 89.
[716] Brazil's answer to panel question No. 50, citing Decision by the Arbitrators, *EC – Hormones (US) (Article 22.6 – EC)*, para. 9.
[717] Brazil's answer to panel question No. 50.

4.314 Brazil also states that the European Communities cannot possibly be suggesting that MERCOSUR, the second biggest customs union in the world, was designed and executed with the sole purpose of discriminating in favour of MERCOSUR retreaders. Brazil states that the European Communities' argument is both far-fetched and offensive.[718]

4.315 The **European Communities** notes that Brazil has contested this by arguing that WTO Members are "presumed to be acting in good faith", and therefore cannot be assumed to want to circumvent their WTO obligations. The European Communities is of the view that this argument is entirely unconvincing. The European Communities submits that according to Brazil's interpretation, the chapeau of Article XX allows the introduction of discrimination between countries where the same conditions prevail, provided that this discrimination is based on an international agreement. The European Communities contends that this interpretation seriously weakens the safeguards imposed by the chapeau, and the European Communities does not see how a requirement of "good faith" could correct this result.[719]

4.316 The European Communities submits that Brazil has also argued that in order to allow the discrimination, the agreement on which the discrimination is based "would still have to meet the requirements of Article XXIV for it to justify discriminatory treatment that is contrary to Article I:1". For the European Communities, this is equally unconvincing. The European Communities argues that the import ban is contrary to Article XI:1, and needs to be justified under Article XX. For the European Communities, whether an exemption from the ban is incompatible with Article I:1, and justified under Article XXIV, is an entirely different question.[720]

4.317 The European Communities argues that in order to limit the excessive consequences of its own argument, Brazil is manifestly trying to import the conditions of Article XXIV into Article XX. However, the European Communities argues further that as Brazil has itself confirmed, Articles XX and XXIV are separate exceptions, and the fulfilment of the conditions of one is independent of the fulfilment of the conditions of the other. Moreover, the European Communities contends that with its reference to Article XX, Article XXIV:8 precisely allows WTO Members to create a customs union or free trade agreement without being obliged to introduce discrimination against third countries not belonging to the customs union or free trade agreement.[721] The European Communities argues further that if Brazil was right and the compliance with an international agreement was sufficient to render a discrimination justifiable, then this should apply to all international agreements, not just to agreements justified under Article XXIV.[722]

4.318 **Brazil** agrees that a measure's compliance with the chapeau does not depend on the measure's justification under Article XXIV, that is, a measure that does not meet Article XXIV requirements can nevertheless meet the requirements of the chapeau if it is neither "arbitrary or unjustifiable" nor a "disguised restriction on international trade." However, Brazil states that when a measure does fulfil the requirements of Article XXIV, all else being equal, it is necessarily consistent with the chapeau because a measure expressly permitted under the WTO agreements cannot be "arbitrary or unjustifiable" or a "disguised restriction."[723]

4.319 The European Communities argues that the arbitrary and unjustifiable character of the discrimination applied by Brazil becomes even clearer when considering that at no point during the

[718] Brazil's answer to panel question No. 50.
[719] European Communities' second written submission, executive summary, para. 90.
[720] European Communities' second written submission, executive summary, para. 91.
[721] European Communities' second written submission, executive summary, para. 92.
[722] European Communities' second written submission, executive summary, para. 93.
[723] Brazil's second oral statement, para. 107; Brazil's answer to panel question No. 126; Brazil's answer to panel question No. 54.

proceedings before the MERCOSUR Arbitral Tribunal Brazil claimed that its measure was justified as a measure regarding the protection of human, animal and plant life and health. For the European Communities, this is striking, since Article 50(d) of the Treaty of Montevideo specifically allows measures regarding the protection of human, animal and plant life and health to be imposed or maintained in the context of MERCOSUR.[724]

4.320 **Brazil** explains that it defended the ban before the MERCOSUR tribunal on technical and not environmental or public health grounds because the scope of the MERCOSUR proceeding was limited to whether Portaria SECEX 8/2000 was, in fact, a new restriction, or simply a continuation of a prior measure, and whether an earlier MERCOSUR decision permitted Members to enact such prohibitions in any event.[725] Brazil states that the decision to defend the ban on technical grounds was a tactical decision made by the attorneys who argued that case. Brazil states that it may have turned out to be a tactical mistake, but that is no indication of improper motives.[726] Brazil notes that Exhibit EC-92 describes what happened:

> "Argentina succeeded in obtaining a ban on the importation of used tyres ... claiming that free trade could not be placed above "higher values" such as health and the environment. Brazil had used technical arguments ... and lost for that reason."[727]

4.321 The **European Communities** submits that Brazil has tried to explain this situation by conceding that it may have made a "tactical error" by not defending its import ban on public health grounds against Uruguay under Article 50(d) of the Treaty of Montevideo.[728] The European Communities notes that in reply to a question from the European Communities, Brazil has explained that "reliance on this article did not seem necessary at the time because this was a straight-forward question of legislative history". For the European Communities, that Brazil's first defence was not straightforward is illustrated not only by the outcome of the dispute, but also by the fact that Uruguay and Brazil engaged in a serious controversy on the question before the ad hoc tribunal.[729]

4.322 In such a situation, the European Communities contends that if Brazil really believed its measure was justified for reasons related to human life and health, it would have been normal litigation practice to invoke Article 50(d) of the Treaty of Montevideo at least as a subsidiary defence, whereas it is now invoking this defence against the European Communities. For the European Communities, this behaviour by itself already constitutes arbitrary and unjustifiable discrimination between countries where the same conditions prevail.[730] Moreover, for the European Communities, it is not clear why the European Communities, or other WTO Members, should have to bear the trade consequences of this "tactical error" made by Brazil.[731]

Tyres retreaded domestically

4.323 **Brazil** argues that the application of the ban to imported, but not locally manufactured retreaded tyres, does not constitute arbitrary or unjustifiable discrimination. Brazil explains that retreading of used tyres collected in Brazil helps extend their useful life and avoids creation of additional tyre waste. Brazil contends that allowing the importation of the shorter-lifespan retreaded

[724] European Communities' second written submission, executive summary, para. 94.
[725] Brazil's first written submission, para. 164 (Exhibit BRA-74).
[726] Brazil's second oral statement, para. 108.
[727] Brazil's second oral statement, para. 108, citing Exhibit EC-92.
[728] European Communities' second oral concluding statement, executive summary, para. 22.
[729] European Communities' second written submission, executive summary, para. 95.
[730] European Communities' second written submission, executive summary, para. 95.
[731] European Communities' second oral concluding statement, executive summary, para. 22.

tyres, on the other hand, would exacerbate the waste tyre disposal problem.[732] Brazil argues that it prohibits such imports to prevent unnecessary creation of dangerous waste.[733]

4.324 The **European Communities** claims that the import ban also constitutes arbitrary and unjustifiable discrimination between the European Communities and Brazil.[734] The European Communities recalls that the Appellate Body accepted in *US - Gasoline* that discrimination in the sense of the chapeau could occur not only between different exporting countries, but also between exporting Members and the importing Member concerned.[735] Moreover, the European Communities notes that the Appellate Body in the same case affirmed that "if no restrictions on domestically-produced like products are imposed at all, and all limitations are placed upon imported products alone, the measure cannot be accepted as primarily or even substantially designed for implementing conservationist goals" and that, in such case, "the measure would simply be naked discrimination for protecting locally-produced goods".[736] For the European Communities, the fact that Brazil has not adopted any measure to ensure that new tyres consumed in its territory are retreaded when they become used tyres reveals a discrimination against imported retreaded tyres, which produce the same public health and environmental externalities as new tyres that are not retreaded.[737]

4.325 Moreover, the European Communities claims that Brazil allows domestically the production of retreaded tyres which, like retreaded tyres from the European Communities, are produced with casings imported from outside MERCOSUR, including the European Communities.[738] The European Communities argues that due to the interim relief adopted by the Brazilian courts, used tyres continue to be imported into Brazil by national retreaders.[739] For the European Communities, the discrimination is arbitrary, because all retreaded tyres, made from used tyres not originating in Brazil, produce the same environmental externalities in Brazil irrespective of the country of origin.[740] The European Communities explains that it is manifest that a casing originating in the European Communities is not more problematic from a waste management point of view just because it is retreaded in the European Communities rather than in Brazil. The European Communities submits that on the contrary, retreading in Brazil should be more problematic, since in this case, Brazil also has to deal with some degree of industrial losses which inevitably occur.[741]

4.326 **Brazil** notes the European Communities' argument that Brazil arbitrarily discriminates between retreaded tyres from the European Communities and retreaded tyres made in Brazil, because domestic retreaded tyres are allegedly made from foreign casings and do not reduce waste in Brazil. Brazil responds that the European Communities' argument could be true only if all of the Brazilian retreaded tyres had indeed been made from foreign casings. However, Brazil states, it has extensively demonstrated that the great majority of domestic retreaded tyres are made from domestic casings.[742]

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[732] Brazil's first written submission, executive summary, para. 29; Brazil's first oral statement, executive summary, para. 16.

[733] Brazil's first written submission, executive summary, para. 29.

[734] European Communities' second written submission, executive summary, para. 96.

[735] European Communities' first written submission, executive summary, para. 46.

[736] European Communities' first written submission, executive summary, para. 43.

[737] European Communities' first written submission, executive summary, para. 46.

[738] European Communities' second written submission, executive summary, para. 96.

[739] European Communities' first written submission, executive summary, para. 48; European Communities' second oral concluding statement, executive summary, para. 22.

[740] European Communities' first written submission, executive summary, para. 48.

[741] European Communities' second written submission, executive summary, para. 96.

[742] Brazil's second oral statement, para. 109 (Exhibit BRA-162).

(ii) Disguised restriction on international trade

Objective of the import ban

4.327 **Brazil** notes that the European Communities insists that the real aim of the import ban is not the protection of life and health, but the protection of Brazil's domestic industry (see paragraph 10 of the European Communities' second oral statement). Brazil argues, however, that it has demonstrated that the import ban is imposed and enforced at considerable cost to the Brazilian domestic retreading industry, as well, which would much rather face competition from the European Communities' retreading companies (many of which have investments in Brazil, by the way), than have its source of cheap casings cut off.[743]

4.328 Brazil contends further that it does not seek to protect its tyre industry because: it has not restricted imports of new tyres; at the same time it subjected its tyre manufacturers to costly disposal obligations and prohibited imports of cheap foreign casings, preferred by the domestic retreaders.[744] Moreover, Brazil argues that the strict producer responsibility obligations offer further evidence that Brazil's measure seeks the protection of human health and the environment, not commercial interests.[745]

4.329 The **European Communities** recalls that the Appellate Body acknowledged in *Japan - Alcoholic Beverages* that the aim of a measure may not be easily ascertained, though it suggested that the protective application of a measure can most often be discerned from its design, architecture and revealing structure.[746] The European Communities argues that the real aim of the import ban on retreaded tyres is not the protection of life and health but the protection of Brazil's domestic industry. The European Communities points out that the rulings, awards and submissions made by Brazilian and MERCOSUR authorities confirm this assertion and that they have not been contested by Brazil in any of its submissions.[747]

4.330 The European Communities notes that the protective application of the import ban is evident in the Brazilian legislation on tyres. The European Communities submits that the import ban emanates from the Ministry responsible for Development, Industry and Foreign Trade by means of the measures challenged in this case, which, none of them, make a link with the legislation adopted by the Ministry in charge of the environment.[748] The European Communities submits that Portaria 8 of 25 September 2000, the first measure prohibiting the import of retreaded tyres, contains no reference whatsoever to the objective pursued by the ban. The European Communities argues that the very reason is that the Brazilian authorities do not consider it a public health measure. According to the European Communities, this can be deduced from the fact that the National Dengue Control Programme adopted in July 2002 only includes monitoring the effective application of Resolution CONAMA 258/1999. For the European Communities, the fact that Portaria 8 is not mentioned is a silence that confirms that the measure is not intended to protect life and health.[749] Moreover, the European Communities submits that Resolution CONAMA 258/1999 expressly includes imported retreaded tyres in the recovery programme.[750]

4.331 The European Communities argues that the protectionist objective of the import ban also finds support in several statements made by the Brazilian authorities. The European Communities

[743] Brazil's second oral concluding statement, executive summary, para. 4.
[744] Brazil's first oral statement, executive summary, para. 16.
[745] Brazil's first written submission, executive summary, para. 31.
[746] European Communities' first written submission, executive summary, para. 50.
[747] European Communities' second oral statement, executive summary, para. 2.
[748] European Communities' first written submission, executive summary, para. 51.
[749] European Communities' second oral statement, executive summary, para. 3.
[750] European Communities' first written submission, executive summary, para. 51.

submits that in the domestic lawsuit against the lifting of the retread import ban for MERCOSUR, the Advocate-General of the Union stated that the ban on the importation of retreaded tyres was not adopted for the defence of public health and the environment, but to protect national trade and industry[751]: "… SECEX Portaria No 08/2000 prohibits the importation of 'retreaded' tyres not for the defence of public health and the environment, but to protect national trade and industry".[752]

4.332 The European Communities submits further that in this lawsuit, SECEX stated that the importation of used and retreaded tyres was harmful to the level of employment in Brazil by creating disloyal competition *vis-à-vis* domestic tyre manufacturers and by reducing the incentive to invest in the country.[753] Moreover, for the European Communities, that the original ban on imports of used products is similarly aimed at protecting Brazil's industry, emerges clearly from the statement which a representative of the Ministry of Development, Industry and Foreign Trade, made in a parliamentary public hearing on 10 April 2002.[754]

4.333 The European Communities also contends that draft decree law 243/00 introduced in 2000 by three Brazilian Senators to abrogate Portaria SECEX 8/2000, suggests that this Portaria was the fruit of lobbying by manufacturers of new tyres established in Brazil who wanted to reduce the sales of retreaded tyres as a competing product.[755] Finally, the European Communities argues that the fact that Presidential Decree 3.919, which establishes the fine for violation of the import ban, refers to an environmental law cannot be interpreted, in the absence of an equivalent reference in the measures establishing the import ban, as meaning that the ban has been established expressly to protect the environment.[756]

4.334 The European Communities contends that the import ban on retreaded tyres is not designed to protect life or health, because of three flaws in its design: first, not all new tyres sold in Brazil are retreadable or retreaded; second, tyres other than passenger car tyres, whose import into Brazil is also banned, are retreadable several times, and, third, the import ban is not applied to retreaded tyres from MERCOSUR countries.[757]

4.335 **Brazil** points out that Minister Marina Silva told the Panel:

> "The core issues at stake in this dispute are public health and the environment. The impact that the outcome of this dispute will have on Brazil's ability to preserve those fundamental values cannot be overstated.
>
> [O]ur own country generates a considerable amount of tyres that are suitable for supplying the retreading industry. This confers a second life cycle to the product and reduces the environmental burden. The same does not occur in relation to imported retreaded tyres, because they are already in their last lifecycle.
>
> The importation of used and retreaded tyres exacerbates the difficulties involved in the management of rubber waste. That's why the import ban is a legitimate and necessary environmental measure."[758]

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[751] European Communities' first written submission, executive summary, para. 52.
[752] European Communities' second written submission, executive summary, para. 102.
[753] European Communities' first written submission, executive summary, para. 52.
[754] European Communities' second written submission, executive summary, para. 102.
[755] European Communities' first written submission, executive summary, para. 53.
[756] European Communities' second written submission, executive summary, para. 101.
[757] European Communities' first oral statement, executive summary, para. 5.
[758] Brazil's second written submission, para. 110, citing Minister of Environment Marina Silva, initial statement by Brazil at the first substantive meeting of the Parties, at paras. 2, 7, 8.

4.336 Brazil also notes that the statement made by a trade official – cited by the European Communities to suggest that the import ban was adopted to protect national industry – dealt exclusively with the 1991 ban on *all* used goods and made no specific mention of used or retreaded tyres. Brazil adds that regardless of any statement that may have been made by a trade official and wrongly used by the European Communities in these proceedings, what is relevant in this case is that Brazil clearly demonstrated that there is a legitimate environmental and health rationale behind the import ban.[759]

Effects of the import ban

4.337 **Brazil** argues that the restrictions that the ban imposes are not "disguised" because there is nothing disguised, deceptive or concealed about the ban's application.[760] Brazil contends further that the import ban is also not applied in a manner that constitutes a "disguised restriction on international trade."[761] Brazil recalls the Appellate Body's statement that[762] "'disguised restriction' ... may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination ... taken under the guise of a measure formally within the terms of an exception listed in Article XX".[763]

4.338 The **European Communities** contends that in order to assess whether there is a disguised restriction on international trade, what matters is not only the objective of the import ban, but also its effects. In the present case, the European Communities argues that the effects have been the exclusion of the European Communities retreaders from the Brazilian market to the benefit of their direct competitors, the retreaders located in Brazil. The European Communities claims that this outcome is clearly a disguised restriction on international trade.[764]

In relation to new tyres

4.339 **Brazil** contends that it has demonstrated – and the European Communities has not contested it – that the new tyre industry in Brazil has not benefited from the import ban.[765] Brazil argues that it does not protect its new tyre industry. To do that, Brazil explains that it would have had to restrict imports of new tyres, but it has done no such thing. Brazil argues that in fact, imports of new tyres have increased since the ban[766] and meanwhile, sales of new tyres by domestic manufacturers[767] have remained stable.[768]

4.340 Brazil is of the view that the European Communities' response to that fact has been simply to suggest – without any evidence whatsoever – that in the absence of the import ban, the new tyre industry would have had a negative growth, rather than remain stable. Brazil notes that this is the European Communities' attempt at rebutting the evidence that the new tyre industry has not experienced any exceptional or even substantial growth resulting from the imposition of the import

[759] Brazil's second oral statement, para. 110; Brazil's answer to panel question No. 129. See also, Brazil's answer to panel question No. 112.

[760] Brazil's first written submission, executive summary, para. 30; Brazil's first oral statement, executive summary, para. 16.

[761] Brazil's first written submission, executive summary, para. 30; Brazil's second written submission, executive summary, para. 36.

[762] Appellate Body Report on *US – Gasoline*, at 25.

[763] Brazil's first written submission, executive summary, para. 30; Brazil's first oral statement, executive summary, para. 16.

[764] European Communities' first oral statement, executive summary, para. 24.

[765] Brazil's first written submission, executive summary, para. 31; Brazil's second oral concluding statement, executive summary, para. 5.

[766] See Exhibit BRA-66 for detailed information on Brazil's tyre imports.

[767] See Exhibit BRA-66 for detailed information on Brazil's tyre imports.

[768] Brazil's first written submission, executive summary, para. 31.

ban on retreaded tyres. Brazil explains that the new tyre industry, on the one hand, and the retreaded tyre industry on the other, do not compete for the same market.[769]

4.341 The **European Communities** contends that the measure adopting the import ban and its subsequent modifications constitute a disguised restriction on international trade, since it has excluded the retreaders of the European Communities from the Brazilian market, and protects the new tyre and retreaded tyre industry in Brazil.[770] The European Communities claims that the import ban of retreaded tyres has, as main objective, to protect the Brazilian tyre industry from the competition of the foreign industry, by restricting international trade.[771] The European Communities contends that the trade of retreaded tyres from the European Communities (and other WTO Members) has ceased to the benefit of new tyres manufactures located in Brazil, who do not have to face competition from a product with similar characteristics and the same end-use as a new tyre, but cheaper.[772] In fact, the European Communities submits that the new tyres industry lobbied for the ban and warmly welcomed it upon its entry into force.[773]

4.342 The European Communities notes that Brazil has claimed that the total sales of new car tyres made in Brazil have not changed, that for all types of new tyres total sales remained stable, and that their market share, compared to that of imported new tyres, fell.[774] The European Communities notes that the assessment made by Brazil does not include an estimation of what would have occurred if the import ban on retreaded tyres had not been in place. The European Communities submits that Brazil has not reacted directly to this argument yet and its analysis of market shares, where new tyres and retreaded tyres are treated as separate markets, shows that it is not prepared to react.[775]

4.343 The European Communities argues that Brazil's position is hiding the fact that new tyre manufacturers located in Brazil lobbied for the adoption of the import ban on retreaded tyres, as is clearly admitted in the circular from Pirelli of 4 October 2000, where Pirelli informed its retailers in Brazil of the entry into force of Portaria 8 of 25 September 2000, which banned the importation of retreaded tyres, in the following terms: "There is no doubt that this Order, which is the result of extensive work carried out in conjunction with the authorities, will make it even more difficult to import these products". The European Communities contends in addition that the draft decree law 243/00 introduced by three Brazilian Senators to abrogate Portaria SECEX 8/2000, suggests that this Portaria was the fruit of lobbying by manufacturers of new tyres established in Brazil who wanted to reduce the sales of retreaded tyres as a competing product.[776]

4.344 **Brazil** notes the European Communities' suggestion that the import ban produced an increase in the sales of new tyres manufactured in Brazil. Brazil responds that the increase in the sales of new tyres in Brazil was caused not by the import ban, but by the fact that there are simply more cars on Brazilian roads. Brazil notes that from 2001 to 2005, the Brazilian fleet expanded from 32 million registered motor vehicles to 42 million, according to the National Traffic Department. During this period, Brazil points out, the replacement market expanded by 9.4 million, or 22 per cent, from about 42.7 million to 52.1 million; however, the sales of new tyres produced in Brazil increased by only 900,000, or a mere five per cent. Brazil states that the European Communities' suggestion that these

[769] Brazil's second oral concluding statement, executive summary, para. 5.
[770] European Communities' first oral statement, executive summary, para. 23; European Communities' first written submission, executive summary, para. 49; second oral concluding statement, executive summary, para. 22.
[771] European Communities' first written submission, executive summary, para. 49.
[772] European Communities' first oral statement, executive summary, para. 23; European Communities' second written submission, executive summary, para. 97.
[773] European Communities' second oral concluding statement, executive summary, para. 22.
[774] European Communities' second written submission, executive summary, para. 98.
[775] European Communities' second written submission, executive summary, para. 99.
[776] European Communities' second written submission, executive summary, para. 100.

sales increased by "a few millions" in footnote 151 is untrue and misleading. Brazil adds that even if one counts 1999 and 2000 – for which Brazil does not have retread production information to calculate the market size – the sales of domestic tyres increased by only 1.6 million, or nine per cent. At the same time, Brazil notes, imports of new tyres more than doubled from 1999 to 2005.[777]

In relation to used tyres

4.345 **Brazil** notes the European Communities' argument[778] that injunctions protect the Brazilian industry by ensuring supplies.[779] Brazil argues that it actively opposes the injunctions that have led to the imports of used tyres and that, in the great majority of the cases, it has prevailed. Brazil is of the view that to state that the ban "has been suspended by Brazilian courts" – as the European Communities does – is a gross misrepresentation.[780] Brazil submits that the ban has not been "suspended" in any way and it is in force and enforced.[781] Furthermore, Brazil argues that its ban on used tyre imports – which significantly increases production costs for domestic retreaders – and its stern opposition to the injunctions on used tyre imports dispels any suggestion that Brazil seeks to protect its retreading industry.[782]

4.346 The **European Communities** submits that due to the MERCOSUR exemption and the imports in Brazil of used tyres to be retreaded, the export flow from the European Communities on tyres has been radically altered.[783] First, the European Communities submits that the trade of retreaded tyres from the European Communities (and other WTO Members) has been replaced by exports of used tyres to Brazil and the other MERCOSUR countries, which are used to produce retreaded tyres.[784] Second, the European Communities contends that the trade of retreaded tyres from the European Communities (and other WTO Members) has ceased to the benefit of retreaded tyres manufactures located in Brazil and in other MERCOSUR countries, who do not have to face competition from a product with the same characteristics.[785]

4.347 On this question, the European Communities notes that Brazil relies on the fact that the import ban covers also casings imported into Brazil to be retreaded and that this ban substantially increases the Brazilian retreaders' production costs by prohibiting imports of cheap foreign casings.[786] The European Communities submits that it has repeatedly explained in its submissions that the import ban on used tyres is not being implemented because Brazilian courts have granted injunctions under which a large number of used tyres are imported. The European Communities notes also that the import ban on used tyres into Brazil does not affect the retreading industry located in other MERCOSUR countries and exporting to Brazil. Finally, the European Communities is of the view that Brazil has not demonstrated that imported casings are cheaper than those gathered on its territory. On the contrary, the European Communities notes that it has proved that, if the importation of casings into Brazil takes place, this is because it is not possible for the Brazilian retreaders to find in Brazil suitable casings for retreading.[787]

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[777] Brazil's answer to panel question No. 26.
[778] European Communities' answer to panel question No. 51.
[779] Brazil's second written submission, executive summary, para. 36.
[780] See European Communities' first written submission, at para. 147.
[781] Brazil's second written submission, executive summary, para. 35.
[782] Brazil's first written submission, executive summary, para. 31; Brazil's second written submission, executive summary, para. 36.
[783] European Communities' first oral statement, executive summary, para. 23.
[784] European Communities' first oral statement, executive summary, para. 23.
[785] European Communities' second written submission, executive summary, para. 103.
[786] European Communities' second written submission, executive summary, para. 104.
[787] European Communities' second written submission, executive summary, para. 105.

B. THE FINES ON IMPORTATION, MARKETING, TRANSPORTATION, STORAGE, KEEPING OR WAREHOUSING OF IMPORTED RETREADED TYRES

4.348 The **European Communities** claims that the fines imposed by Brazil on the importation, as well as the transportation, storage, keeping or warehousing of retreaded imported tyres constitute a restriction on imports incompatible with Article XI:1 of GATT 1994. In the view of the European Communities, the fines on the marketing, transportation, storage, keeping or warehousing must be regarded as constituting a restriction on the importation of goods. In this context, it should be noted that the disciplines of Article XI:1 also extent to measures of a *de facto* nature.[788] By imposing a fine – which normally will exceed the value of the goods – on any action which is necessary for the internal commercialisation of imported retreaded tyres, Brazil is essentially making any commercialisation of such tyres impossible. These restrictions only apply to imported goods affected by the ban, not to domestic goods. Moreover, these fines are ancillary to the import ban, which they complement and reinforce. Accordingly, they equally constitute a violation of Article XI:1.

4.349 Alternatively, the European Communities contends that should the Panel consider that the fines at issue do not constitute a restriction on the importation of products, they would have to be considered as incompatible with Article III:4 of GATT 1994, which obliges Brazil not to discriminate against imported products in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.[789] The European Communities claims that in either case the violation of Brazil's WTO obligations cannot be justified under Article XX of GATT 1994.[790]

4.350 The European Communities submits that although Brazil asserts that the justification of the import ban under Article XX(b) applies *mutatis mutandis* to the fines, no additional argument was presented to justify the latter measure. Moreover, the European Communities notes that in light of Article XX(d), Brazil claims that the fines are "necessary to secure compliance" with the provisions of the import ban. For the European Communities, this argument is equally doomed to fail because Article XX(d) applies only to measures necessary to secure compliance with laws or regulations "which are not inconsistent with the provisions of this Agreement", whereas the import ban is inconsistent with Article XI:1, and is not justified under Article XX(b).[791]

4.351 The European Communities contends further that since both parties agree that there is a prima facie incompatibility with Article XI:1, the Panel need not address the question whether there is also a violation of Article III:4. The European Communities argues that like the import ban, the fines cannot be justified under Article XX(b) or (d). Accordingly, for the European Communities the fines are likewise WTO-inconsistent.[792]

4.352 **Brazil** argues that it imposes anti-circumvention fines to safeguard the integrity of the import ban by penalizing traders that circumvent import controls.[793] As such, Brazil argues that the fines are measures to enforce the import ban.[794] Brazil contends that because the import ban is justified by

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[788] Panel Report on *Argentina – Hides and Leather*, para. 11.17.

[789] European Communities' first written submission, executive summary, para. 54; European Communities' first oral statement, executive summary, para. 25; European Communities' second written submission, executive summary, para. 106.

[790] European Communities' first written submission, executive summary, para. 54.

[791] European Communities' first oral statement, executive summary, para. 25.

[792] European Communities' second written submission, executive summary, para. 107.

[793] Decreto Presidencial 3.919/2001 (Exhibit BRA-72), amending Decreto Presidencial 3.179/1999, Art. 47-A (Exhibit BRA-73).

[794] Brazil argues that the European Communities recognizes that the fines are an enforcement measure of the import ban; see European Communities' first written submission, at paras. 172-174, 179.

Article XX(b), fines that enforce the ban are likewise justified by Article XX(b).[795] Brazil contends that the anti-circumvention fines are justified by Article XX(b) because they are measures necessary to protect human life and health, and the environment.[796]

4.353 Moreover, Brazil is of the view that Article XX(d) also justifies the fines because they are "necessary to secure compliance with" the import ban, which is not inconsistent with the GATT 1994.[797] For Brazil, the fines are "necessary" because they significantly enhance effectiveness of the ban.[798] Brazil claims that the fines meet the criteria of the chapeau for the same reasons that the import ban itself meets that criteria and because they discipline mainly Brazilian businesses.[799]

4.354 Brazil submits that both parties[800] agree that anti-circumvention fines are an ancillary enforcement measure that must stand or fall with the ban.[801] Beyond these points, Brazil notes that parties essentially disagree.[802]

C. RESTRICTIONS ON THE MARKETING OF IMPORTED RETREADED TYRES AT STATE LEVEL

4.355 The **European Communities** claims that Law 12.114 of the Brazilian State of Rio Grande do Sul of 5 July 2004 prohibits the marketing of retreaded tyres produced outside Brazil. The European Communities contends that this prohibition does not apply to the marketing of retreaded tyres produced in Brazil from domestic carcasses. For the European Communities, this measure constitutes a discrimination against imported products which is incompatible with Article III:4[803] and Brazil has not contested this incompatibility.[804]

4.356 The European Communities submits that Article 1, paragraph 1 of Law 12.114, *as originally adopted*, prohibits the domestic marketing, in Rio Grande do Sul, of imported used tyres, which it defines as including imported retreaded tyres.[805] The European Communities submits that Law 12.114, *as recently amended* (through State Law 12.381 of 28 November 2005), also contains elements of discrimination which are not found in the Brazilian federal measures.[806] The European Communities contends that paragraph 2 of Article 1 of the amended law now specifically authorises the importation of used or retreaded tyres. The European Communities submits that importation of retreaded tyres produced in Brazil from imported used tyres would be allowed, provided that the importer proves to have destroyed one used tyre existing in Brazil for every retreaded tyre. In contrast, the European Communities notes that the importation and marketing of

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[795] Brazil's first written submission, executive summary, para. 32; Brazil's first oral statement, executive summary, para. 17; second written submission, executive summary, para. 37.

[796] Brazil's first written submission, executive summary, para. 17.

[797] Brazil's first written submission, executive summary, paras. 17, 32.

[798] Brazil's first written submission, executive summary, para. 32; Brazil's first oral statement, executive summary, para. 17.

[799] Brazil's first written submission, executive summary, para. 32.

[800] See European Communities' answer to panel question No. 65. See also European Communities' first written submission, at paras. 172-174, 179.

[801] Brazil's second written submission, executive summary, paras. 1, 37.

[802] Brazil's second written submission, executive summary, para. 1.

[803] European Communities' first written submission, executive summary, paras. 55, 57; European Communities' first oral statement, executive summary, para. 26; European Communities' second written submission, executive summary, para. 108.

[804] European Communities' second written submission, executive summary, para. 108.

[805] European Communities' second written submission, executive summary, para. 109.

[806] European Communities' first written submission, executive summary, para. 56; European Communities' first oral statement, executive summary, para. 27.

imported retreaded tyres is allowed only if the importer proves to have destroyed ten used tyres in Brazil for every retreaded tyre.[807]

4.357 The European Communities argues further as regards paragraph 2 of Article 1, that a measure which requires the disposal of ten used tyres for every imported retreaded tyre is manifestly disproportionate, as Brazil has in fact itself acknowledged. The European Communities submits that even according to Brazil's own arguments, according to which every imported retreaded tyre leads to one more used tyre to be disposed of in Brazil, it cannot be argued that an additional amount of ten waste tyres is due to the importation of each retreaded tyre.[808] The European Communities notes Brazil's argument that the disposal obligation is a "non-circumvention fine" for the import ban which, as a "penalty", need not be proportionate. For the European Communities, this argument does not correctly reflect the content of the State law. The European Communities argues that under paragraph 2 of Article 1 of the amended law, imports of retreaded tyres are explicitly authorised, provided that the importer disposes of ten used tyres per imported retreaded tyre. The European Communities contends that this provision is not a "sanction" for violation of an import ban. Rather, for the European Communities, it is a measure which restricts the internal sale of retreaded tyres to the disadvantage of imported retreaded tyres.[809]

4.358 The European Communities argues that the requirement of having to dispose of ten used tyres, rather than one tyre, clearly constitutes less favourable treatment of imported retreaded tyres. In other words, for the European Communities the amended law introduces an additional discrimination between retreaded tyres produced in Brazil from imported carcasses, and retreaded tyres imported into Brazil.[810]

4.359 Furthermore, the European Communities submits that it is not entirely clear how paragraphs 1 and 2 of Law 12.114 relate to one another. The European Communities notes that when questioned by the Panel on this point, Brazil replied that the amendments introduced by Law 12.381, permitting imports under certain conditions, seem to conflict with Article 1 of Law 12.114, which prohibits imports of used tyres, and that it is not clear whether the amendments intended to lift the import prohibition.[811] The European Communities assumes that in the Brazilian legal order, the conflict rules of *lex posterior derogat priori* and *lex specialis derogat generali* apply. The European Communities assumes that since paragraph 2 of Article 1 of Law 12.114 is both later in time and more specific than paragraph 1 thereof, tyres which have been imported in accordance with the conditions of paragraph 2 may also legally be marketed in Rio Grande do Sul.[812]

4.360 In this sense, the European Communities argues that paragraph 2 would constitute an exception from paragraph 1. The European Communities contends that the combined effect of Law 12.114 with its combination of prohibitions and conditional, but discriminatory, authorisations, is to create considerable uncertainty about the legality of the sale of imported retreaded tyres in Rio Grande do Sul. The European Communities submits further that the law discourages imports of retreaded tyres, and as such has a considerable chilling effect on foreign trade.[813]

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[807] European Communities' first written submission, executive summary, para. 56; European Communities' first oral statement, executive summary, para. 27; European Communities' second written submission, executive summary, para. 109.

[808] European Communities' second written submission, executive summary, para. 117.

[809] European Communities' first oral statement, executive summary, para. 27; European Communities' second written submission, executive summary, para. 118.

[810] European Communities' first written submission, executive summary, para. 56.

[811] European Communities' second written submission, executive summary, para. 110.

[812] European Communities' second written submission, executive summary, para. 111.

[813] European Communities' second written submission, executive summary, para. 112.

4.361 As regards the legal effect of the Rio Grande do Sul Law, the European Communities notes Brazil's argument that it "warrants no independent consideration because it does not restrict imports of retreaded tyres any more than the federal import ban". The European Communities does not agree with these arguments.[814] The European Communities argues that, in contrast to what Brazil has claimed, Law 12.114 is a measure independent of the measures adopted at the federal level in Brazil and, consequently, does warrant independent consideration in the context of the present dispute.[815]

4.362 The European Communities submits Brazil's claim that the State measure is incompatible with Brazilian constitutional law, and therefore has no legal effect.[816] The European Communities argues, however, that Brazil has failed to establish both that the measure in its entirety is indeed unconstitutional, nor that this unconstitutionality as such would deprive the measure of its legal effect.[817] The European Communities submits that Brazil has also claimed that "to the extent that the state measure conflicts with the federal measure ... the federal measure will prevail and trump the state measure". The European Communities further submits that in support, Brazil has referred to the fact that the federal government has the exclusive power to regulate foreign and interstate trade.[818]

4.363 For the European Communities, these explanations are unconvincing. First of all, the European Communities argues that it is not clear whether and to which extent Law 12.114 falls under the exclusive competence of the federal government for foreign and inter-state trade. The European Communities is of the view that this is particularly doubtful with respect to paragraph 2 of Article 1 of that Law, which in essence contains disposal obligations imposed on importers of retreaded and used tyres. The European Communities notes that, as Brazil has explained, States and the federal government have concurrent jurisdiction over environmental protection. For this reason, the European Communities argues, as Brazil has equally confirmed, that Rio Grande do Sul can legislate on matters related to disposal of waste. However, the European Communities contends that it can be argued that this is precisely what Rio Grande do Sul has done in paragraph 2 of Article 1 of Law 12.114. The European Communities argues that the fact that the disposal obligations heavily discriminate against imported retreaded tyres, and have the obvious intention of discouraging such imports, is not enough to assume that these measures *per se* constitute regulations of foreign trade.[819]

4.364 Second, for the European Communities, even to the extent that Law 12.114 conflicts with Brazilian constitutional law, Brazil has not shown that the law for this reason has no legal effect in the Brazilian legal order. On the contrary, the European Communities argues that Brazil has confirmed that "[i]n order to have the state measures at issue declared null and void, a specific court ruling – *i.e.*, a ruling by the Federal Supreme Court in an unconstitutionality action cf. Art. 102(I)(a) of the Constitution) – is required". In the absence of such a ruling, the European Communities argues that it would thus appear that there is no basis for assuming that courts and administrators in Rio Grande do Sul would not apply the Rio Grande do Sul law.[820]

4.365 The European Communities contends further that if the ban at federal level were lifted following the present dispute, but the State law maintained, this would continue to restrict the marketing of imported retreaded tyres in Rio Grande do Sul.[821]

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[814] European Communities' second written submission, executive summary, para. 113.
[815] European Communities' first oral statement, executive summary, para. 26; European Communities' second written submission, executive summary, para. 113.
[816] European Communities' second oral concluding statement, executive summary, para. 23.
[817] European Communities' second oral concluding statement, executive summary, para. 23.
[818] European Communities' second written submission, executive summary, para. 114.
[819] European Communities' second written submission, executive summary, para. 115.
[820] European Communities' second written submission, executive summary, para. 116.
[821] European Communities' first oral statement, executive summary, para. 26; European Communities' second written submission, executive summary, para. 113.

4.366 The European Communities claims that these restrictions cannot be justified by Article XX(b).[822] The European Communities contends that Brazil has offered no arguments as regards the possibility of a justification of the Rio Grande do Sul measure under Article XX(b). For the European Communities, any attempt to justify this measure as "necessary" under Article XX(b) must fail.[823] The European Communities claims that Brazil has also not succeeded in demonstrating that the measure, and in particular the discriminatory disposal obligations it imposes, can be justified under Article XX(b).[824] For the European Communities, such a discriminatory scheme, the only intention of which in fact seems to be to discourage imports, cannot be justified under Article XX(b).[825] Moreover, the European Communities argues that Brazil, as a WTO Member, is responsible for the respect of its WTO obligations by its federal states in accordance with Article XXIV:12.[826]

4.367 **Brazil** argues that the state of Rio Grande do Sul imposes a state ban on sales of imported retreaded tyres,[827] which has effect only to the extent that it is consistent with federal law.[828] Brazil contends that it has demonstrated that the challenged state measure is not inconsistent with Article III:4 because the import-related provisions in this measure are pre-empted by federal law and have no effect. Brazil also notes that in July 2006, the Office of the Chief of Staff to the President issued a legal opinion[829], advising the Solicitor General that the state measure violates provisions of the Brazilian Constitution and recommending that the Solicitor General bring a Direct Action of Unconstitutionality.[830] Brazil reports that that the General Prosecutor of the Republic has consequently presented to the Federal Supreme Court the Unconstitutionality Action recommended by the Chief of Staff Minister.[831]

4.368 Brazil notes that it has also explained that the law has no legal effect because Brazilian states have no authority to regulate interstate or international trade under Brazil's Constitution. According to Brazil, state authorities simply cannot authorize or prohibit imports because import licenses are issued by the federal government, not by the states; neither can state authorities impede sales of imported products.[832]

4.369 Brazil claims that the Rio Grande do Sul state measure is justified by Article XX(b) because it is a measure necessary to protect human life and health, and the environment.[833] Moreover, Brazil contends that the state measure warrants no independent consideration because it does not restrict

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[822] European Communities' first written submission, executive summary, para. 57; European Communities' first oral statement, executive summary, para. 26; European Communities' second written submission, executive summary, para. 117.

[823] European Communities' first oral statement, executive summary, para. 28.

[824] European Communities' second oral concluding statement, executive summary, para. 23.

[825] European Communities' second written submission, executive summary, para. 117.

[826] European Communities' first written submission, executive summary, para. 57.

[827] Law No. 12.114 of Rio Grande do Sul (Exhibit BRA-80), as amended by Law 12.381 (Exhibit BRA-81).

[828] Brazil's first written submission, executive summary, para. 16.

[829] Office of the Chief of Staff to the President, Official Letter SAJ No. /05-, 26 June 2006 (Exhibit BRA-156).

[830] Brazil's second written submission, executive summary, para. 46.

[831] Brazil's comment to the European Communities' answer to panel question No. 118 (Exhibit BRA-169).

[832] Brazil's responses to question 111.

[833] Brazil's first written submission, executive summary, paras. 17, 36.

imports of retreaded tyres from the European Communities any more than the federal import ban does. In the event of a conflict, Brazil submits that the federal measure prevails.[834]

D. THE MERCOSUR EXEMPTION

1. Articles XIII:1 and I:1 of GATT 1994

4.370 The **European Communities** claims that the exemptions of retreaded tyres imported from other MERCOSUR countries from the import ban and the associated fines are incompatible with Articles XIII:1 and I:1 of GATT 1994.[835] The European Communities contends that Brazil has not denied this inconsistency and has argued that the MERCOSUR exemption is justified under Articles XXIV and XX(d) of GATT 1994.[836]

4.371 The European Communities submits that in relation to the scope of the MERCOSUR exemption, Brazil has argued that the exemption for exports from MERCOSUR countries in Article 40 of Portaria SECEX 14/2004 does not apply to all retreaded tyres, but only to "remoulded tyres", i.e. tyres where the tread and the sidewall have been renewed from bead to bead.[837] The European Communities argues that this explanation is not compatible with the wording and context of the Brazilian measures. For the European Communities, if the term "remoldagem" in Article 40 were to apply only to retreaded tyres produced through one specific process, then the same should also apply to the term "recauchutados", which should apply only to tyres retreaded through the process of re-capping. However, the European Communities submits that Brazil maintains that the term "recauchutagem" is to be interpreted and applied in a large sense as including all retreaded tyres. For the European Communities, it is not clear, therefore, why only one term is to be interpreted in a large sense, whereas the other term in a narrow sense.[838]

4.372 The European Communities contends that Brazil's interpretation is also contradicted by Presidential Decree 4.592, which exempts from the fines imposed on the importation of retreaded tyres, all retreaded tyres originating in MERCOSUR countries. Accordingly, for the European Communities, it would appear that the importation of all retreaded tyres from these countries is legal, and not just the importation of remoulded tyres.[839]

4.373 The European Communities also argues that Brazil's claim is also at odds with its reply to the Panel's question No. 30, where it explains that "because Portaria SECEX 14/2004 is a foreign trade regulation, it employs the HS terminology", and concludes that the "terms 'used' and 'retreaded tyres' refer, respectively, to HS tariff lines 4012.20 and 4012.11, 4012.12, 4012.13, and 4012.19". The European Communities contends that the HS terminology does not distinguish between retreaded tyres depending on the process according to which they have been produced.[840]

4.374 However, the European Communities argues that even if the Panel were to conclude that the exemption only covers the specific type of retreaded tyres produced by "remoulding", there would still be a violation of Article XIII:1 and XI:1 to the extent that Brazil grants an advantage to these

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[834] Brazil's first written submission, executive summary, para. 36; Brazil's first oral statement, executive summary, para. 21.

[835] European Communities' first oral statement, executive summary, para. 29; European Communities' first written submission, executive summary, para. 58.

[836] European Communities' first oral statement, executive summary, para. 29.

[837] European Communities' second written submission, executive summary, para. 119.

[838] European Communities' second written submission, executive summary, para. 120.

[839] European Communities' second written submission, executive summary, para. 121.

[840] European Communities' second written submission, executive summary, para. 122.

specific products from MERCOSUR countries which it does not extend to the products of other WTO Members.[841]

4.375 Further, as regards Brazil's claim that it is working with its MERCOSUR partners to eliminate the MERCOSUR exemption, the European Communities considers that these remarks are irrelevant for the purposes of deciding this dispute. The European Communities submits that the measure at issue is the MERCOSUR exemption as in force at the date of establishment of the Panel. The European Communities contends that whether this exemption might be removed at some date in the future is not only entirely speculative, but also irrelevant for the purposes of the findings and conclusions which this Panel must make.[842]

4.376 The European Communities submits that, moreover, Brazil's claim that it would "soon be allowed to prohibit retreaded tyre imports from other Mercosul countries" is also entirely unsupported. The European Communities notes that Brazil has submitted a draft MERCOSUR agreement on waste policy. However, the European Communities argues that apart from the fact that this agreement is not yet in force, this agreement would only apply to used tyres, not to retreaded tyres. The European Communities sees no basis for Brazil's statement that it "would soon be allowed to prohibit retreaded tyre imports from other Mercosul countries". Moreover, in the European Communities' view, it does not appear likely that Uruguay, after having obtained the right to export retreaded tyres to Brazil and Argentina through two MERCOSUR dispute settlement proceedings, would agree to a prohibition of these same exports.[843]

4.377 According to **Brazil**, the MERCOSUR exemption is justified by Articles XX(d) and XXIV.[844]

2. Article XXIV

4.378 **Brazil** submits that it exempted MERCOSUR countries from the ban and the anti-circumvention fines to comply with a ruling by a MERCOSUR tribunal. Brazil states that because Uruguay only challenged the ban's application to remoulded tyres, the proceedings did not affect imports of other types of retreaded tyres and Brazil limited its exemption to the remoulded tyres.[845] Brazil contends that Article XXIV authorizes customs union members to adopt measures that would otherwise be contrary to their WTO obligations, provided that such measures do not raise trade barriers to non-parties.[846] Brazil argues further that the limited exemption did not raise Brazil's level of protection, but relaxed trade restriction for MERCOSUR partners.[847] Brazil argues that the MERCOSUR exemption is authorized under Article XXIV[848] and the European Communities has failed to rebut Brazil's defence of the limited exemption of MERCOSUR under Article XXIV.[849]

4.379 Brazil submits that with respect to Article XXIV, the two main arguments made by the European Communities and certain third parties are: first, that the members of MERCOSUR did not notify that customs union under Article XXIV; and second, they argue that Brazil has not

[841] European Communities' second written submission, executive summary, para. 123.
[842] European Communities' second oral statement, executive summary, para. 79.
[843] European Communities' second oral statement, executive summary, para. 79.
[844] Brazil's first written submission, executive summary, para. 17.
[845] Brazil's first written submission, para. 77 (Exhibit BRA-74).
[846] See GATT 1994, Art. XXIV:5, 8.
[847] Brazil's first written submission, executive summary, para. 33.
[848] Brazil's first written submission, executive summary, para. 33; Brazil's first oral statement, executive summary, paras. 11, 18.
[849] Brazil's first oral concluding statement, executive summary, p. 4.

demonstrated that the limited exemption was introduced upon the formation of the customs union and that such formation would have been prevented if the exemption had not been introduced.[850]

4.380 The **European Communities** argues that the MERCOSUR exemption cannot be justified under Article XXIV.[851] The European Communities submits that Brazil appears to be arguing that the import ban and fines on the importation of retreaded tyres are justified under Article XX. However, in the European Communities' view, measures which are permitted under Article XX are explicitly excluded by Article XXIV:8(a)(i) from the requirement to eliminate restrictive regulations of commerce with respect to substantially all trade. Accordingly, for the European Communities, an exemption from a measure which is justified under Article XX cannot be "necessary" within the meaning of Article XXIV:5.[852] Furthermore, the European Communities argues that Brazil has not shown that the MERCOSUR exemption was necessary for allowing the formation of MERCOSUR. In particular, Brazil has failed to explain why it could be necessary to exempt its MERCOSUR partners from a measure which it claims is necessary for the purposes of protecting human life and health, and which Article XXIV:8 explicitly exempts from the need to liberalise internal trade.[853]

4.381 The European Communities argues that there is therefore a fundamental logical contradiction in the measures adopted by Brazil with respect to retreaded tyres. The European Communities contends that if Brazil was right in arguing that the ban and fines on the importation of retreaded tyres are justified under Article XX, then the ban and the fines should be imposed on imports from all countries, including from other MERCOSUR members. On the other hand, if the ban and fines are not justified under Article XX, the European Communities submits that not only MERCOSUR members should be exempted from them, but all WTO Members.[854]

4.382 The European Communities argues that the only applicable exception which could be invoked would appear to be Article XXIV:5. The European Communities is of the view that it would be for Brazil to invoke this provision, and to establish that its conditions are met.[855] The European Communities argues that in order for a measure to be justified under Article XXIV:5, the defending party must fulfil the two conditions set out by the Appellate Body in *Turkey – Textiles*: 1) it must demonstrate that the measure is introduced upon the formation of a customs union that fully meets the requirements of Article XXIV:8(a) and 5(a); and 2) it must establish that the formation of the customs union would have been prevented if it were not allowed to introduce the measure at issue.[856] In the present case, the European Communities contends that Brazil could not successfully invoke Article XXIV:5.[857]

(a) Whether MERCOSUR meets the requirements of Article XXIV

4.383 **Brazil** submits that MERCOSUR fully meets the conditions under Article XXIV because it is a customs union, whose members have liberalized substantially all trade among themselves, substantially harmonized duties and trade regulations for non-parties, and did not raise outside trade barriers.[858] Brazil notes that it has adduced evidence that establishes a prima facie case that

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[850] Brazil's first oral concluding statement, executive summary, p. 4.
[851] European Communities' second written submission, executive summary, para. 124.
[852] European Communities' first written submission, executive summary, para. 61.
[853] European Communities' second oral concluding statement, executive summary, para. 25.
[854] European Communities' first written submission, executive summary, para. 62.
[855] European Communities' first written submission, executive summary, para. 59.
[856] European Communities' first oral statement, executive summary, para. 30; European Communities' second written submission, executive summary, para. 124.
[857] European Communities' second oral concluding statement, executive summary, para. 24.
[858] Brazil's first oral statement, executive summary, para. 18; Brazil's first written submission, executive summary, para. 33.

MERCOSUR is a customs union that meets the conditions of paragraphs 5 and 8 of Article XXIV. Brazil contends that the European Communities has done nothing to rebut that prima facie case.[859]

4.384 The **European Communities** argues that Brazil must establish that MERCOSUR is a customs union that fully meets the requirements of Article XXIV:8(a) and 5(a). However, the European Communities claims that Brazil has merely asserted, without offering any further proof or argument, that the conditions of Article XXIV:8(a) are met by MERCOSUR.[860] The European Communities contends that Brazil has not taken any position on the condition of Article XXIV:5(a). The European Communities argues that submissions of Brazil do not seem sufficient to enable the Panel to determine whether the conditions of Article XXIV:8(a) and 5(a) are met.[861] The European Communities claims further that Brazil has failed to demonstrate that MERCOSUR is a customs union which is in full accordance with the requirements of Article XXIV:5 and 8. Instead, the European Communities contends that Brazil appears to believe to be able to establish these requirements by simple force of assertion. However, as the European Communities has shown, there are numerous open questions as to the fulfilment by MERCOSUR of the requirements of Article XXIV.[862]

(i) The notification requirement under Article XXIV:7

4.385 **Brazil** submits that the European Communities and certain third parties have argued that MERCOSUR was not notified pursuant to Article XXIV:7[863], and, as a consequence, Brazil cannot invoke Article XXIV as a justification for the exemption.[864] Brazil notes, first of all, that Article XXIV:7 does not provide formal requirements concerning the obligation to notify CONTRACTING PARTIES of the formation of a customs union.[865] Brazil argues further that there is nothing in Article XXIV:7 that says that the notification must explicitly state that the information is being provided pursuant to the Article.

4.386 In any event, as a factual and legal matter, Brazil submits that MERCOSUR was notified to the CONTRACTING PARTIES in a manner that meets the notification obligation contained in Article XXIV:7.[866] Brazil submits that Argentina, Brazil, Paraguay and Uruguay notified the CONTRACTING PARTIES in March 1992 that they had entered the Treaty of Asunción, with the objective of facilitating the creation of the necessary conditions for the establishment of a common market between the four countries.[867] Brazil argues that the effectiveness of that notification to inform the CONTRACTING PARTIES of the creation of the customs union, in accordance with Article XXIV:7, is evidenced by the fact that a Working Group was established to examine MERCOSUR "in light of the relevant provisions of the Enabling Clause and the GATT, including Article XXIV".[868]

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[859] Brazil's first oral concluding statement, executive summary, p. 5; Brazil's second written submission, executive summary, para. 38.

[860] European Communities' first oral statement, executive summary, para. 31; European Communities' second written submission, executive summary, para. 125.

[861] European Communities' first oral statement, executive summary, para. 31.

[862] European Communities' second oral concluding statement, executive summary, para. 24.

[863] Brazil's first oral concluding statement, executive summary, p. 4; second written submission, executive summary, para. 41.

[864] Brazil's second written submission, executive summary, para. 41.

[865] Brazil's first oral concluding statement, executive summary, p. 4.

[866] Brazil's first oral concluding statement, executive summary, p. 4.

[867] Brazil's first oral concluding statement, executive summary, p. 4.

[868] Brazil's first oral concluding statement, executive summary, p. 4; Brazil's second written submission, executive summary, para. 41.

(ii) The requirements of Article XXIV:8(a) and 5(a)

4.387 **Brazil** argues that the European Communities has explicitly acknowledged that MERCOSUR is a customs union[869] and that[870] MERCOSUR "has a common external tariff and a common external trade policy".[871] Brazil contends further that Article XXIV:8(a) requires internal liberalization with respect to "substantially all the trade" between the constituent territories and application of substantially the same external duties and other regulations to non-parties. Brazil argues that MERCOSUR meets these requirements, as the documents submitted to the Committee on Regional Trade Agreements (CRTA) demonstrate. Brazil submits that calculation of the weighted average duties was the last major hurdle in the examination of MERCOSUR by the CRTA, and the Committee Chairman has noted that the Committee[872] now appeared to have all the necessary information and that the examination would soon be concluded.[873]

4.388 Brazil explains that MERCOSUR is presently being examined by the CRTA[874] under Article XXIV.[875] Brazil notes that in 2005, the Secretariat completed calculations of the weighted average tariffs, which showed that they were not "on the whole" higher than before the formation (in fact, they fell from 12.5 per cent to 10.4 per cent).[876] Thus, Brazil argues that MERCOSUR meets the conditions of Article XXIV:5(a).[877]

4.389 Brazil notes that MERCOSUR is being examined by the CRTA under Article XXIV, and that the Members of the WTO, including the European Communities, have actively participated in that process. Brazil notes that the Committee has not completed its examination, but the same can be said of every other customs union and free trade agreement being examined by the Committee, including the European Communities.[878]

4.390 Brazil argues that it has demonstrated that MERCOSUR meets the requirements of Article XXIV:5 and 8. Brazil first points out that the Committee on Regional Trade Agreements has completed its factual inquiry on MERCOSUR, and that during the April 2006 meeting of the CRTA, the Committee Chairman noted that the Committee "seemed to have exhausted its factual inquiry," that the Secretariat would begin drafting the report on the examination of MERCOSUR, and that the examination would soon be concluded.[879] Brazil notes that in meetings of the CRTA, the European Communities has asked Brazil about how certain aspects of the customs union operate, but has not made any substantive objections.[880]

4.391 Brazil notes that in the context of this dispute, however, the European Communities argues that sugar and automotive sectors have not been fully liberalized. Brazil responds that as Argentina, acting as MERCOSUR's *president pro tempore*, pointed out at the April meeting, sugar's share of the intra- MERCOSUR trade is minimal – 0.001 per cent of the total. Argentina also explained that

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[869] Brazil's first oral concluding statement, executive summary, p. 4; Brazil's second written submission, executive summary, para. 38.

[870] See European Communities' answer to panel question No. 76.

[871] Brazil's second written submission, executive summary, para. 40.

[872] See Note on the Meeting of 3 April 2006, WT/COMTD/1/Add.16, at para. 14.

[873] Brazil's second written submission, executive summary, para. 40.

[874] See COM.TD/133.

[875] Brazil's first oral statement, executive summary, para. 18; Brazil's second written submission, executive summary, para. 39.

[876] See Committee on Regional Trade Agreements, WT/COMTD/1/Add.15, 24 May 2005, at 3.

[877] Brazil's second written submission, executive summary, para. 39.

[878] Brazil's first oral statement, para. 70 and second written submission, para. 170.

[879] Brazil's answer to panel question No. 132, citing WT/COMTD/1/Add.16, at para. 14 (Exhibit BRA-170).

[880] Brazil's answer to panel question No. 132.

MERCOSUR members are in the process of liberalizing the intra-MERCOSUR trade in the automotive sector under the MERCOSUR Automobile Policy.[881] Brazil notes that the bilateral agreements between MERCOSUR members have already led, in practice, to duty-free trade in almost one hundred per cent of the commerce in the auto sector. Brazil also notes that with respect to measures that affect extra-MERCOSUR imports and exports, Argentina submitted evidence to the CRTA indicating that MERCOSUR applies common external tariff to products in over 90 per cent of the tariff lines and has a specific timetable in place to cover the remaining categories of products by 2008.[882] Brazil argues that it can hardly be disputed that harmonizing external tariffs and regulations affecting more than 90 per cent of tariff lines amounts to application of "substantially the same duties and other regulations" under Article XXIV:8. Brazil also notes that extra-regional trade has increased by 239 per cent since the founding of MERCOSUR.[883]

4.392 Brazil also notes the European Communities' argument that MERCOSUR parties maintain "non-tariff barriers." Brazil states that the "non-tariff barrier" presented by the European Communities is the import ban on retreaded tyres, which is the subject to this dispute. Brazil again recalls that the ban was initially applied *erga omnes*, that it was not imposed on non-members as one step in the formation of MERCOSUR, and that it is justified by Article XX(b).[884]

4.393 The **European Communities** notes that Brazil has also claimed that the European Communities has recognised MERCOSUR as a customs union by engaging in negotiations of a "bi-regional free trade agreement".[885] The European Communities does not contest that the Treaty of Asuncion involves the establishment of a customs union in a general sense. However, for the European Communities, this is independent of the question whether MERCOSUR is fully in accordance with the conditions of Article XXIV:5(a) and 8(a). The European Communities argues that it is for Brazil, as the party invoking these provisions, to establish that the conditions of the exception are met. The European Communities contends that the negotiations for a bi-regional trade agreement between the European Communities and MERCOSUR are of no relevance in this context.[886]

4.394 The European Communities considers as surprising Brazil's assertion that it has recognised that the conditions of Article XXIV are fulfilled. Throughout the present proceedings, the European Communities has clearly and unambiguously stated that Brazil has failed to demonstrate that the conditions of Articles XXIV:5 and 8 are fulfilled. The European Communities is of the view that Brazil should not be allowed to escape its burden of proof by imputing statements to the European Communities.

4.395 The European Communities submits that Brazil has limited itself to the simple assertion that MERCOSUR is in compliance with Articles XXIV:5(a) and 8(a), without substantiating this with any sufficient evidence. The European Communities contends that Brazil has referred to "documents submitted by Brazil and its Mercosul partners" to the CRTA. However, the European Communities argues that Brazil does not identify the specific documents to which it refers, nor does it explain in which way they are relevant for establishing compliance with the conditions of Article XXIV:5 and 8. For the European Communities, this blanket reference does not constitute a sufficient way of discharging Brazil's burden of proof. Moreover, the European Communities is of the view that documents submitted to the Committee in 1995 to 1997 do not reflect the current state of affairs.

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[881] Brazil's answer to panel question No. 132, citing WT/COMTD/1/Add.17, at 2 (Exhibit EC-121). See also Exhibit BRA-171 and Exhibit BRA-172.

[882] Brazil's answer to panel question No. 132, citing WT/COMTD/1/Add.17, at 2 (Exhibit EC-121).

[883] Brazil's answer to panel question No. 132, citing WT/COMTD/1/Add.16 (Exhibit BRA-170).

[884] Brazil's answer to panel question No. 132.

[885] European Communities' second written submission, executive summary, para. 125.

[886] European Communities' second written submission, executive summary, para. 126.

4.396 The European Communities argues that despite the information submitted by Brazil and its MERCOSUR partners, the CRTA and the Committee on Trade and Development did not reach the conclusion that MERCOSUR is in compliance with Article XXIV. In fact, the European Communities points out that many WTO Members continue to express doubts about MERCOSUR's compliance with the conditions of this provision. The European Communities argues that it is therefore astonishing that Brazil would consider a blanket reference to the inconclusive discussions in the Committee sufficient for establishing the compatibility of MERCOSUR with Article XXIV.

4.397 Moreover, the European Communities argues that Article XXIV:8(a)(i) and (ii) requires that duties and other restrictive regulations of commerce must be eliminated with respect to substantially all trade between the members of the customs union, and that substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade with territories not included in the union.[887] It is noteworthy that for certain sectors, notably the automotive and the sugar sectors, trade has not been entirely liberalised within MERCOSUR. As the MERCOSUR member States have confirmed, the automotive sector alone accounts for approximately 29 per cent of intra-MERCOSUR trade. Accordingly, even without going into the further question of persisting internal non-tariff barriers, MERCOSUR does not seem to have achieved a liberalisation of "substantially all" intra-MERCOSUR trade as required by Article XXIV:8(a)(i).

4.398 Second, according to the European Communities, Article XXIV:8(a)(ii) requires that substantially the same duties and other regulations of commerce are applied by each of the members of the customs union to the trade with territories not included in the union. In this context, it is noted that the Contracting Parties of MERCOSUR have confirmed that there are exceptions to MERCOSUR's common external tariff which currently concern up to 10 per cent of the tariff lines according to the information given by the MERCOSUR member States. In addition, MERCOSUR member States maintain export duties and "other regulations of commerce" on trade with third countries that are not common to all MERCOSUR countries. Accordingly, it does not appear clear that MERCOSUR member States currently apply substantially the same duties and other regulations of commerce on trade with third countries.

4.399 The European Communities stresses that the failure to comply with the requirements of Article XXIV:8(a) could not be justified as part of an "interim arrangement" within the meaning of Article XXIV:5(c). Such an interim arrangement must lead to the formation of a customs union within a reasonable length of time. The Understanding on the Interpretation of Article XXIV provides that this reasonable length of time shall exceed 10 years only in exceptional cases. Since there appear to be no exceptional circumstances which would justify a longer transition period, this period has already expired for MERCOSUR.

4.400 In addition, the European Communities argues that Article XXIV:5(a) requires that the duties and restrictive regulations of commerce imposed on trade with certain parties shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce prior to the formation of the customs union. In this regard, the European Communities notes that Brazil has referred to calculations of weighted import tariff rates prepared by the WTO Secretariat. In this respect, the European Communities notes first of all that the calculations of the Secretariat show that the average weighted tariff rates have increased for three of the four MERCOSUR members. Moreover, the European Communities remarks that these calculations do not address non-tariff measures, as at issue in the present case. For the European Communities, this is significant, since, as the measure at issue in the present dispute illustrates, MERCOSUR countries continue to adopt non-tariff measures affecting extra-MERCOSUR imports and exports which are not reflected in the calculations of the WTO Secretariat.[888] The European Communities argues that Brazil has therefore

[887] European Communities' second written submission, executive summary, para. 127.
[888] European Communities' second written submission, executive summary, para. 128.

not demonstrated what is the situation for non-tariff measures, and whether these measures on the whole are not more restrictive than prior to the creation of MERCOSUR. The European Communities submits that the answer to this question is far from obvious. Moreover, the European Communities also notes that Article XXIV:5(a) concerns not only import duties, but also export duties. However, although MERCOSUR countries continue to impose export duties on certain products, the European Communities is of the view that these duties are not addressed in the calculations of the Secretariat either.

4.401 The European Communities also notes that despite several years of examination in the WTO Committee on Trade and Development, WTO Members have not reached agreement on whether MERCOSUR is compatible with Article XXIV.[889]

4.402 Finally, the European Communities submits that, as regards specifically the automotive sector, Brazil referred to a recent agreement liberalising this sector. However, the European Communities submits that the only agreement in this respect is a bilateral agreement between Argentina and Brazil which institutes a form of managed trade for the automotive sector. For the European Communities, this agreement does not amount to a liberalisation of trade within MERCOSUR.[890]

(b) Whether the formation of the customs union would have been prevented if brazil were not allowed to introduce the measure at issue

4.403 **Brazil** claims that it has adduced evidence that establishes a prima facie case that the MERCOSUR exemption is justified by Article XXIV. Brazil claims that the European Communities has done nothing to rebut that prima facie case.[891] Brazil notes that it has also demonstrated that it adopted the limited exemption of MERCOSUR countries from the ban and the anti-circumvention fines pursuant to its MERCOSUR obligations, after a MERCOSUR Ad Hoc Tribunal ruled that Brazil could not maintain the ban on other MERCOSUR countries. In order to comply with that award, and safeguard the integrity of MERCOSUR dispute settlement system, Brazil explains that it exempted only remoulded tyres imported from other MERCOSUR countries from the ban.[892]

4.404 Brazil submits that another argument presented by certain third parties[893] and half-heartedly endorsed by the European Communities is that Brazil has not demonstrated that it meets the two conditions set forth by the Appellate Body in *Turkey – Textiles*, including that the exemption is necessary to the formation of MERCOSUR.[894] Brazil is of the view that the analysis of the Appellate Body in that case, however, cannot be applied to the present dispute. In the present factual context and in line with the panel's findings in *US – Line Pipe*, Brazil is not required to demonstrate that the measure was "necessary" for the formation of the customs union. Brazil contends that the facts in this case are starkly different from those in *Turkey – Textiles*. Brazil also submits, as the panel in *United States – Line Pipe* made clear that *Turkey – Textiles* addressed a measure which imposed new restrictions.[895]

[889] European Communities' second written submission, executive summary, para. 129.
[890] European Communities' second oral concluding statement, executive summary, para. 24.
[891] Brazil's second written submission, executive summary, para. 38.
[892] Brazil's first oral concluding statement, executive summary, p. 5.
[893] See, e.g., Third Party Submission of Chinese Taipei, at paras. 11-13.
[894] Brazil's first oral statement, executive summary, para. 19; Brazil's first oral concluding statement, executive summary, pp. 4-5; Brazil's second written submission, executive summary, para. 42.
[895] Brazil's second written submission, executive summary, para. 42.

4.405 Brazil argues that unlike Turkey, Brazil is not invoking Article XXIV to justify measures raising barriers to the trade of other WTO Members.[896] Brazil submits that the measure in this case is the exemption of MERCOSUR countries from the ban; that is to say, it consists of lifting restrictions internally, within the territory of the customs union.[897] Brazil contends that it merely relaxed an already-existing restriction for its MERCOSUR partners. Brazil relies on Article XXIV not to justify a trade restriction for non-members, but to justify internal liberalization within a customs union. Therefore, Brazil is of the view that it does not need to demonstrate that the exemption is necessary for the formation of the customs union.[898]

4.406 Brazil contends that a more apposite case for the Panel's examination of Brazil's defence under Article XXIV is *United States – Line Pipe*, which considered whether the United States could exclude its NAFTA partners, Canada and Mexico, from the application of safeguard measures to other WTO Members. Brazil notes that the panel in that case noted the decision of the Appellate Body in *Turkey – Textiles* but distinguished the facts in each case. Brazil recalls that the Panel found, in paragraphs 7.144 to 7.146, that "the United States [was] entitled to rely on Article XXIV defence against Korea's claims under Articles I, XIII and XIX regarding the exclusion of imports from Canada and Mexico from the scope of the line pipe measures". Brazil notes that the Panel explained that in *Turkey – Textiles*, the Appellate Body had been addressing a measure which imposed new restrictions against third countries whereas in the *United States – Line Pipe* case, the measure was part of the elimination of duties and other restrictive regulations between parties to the free-trade agreement.[899]

4.407 Brazil also notes that the Panel concluded that it was "not at all convinced" that Members should be required to demonstrate the necessity of a measure related to internal liberalization.[900] Brazil argues that the same is true in this case. Similar to the facts in *United States – Line Pipe*, Brazil contends that in this case the measure at issue does not impose new restrictions against third countries but rather eliminates restrictive regulations between parties to the customs union.[901]

4.408 Contrary to what the European Communities says, Brazil submits that the Appellate Body did not overturn the finding of the *United States – Line Pipe* decision. Brazil argues that the Appellate Body said that it was moot and had no legal effect, but it did so based on entirely different grounds, which had nothing to do with the substance or soundness of the Panel's reasoning. Brazil submits that the reasons that led the Panel to reach that conclusion are equally applicable in this case. Brazil submits further that the factual differences that the European Communities points to have no relevance or importance for the main point that Brazil (and the *United States – Line Pipe*) made: in this case, Brazil has not imposed new restrictions on WTO Members.[902]

4.409 Finally, Brazil argues that contrary to the European Communities' claim, Article XXIV authorizes the MERCOSUR exemption and does not require a showing of necessity.[903]

4.410 The **European Communities** claims that Brazil must show that without the exclusion of MERCOSUR members from the import ban, the formation of MERCOSUR would have been

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[896] Brazil's first oral statement, executive summary, para. 19; Brazil's first oral concluding statement, executive summary, pp. 4-5; Brazil's second written submission, executive summary, para. 42.

[897] Brazil's first oral concluding statement, executive summary, pp. 4-5; Brazil's second written submission, executive summary, para. 42.

[898] Brazil's first oral statement, executive summary, para. 19.

[899] Brazil's first oral concluding statement, executive summary, p. 5.

[900] Panel Report on *US – Line Pipe*, para. 7.148.

[901] Brazil's first oral concluding statement, executive summary, p. 5; Brazil's second written submission, executive summary, para. 42.

[902] Brazil's second oral concluding statement, executive summary, para. 16.

[903] Brazil's second written submission, executive summary, para. 3.

prevented.[904] The European Communities argues that Brazil fails in demonstrating that the MERCOSUR exemption was necessary in order to allow the formation of the customs union, as required by Article XXIV:5.[905] As regards the second condition, Brazil has been unable to show the necessity of the MERCOSUR exemption, and has instead chosen to contest that it must demonstrate the necessity of the exemption. As a consequence, Brazil has failed to demonstrate that this exemption is justified under Article XXIV.

4.411 The European Communities notes Brazil's argument that the case law in *Turkey - Textiles* does not apply in the present case, because *Turkey – Textiles* concerned a new quantitative restriction on imports, whereas in the present case, Brazil exempted MERCOSUR countries from an "existing" ban on the importation of retreaded tyres.[906] The European Communities is of the view that this amounts to an unduly narrow interpretation of the Appellate Body's case law in *Turkey – Textiles*.[907] The European Communities argues that the conditions formulated by the Appellate Body in *Turkey - Textiles,* which are derived from the plain wording of Article XXIV:5, were formulated without any reference to the sequence in which the discrimination was introduced. For the European Communities, there is therefore no indication that the Appellate Body wanted to distinguish between cases where the restriction is imposed immediately on imports, without being imposed on goods from within the customs union, and cases where the restriction is first imposed on all goods, and then lifted for goods originating in the customs union.[908] The European Communities stresses that what is relevant is that in both cases, there is a difference in treatment which is incompatible with most-favoured nation obligations, and which therefore requires a justification under Article XXIV.[909]

4.412 Moreover, the European Communities submits that in support of its view, Brazil, relying mainly on the Panel in *US – Line Pipe*, has contested that it must demonstrate the necessity of the measure.[910] The European Communities submits that this reliance by Brazil on the Panel in *US – Line Pipe* is misplaced.[911] For the European Communities, the findings on which Brazil relies in the Panel Report in *US – Line Pipe* were explicitly declared "moot and as having no legal effect" by the Appellate Body in *US – Line Pipe*. The European Communities considers it odd that Brazil would ask the Panel not to "disturb" findings which the Appellate Body has already overturned.[912]

4.413 The European Communities submits further that the reliance by Brazil on *US – Line Pipe* is also unjustified in substance. The European Communities is of the view that the Panel in *US – Line Pipe* did not concern an exemption from a measure which is allegedly justified under Article XX, but rather the question whether the United States could exclude its NAFTA partners from the scope of a safeguard measure. However, for the European Communities, it is noteworthy that whereas Article XXIV:8(a)(i) specifically exempts measures justified under Article XX from the need to liberalise substantially all trade, it does not refer to Article XIX, which concerns safeguard measures.[913]

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[904] European Communities' second written submission, executive summary, para. 130.

[905] European Communities' first oral statement, executive summary, para. 33; European Communities' first written submission, executive summary, para. 60; European Communities' second written submission, executive summary, para. 135; second oral concluding statement, executive summary, para. 25.

[906] European Communities' first oral statement, executive summary, para. 32; European Communities' second written submission, executive summary, para. 130.

[907] European Communities' first oral statement, executive summary, para. 32.

[908] European Communities' first oral statement, executive summary, para. 32; European Communities' second written submission, executive summary, para. 131.

[909] European Communities' second written submission, executive summary, para. 131.

[910] European Communities' second oral statement, para. 68.

[911] European Communities' second oral statement, para. 69.

[912] European Communities' second oral statement, para. 69.

[913] European Communities' second oral statement, para. 70.

4.414 Finally, the European Communities argues that Brazil greatly over-interprets the findings of the Panel in *US – Line Pipe*. The European Communities submits that the Panel in that case stated that "if the alleged violation of GATT 1994 forms part of the elimination of 'duties and other restrictive regulations of commerce', there can be no question of whether it is necessary for the elimination of 'duties and other restrictive regulations of commerce'". In support, the European Communities notes the Panel's argument that the elimination of duties on one product (e.g. cars) could not be questioned by arguing that duties could be eliminated on another product (e.g. peanuts), since otherwise, it might never be possible to achieve the threshold of "substantially all trade".[914] For the European Communities, this reasoning manifestly has no application in the present case. The European Communities is not arguing that instead of liberalising intra-MERCOSUR trade in retreaded tyres, Brazil should have removed duties or restrictive regulations on some other product. Rather, the European Communities is arguing that if Brazil were correct that the ban on the importation of retreaded tyres is necessary for the protection of public health, then it is not necessary to remove this ban on imports from other MERCOSUR countries, which have precisely the same implications from the point of view of waste management or public health.[915]

4.415 The European Communities considers that its reasoning is supported by the explicit wording of Article XXIV:8(a), which explicitly excludes measures justified under Article XX from the need to liberalise trade within the customs union. Accordingly, the European Communities submits that an exemption from such measures cannot be necessary for the purposes of allowing the formation of a customs union. The European Communities argues that Brazil's interpretation, in contrast, fails to give any useful meaning to the explicit reference in Article XXIV:8(a) to Article XX. For the European Communities, this is not in accordance with the principle of effective treaty interpretation. The European Communities notes, as the Appellate Body has confirmed on numerous occasions, that this principle implies that the interpreter "must give meaning and effect to all the terms of the treaty", and may not "adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility".[916]

4.416 **Brazil** points to the difficulty of overextending the analysis of *Turkey – Textiles* to cover measures of internal liberalization that do not raise outside trade barriers, as the panel in *US – Line Pipe* recognized. Brazil contends that GATT Contracting Parties intended Article XXIV to be an effective tool of regional liberalization, not its death knell.[917] Brazil states that the MERCOSUR exemption is fully consistent with the purpose of customs unions and free trade agreements, which is to "facilitate trade between the constituent territories" of the union and eliminate "restrictive regulations of commerce … with substantially all the trade" between those territories.[918]

4.417 The **European Communities** submits that Brazil has also argued that "over-extending" the analysis of *Turkey – Textiles* could be the "death knell" of regional trade liberalisation. The European Communities does not see why it would be problematic for WTO Members to demonstrate the necessity of discrimination which results from the creation of a customs union or free trade area. Typically, the European Communities argues that this will be a reasonably straightforward exercise, given the requirement in Article XXIV:8(a) and (b) to eliminate tariffs and other restrictive regulations of commerce on substantially all trade between the members of the customs union or free trade area. That this is different in the present case, which involves a discriminatory application of

[914] European Communities' second oral statement, para. 71.
[915] European Communities' second oral statement, para. 72.
[916] European Communities' second oral statement, para. 73.
[917] Brazil's answer to panel question No. 78.
[918] Brazil's second written submission, para. 182.

measures purportedly justified under Article XX, is a different matter which, for the European Communities, confirms the usefulness of the necessity test.[919]

4.418 The European Communities contends that if Brazil's argument were accepted, Article XXIV would be turned into an almost limitless exception, which would allow parties to a customs union to take any measure derogating from WTO obligations without having to demonstrate that the measure is in fact necessary for the formation of the customs union.[920]

4.419 The European Communities argues that according to Article XXIV:4, the basic objective of a customs union is to facilitate trade between the constituent territories of the customs union, while not raising barriers to the trade with other WTO Members. For the European Communities, this objective is reflected in Article XXIV:8(a)(i), which requires that in principle, duties and restrictive regulations on trade should be abolished with respect to substantially all trade between the constituent members of the customs union.[921] However, the European Communities submits that Article XXIV:8(a)(i) explicitly exempts from this need to liberalise trade within the customs union a number of measures, including in particular those which are justified under Article XX. The European Communities argues that this means that the maintenance of restrictive regulations of commerce which are justified on the basis of Article XX does not prevent the formation of a customs union. In other words, the European Communities contends that the selective abolition of such measures only as regards trade with another member of the customs union is not necessary for the formation of a customs union.[922]

4.420 The European Communities argues that this is where the fundamental logical contradiction of Brazil's arguments lies. The European Communities remarks, as Korea and Chinese Taipei, that if, as Brazil argues, the import ban on retreaded tyres was indeed justified as a measure necessary to protect human life or health under Article XX(b), then there was no need to abolish this ban in trade with other MERCOSUR countries, since its maintenance was explicitly allowed by Article XXIV:8(a). The European Communities argues further that if, in contrast, the ban is not justified under Article XX(b), then it should be removed for all WTO Members, and not just for other MERCOSUR members.[923]

4.421 **Brazil** explains that the phrase "where necessary" gives WTO-Members that are part of a customs union the right to maintain duties and other restrictive regulations between the constituent territories, based *inter alia* on the general exceptions in Article XX, and still meet the requirement under Article XXIV:8 that restrictions be eliminated with substantially all the trade between the constituent territories. However, Brazil argues, Article XXIV:8 does not *require* or impose the obligation on customs union members to maintain trade restrictions by invoking Article XX. To Brazil, that interpretation of the parenthetical in Article XXIV:8(a) would contradict the very purpose behind the formation of customs unions – which is to eliminate trade barriers among members – and be contrary to Article XXIV, which encourages the highest level of internal liberalization ("eliminated with respect to substantially all the trade").[924]

4.422 The **European Communities** notes that Brazil has contested this interpretation by arguing that Article XXIV:8 "does not *require* or impose the obligation on customs union members to maintain trade restrictions by invoking Article XX". The European Communities argues that the

[919] European Communities' second written submission, executive summary, para. 133.
[920] European Communities' second written submission, executive summary, para. 134.
[921] European Communities' first oral statement, executive summary, para. 33; European Communities' second written submission, executive summary, para. 136.
[922] European Communities' first oral statement, executive summary, para. 33; European Communities' second written submission, executive summary, para. 137.
[923] European Communities' first oral statement, executive summary, para. 34; European Communities' second written submission, executive summary, para. 138.
[924] Brazil's answer to panel question No. 80.

question is not whether Article XXIV requires the maintenance of trade restrictions based on Article XX, but whether it requires their elimination. The European Communities argues further that since it does not do the latter, it can therefore also not be invoked in order to justify the selective elimination of such trade restrictions only with respect to trade with other members of the customs union.[925]

4.423 Finally, the European Communities argues that the necessity of the MERCOSUR exemption is also put into doubt by the sequencing of the measures adopted by Brazil. It should be recalled that MERCOSUR was concluded in 1991, when imports of retreaded tyres into Brazil took place both from the European Communities and from other MERCOSUR countries. The European Communities submits that the ban on imports of retreaded tyres was adopted by Brazil only in 2000, and then partially lifted for imports from MERCOSUR countries in March 2002. The European Communities notes, as Chinese Taipei has aptly remarked, that Brazil cannot claim that the introduction of these measures, which were adopted several years after the conclusion of MERCOSUR, was necessary for the formation of the customs union.[926] In fact, the European Communities submits that since at the formation of MERCOSUR, trade in retreaded tyres was free of any quantitative restrictions, no further measures regarding this product were necessary to allow the formation of the customs union.[927]

4.424 **Brazil** states that in the present case, the sequencing of measures demonstrates that Brazil did not engage in unjustifiable and arbitrary discrimination. Brazil explains that it maintained an import prohibition that applied to imports of *all* countries; when Uruguay challenged the prohibition in MERCOSUR, Brazil vigorously defended the ban before the MERCOSUR Ad Hoc Tribunal. Brazil states that it was only after the MERCOSUR tribunal ruled against Brazil, that Brazil exempted MERCOSUR members from the ban, and only to the minimum extent required. Brazil concludes that, if anything, the sequencing of Brazil's measures demonstrates that Brazil's goal has always been intent on protecting public health and the environment by applying the import ban as rigorously and comprehensively as possible.[928]

3. Article XX(d)

4.425 **Brazil** submits that the MERCOSUR exemption is also justified by Article XX(d)[929], which permits WTO Members to adopt and enforce measures "necessary to secure compliance with laws or regulations" not inconsistent with the GATT. Brazil argues that the measure must be[930] "designed to 'secure compliance'" and must be "'necessary' to secure such compliance."[931] Brazil explains that its import prohibition on retreaded tyres does not apply to the constituent territories of MERCOSUR. Brazil submits that it exempted its MERCOSUR partners from the ban after a MERCOSUR tribunal ruled that the ban violated the customs union's internal trade rules and ordered the exemption. Brazil further submits that because the decision was limited to tyres retreaded by remoulding, Brazil continued to prohibit imports of the other kinds of retreaded tyres. Brazil argues that the exemption is thus limited.[932]

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[925] European Communities' second written submission, executive summary, para. 139.

[926] European Communities' first oral statement, executive summary, para. 35; European Communities' second written submission, executive summary, para. 140.

[927] European Communities' second written submission, executive summary, para. 140.

[928] Brazil's answer to panel question No. 79.

[929] Brazil's first written submission, executive summary, paras. 34-35; European Communities' first oral statement, executive summary, para. 20; second written submission, executive summary, para. 43.

[930] Appellate Body Report on *Korea – Beef*, at para. 157. See also Appellate Body Report on *Mexico – Taxes on Soft Drinks*, para. 67.

[931] Brazil's first written submission, executive summary, para. 34.

[932] Brazil's first written submission, executive summary, para. 15.

4.426 Brazil argues that it enacted the MERCOSUR exemption with no other purpose than to "secure compliance" with Brazil's municipal law that made the MERCOSUR commitments and the rulings[933] of the MERCOSUR dispute settlement body binding on Brazil. In the Article XX(d) sense, Brazil is of the view that the exemption was thus "necessary to secure compliance with laws and regulations", with laws that are themselves consistent with the GATT.[934] Brazil contends that the exemption is also consistent with the chapeau of Article XX: Brazil introduced the exemption not to favour fellow MERCOSUR countries, but to comply with a ruling of an international tribunal; it also limited the exemption to remoulded tyres (a subcategory of retreaded tyres).[935]

4.427 Brazil recalls that the Appellate Body has made clear that for purposes of Article XX(d), "the terms 'laws or regulations' cover rules that form part of the domestic legal system of a WTO Member, including rules deriving from international agreements that have been incorporated into the domestic legal system".[936] Brazil argues that, with respect to Article XX(d), the only disagreement between the European Communities and Brazil is whether the term "to secure compliance with laws or regulations" applies to the government's compliance with international obligations: the European Communities argues that it does not, and that the term "to secure compliance" means to enforce laws or regulations "as regard other actors, typically natural or legal persons" rather than by the government itself.[937]

4.428 Brazil notes that the only case that the European Communities cites in support of its argument is *EEC – Parts and Components*.[938] Brazil notes that according to the European Communities, that case confirms that the terms "to secure compliance" in Article XX(d) "imply that compliance is 'secured' by the governmental authorities against other subjects in the domestic legal order."[939] Brazil is of the view that this case confirms no such thing. Brazil argues that the passage cited by the European Communities simply notes that Article XX(d) covers only laws and regulations "that require enforcement," that is laws that give rise to legal obligations. For Brazil, there is no suggestion that only obligations that fall on individuals, as opposed to the State, are relevant and within the scope of that provision.[940]

4.429 Brazil argues that the Appellate Body's interpretation of Article XX(d) in *Mexico – Taxes on Soft Drinks* confirms that there is no basis for the European Communities' position.[941] Brazil submits that the Appellate Body made no distinction between laws and regulations that are to be enforced as regards "individuals" (natural or legal persons), as opposed to "governments."[942] Brazil argues that it has explained in its second written submission that the term "to secure compliance" of Article XX(d) covers not only individuals but also governments. Brazil notes that, in its second written submission, the European Communities also argues that Brazil did not incorporate its MERCOSUR obligations

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[933] See Protocol of Brasilia, Art. 20 (Exhibit BRA-89), Decreto Legislativo 88/1992 (Exhibit BRA-76). Brazil's original regulation that exempted MERCOSUR imports, Portaria SECEX 2/2002, specifically stated that its goal was to bring Brazil into compliance with the tribunal's ruling.

[934] Brazil's first written submission, executive summary, para. 35; Brazil's first oral statement, executive summary, para. 20.

[935] Brazil's first written submission, executive summary, para. 35.

[936] Appellate Body Report on *Mexico – Soft Drinks*, para. 79. Brazil's first written submission, executive summary, para. 34.

[937] European Communities' answer to panel question No. 83.

[938] See European Communities' First Oral Statement, at para. 135 (citing GATT Panel Report on *European Economic Community – Regulation on Imports of Parts and Components ("EEC – Parts and Components)*, L/6657, adopted 16 May 1990, BISD 37S/132, para. 5.18).

[939] European Communities' first oral statement, para. 135.

[940] Brazil's second written submission, executive summary, para. 43.

[941] Appellate Body Report on *Mexico – Taxes on Soft Drinks*, para. 79.

[942] See Appellate Body Report on *Mexico – Taxes on Soft Drinks*, para. 79. Brazil's second written submission, executive summary, para. 44.

and that, to conclusively establish this fact, Brazil must produce court decisions striking down incompatible internal laws.[943] Brazil argues that according to the European Communities' logic, a government that complies with its international obligations without being prodded by its courts could never prove that international obligations have been incorporated.[944]

4.430 Brazil notes the European Communities' argument that if Brazil's position was accepted, the Members could violate WTO provisions by reaching international agreements. That is not Brazil's argument. Brazil argues that in order to meet the requirements of Article XX(d), the challenged measure must be necessary to secure compliance with laws and regulations that *themselves* are not inconsistent with GATT provisions. Brazil argues further that in its interpretation of Article XX(d) and its incorrect reading of the Appellate Body's decision in *Mexico – Taxes on Soft Drinks*, it is clear that the European Communities confuses "direct effect" with incorporation into domestic law. Brazil contends that a law may have direct effect in a country, and yet be incorporated into domestic law. Brazil argues that the Appellate Body in *Mexico – Taxes on Soft Drinks* clearly noted that distinction when it said that "laws and regulations" cover "rules that form part of the domestic legal system of a WTO Member, including rules deriving from international agreements that have been incorporated into the domestic legal system of a WTO Member or have direct effect according to that WTO Member's legal system".[945]

4.431 Brazil also contends that the European Communities' suggestion that Brazil could have implemented the MERCOSUR Ad Hoc Tribunal's ruling by lifting the import ban to all WTO Members, as opposed to only MERCOSUR countries, highlights the European Communities' complete disregard for Brazil's policy and the seriousness of the health and environmental problems it seeks to solve through the import ban.[946]

4.432 Presently, Brazil explains that it has a legal obligation to comply with the MERCOSUR tribunal's ruling. However, Brazil submits that it is actively working with its MERCOSUR partners on a common waste policy and expects that it will soon be allowed to prohibit retreaded tyre imports from other MERCOSUR countries. Brazil submits further that during their March 2006 meeting, the environmental ministers of the MERCOSUR countries approved a draft agreement on waste policy, which designates used tyres as a special waste, recognizes the principle of non-generation, and establishes as one of its objectives "[discouragement of] the entry into the region of wastes and products from third countries that imply an environmental problem."[947]

4.433 The **European Communities** submits that the MERCOSUR exemption cannot be justified under Article XX(d). The European Communities notes that Brazil has argued that the exemption was necessary to "secure compliance" with the ruling of the Arbitral Tribunal in the dispute Brazil vs. Uruguay, which had found the import ban on retreaded tyres to be incompatible with Brazil's obligations under MERCOSUR.[948] However, for the European Communities, this argument is equally

[943] See Brazil's Second Written Submission, at para. 244.
[944] Brazil's second oral statement, executive summary, para. 24.
[945] Brazil's second oral concluding statement, executive summary, para. 17.
[946] Brazil's second oral concluding statement, executive summary, para. 18.
[947] Draft Decision: Agreement on the MERCOSUR Policy for Environmental Management of Special Universal Wastes and Post Consumer Responsibility, included as Annex IV to Minutes of the First Extraordinary Meeting of Environmental Ministers of MERCOSUR in Curitiba, 29 March 2006 (Exhibit BRA-155). Brazil's second written submission, executive summary, para. 45.
[948] European Communities' first oral statement, executive summary, para. 36; European Communities' second written submission, executive summary, para. 141.

unfounded because the exemption of MERCOSUR imports from such a ban is not a measure "necessary to secure compliance with laws or regulations" within the meaning of Article XX (d).[949]

4.434 First, the European Communities contends that the obligation to comply with the ruling of the Arbitral Tribunal is not contained in a "law or regulation" within the meaning of Article XX(d). The European Communities submits that in *Mexico – Taxes on Soft Drinks*, the Appellate Body found that the term "laws and regulations" covered "rules that form part of the domestic legal system of a WTO Member, including rules deriving from international agreements that have been incorporated into the domestic legal system of a WTO Member or have direct effect according to that WTO Member's legal system".[950]

4.435 The European Communities contends that by contrast, Brazil has shown neither that the obligation to comply with rulings of MERCOSUR Arbitral Tribunals – as contained in Article 21.2 of the Protocol of Brasilia – has been incorporated nor that it has direct effect into the Brazilian legal order.[951] In its first written submission, the European Communities notes that Brazil argued that the Protocol of Brasilia was contained in Brazilian legislative decree 88/1992, concerning the conclusion of the Protocol of Brasilia. The European Communities argues that when it pointed out that this Decree does not "contain" the obligation set out in Article 21.2 of the Protocol of Brasilia, but merely approves the Protocol on behalf of Brazil, Brazil changed its reasoning and now refers to a subsequent Presidential decree as the measure incorporating the Protocol into the Brazilian legal order.[952]

4.436 For the European Communities, this explanation remains unconvincing. The European Communities argues that like legislative decree 88/1992, the presidential decree is part of the Brazilian ratification process with respect to the Protocol of Brazil. The European Communities is of the view that Brazil has not shown that this Decree will render the Protocol of Brasilia, and in particular Article 21.2 thereof, applicable within the domestic legal order in such a way that it could be invoked by individuals, or enforced as against them.[953]

4.437 In order to prove its point, the European Communities argues that Brazil should have provided examples where Brazilian courts have, on the basis of Article 21.2 of the Protocol of Brasilia set aside Brazilian laws because they were incompatible with a ruling of a MERCOSUR arbitral tribunal. However, the European Communities points out that Brazil has not provided any such examples.[954] In particular, the European Communities submits that Brazil has not provided evidence that Brazilian courts have relied on Article 21.2 of the Protocol in order to set aside Brazilian laws, such as for instance Portaria 8/2000. In fact, the European Communities argues that Brazil's own practice disproves its arguments. The European Communities submits that after the MERCOSUR Arbitral Tribunal had issued its ruling, Brazil adopted a specific measure, namely Portaria Secex 2 of 8 March 2002, which exempted imports from other MERCOSUR countries from the import ban. The European Communities submits further that accordingly, Brazil did not simply leave it to its courts or administrative authorities to apply Article 21.2 of the Protocol of Brasilia in conjunction with the ruling of the MERCOSUR Arbitral Tribunal.[955]

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[949] European Communities' first oral statement, executive summary, para. 36; European Communities' second written submission, executive summary, para. 142.

[950] European Communities' first oral statement, executive summary, para. 37; European Communities' second written submission, executive summary, para. 143.

[951] European Communities' first oral statement, executive summary, para. 37; European Communities' second written submission, executive summary, para. 144.

[952] European Communities' second written submission, executive summary, para. 144.

[953] European Communities' second written submission, executive summary, para. 145.

[954] European Communities' second written submission, executive summary, para. 146.

[955] European Communities' second written submission, executive summary, para. 147.

4.438 **Brazil** notes the European Communities' argument that Article XX(d) does not justify the MERCOSUR exemption because Brazil has not shown that it had incorporated its MERCOSUR obligations into its domestic law. Brazil responds that it has presented to the Panel legislative and presidential decrees, which unambiguously incorporate the MERCOSUR obligations; Brazil has also confirmed this fact at the First Panel Meeting. Brazil notes the European Communities' argument that to conclusively establish this fact, Brazil must produce court decisions striking down incompatible internal laws. Brazil responds that the European Communities' argument is grounded neither in international law, nor in Brazilian law, nor in reason. Brazil states that according to the European Communities' logic, a government that complies with its international obligations without being prodded by its courts could never prove that international obligations have been incorporated.[956]

4.439 Second, the **European Communities** argues that Brazil's measure is not intended to "secure compliance" with Article 21.2 of the Protocol of Brasilia. The European Communities contends that the terms "to secure compliance" in Article XX(d) imply that compliance is "secured" by the governmental authorities against other subjects in the domestic legal order. In other words, for the European Communities, Article XX(d) covers measures through which the public authorities enforce laws and regulations in the domestic legal system, as it was confirmed by the GATT Panel in *EEC - Parts and Components*.[957]

4.440 The European Communities contends that Brazil has misrepresented its argument by claiming that the European Communities "attempts to differentiate between laws that bind private parties ... and laws that bind the State or its organs". The European Communities notes that it is not distinguishing between different kinds of laws, but between the acts of "complying with" and "securing compliance with". The European Communities submits that Brazil is effectively proposing that Article XX(d) be interpreted as referring to measures "necessary to comply with laws and regulations". However, for the European Communities, the term "to secure" in Article XX(d) cannot simply be omitted, and must thus be given a useful meaning.[958] The European Communities argues that if all the terms of Article XX(d) are supposed to have a useful meaning, "securing compliance" must mean something other than "complying", namely that the compliance is achieved by persons which are separate of the actor which is "securing" the compliance. In other words, for the European Communities, measures adopted under Article XX(d) are *enforcement* measures.

4.441 The European Communities argues that this is also illustrated by the concrete examples given in Article XX(d). The European Communities notes, as the Appellate Body has confirmed, that those matters typically involve the regulation by the government of activity undertaken by economic operators. The European Communities is of the view that the fact that Article XX(d) covers only enforcement measures was also confirmed by the GATT Panel in *EEC – Parts and Components*.[959]

4.442 The European Communities argues further that the fact that the Appellate Body in *Mexico - Taxes on Soft Drinks* has held that laws and regulations may also include rules deriving from international agreements is not incompatible with this interpretation. The European Communities contends that international agreements may also deal with matters which require enforcement in the internal legal order of WTO Members. For the European Communities, if such an agreement, rather than being transposed through internal legislation, is directly applicable in the domestic legal order, then it may also be the subject of enforcement measures within the meaning of Article XX(d).[960]

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[956] Brazil's second oral statement, para. 116.

[957] European Communities' first oral statement, executive summary, para. 38; European Communities' second written submission, executive summary, para. 148.

[958] European Communities' second written submission, executive summary, para. 149.

[959] European Communities' second written submission, executive summary, para. 150.

[960] European Communities' second written submission, executive summary, para. 151.

4.443 The European Communities submits that in the present case, by lifting the ban on imports from other MERCOSUR countries, the Brazilian authorities were not enforcing and "securing compliance" with the ruling of the Arbitral Tribunal by anyone else. The European Communities argues rather that Brazil was in fact simply "complying" with its obligations under international law, in this case under MERCOSUR.[961] Thereby, the European Communities argues that Brazil confuses the notions of "securing compliance" and "complying".

4.444 The European Communities stresses that accepting the interpretation of Brazil would have far-reaching and pernicious consequences for the multilateral trading system, since any measure taken to comply with an international agreement, be it bilateral or multilateral, would be justified under Article XX(d).[962] The European Communities argues that WTO Members could in the future grant each other advantages without having to justify this under Article XXIV, provided only that they have agreed to do so in an international agreement which forms part of their domestic legal order. For the European Communities, this would mean that wherever two WTO Members grant each other advantages through conclusion of an international agreement, they could rely on Article XX(d) to justify these advantages.[963] The European Communities is of the view that such an interpretation would mean the end of a cornerstone of WTO legal order, namely the most-favoured nation principle enshrined, *inter alia*, in Article I:1 and XIII:1.[964] The European Communities is of the view that this was certainly not the intention of the Appellate Body in *Mexico – Soft Drinks* when it confirmed that international agreements under certain conditions might also constitute "laws and regulations" within the meaning of Article XX(d). The European Communities argues that the Panel should not follow a reasoning which would be profoundly damaging to the multilateral trading system.[965]

4.445 **Brazil** argues that WTO Members cannot justify otherwise inconsistent measures by simply concluding agreements with other Members that provide for discriminatory treatment. Brazil explains that the hypothetical agreement between the Members that the European Communities refers to would still have to meet the requirements of Article XXIV for it to justify discriminatory treatment that is contrary to Article I:1. Brazil notes that Article XXIV contains safeguards ensuring that only bona fide customs union parties could invoke the Article to justify prima facie discriminatory treatment. The high burden of Article XXIV, Brazil argues, ensures against any potential abuse.[966]

4.446 The **European Communities** submits that it would at the same time make redundant the specific conditions for customs unions and free trade agreements contained in Article XXIV.[967] For the European Communities, it is clear that such an interpretation of Article XX(d) cannot have been within the intention of the drafters of the WTO Agreements.[968] Similarly, the European Communities argues that the question would arise why the European Communities had to obtain a waiver under Article IX:1 of the WTO Agreement in order to justify the preferential treatment it was obliged to grant to the ACP countries under the Lomé and Cotonou Agreements. If Brazil's reasoning was correct, the European Communities contends that then these waivers were legally superfluous, since

[961] European Communities' first oral statement, executive summary, para. 38; European Communities' second written submission, executive summary, para. 152.
[962] European Communities' first oral statement, executive summary, para. 39; European Communities' second written submission, executive summary, para. 153.
[963] European Communities' first oral statement, executive summary, para. 39.
[964] European Communities' first oral statement, executive summary, para. 39; European Communities' second written submission, executive summary, para. 153; European Communities' second oral concluding statement, executive summary, para. 26.
[965] European Communities' first oral statement, executive summary, para. 39; European Communities' second oral concluding statement, executive summary, para. 26.
[966] Brazil's answer to panel question No. 50.
[967] European Communities' first oral statement, executive summary, para. 39; European Communities' second written submission, executive summary, para. 154.
[968] European Communities' first oral statement, executive summary, para. 39.

the European Communities could simply have invoked Article XX(d) to justify any measure necessary to comply with its obligations under the Cotonou Agreement.[969]

4.447 Third, the European Communities submits that Brazil's measure could also not be "necessary" in order to secure compliance with laws or regulations. The European Communities argues that the determination of whether a measure is "necessary" involves a weighing and balancing a number of factors, including *inter alia* the existence of alternative measures. The European Communities contends that in the present case, as certain third parties have also remarked, there was a clear alternative available to Brazil: in order to comply with its MERCOSUR obligations, it could have lifted the ban on imports from all WTO Members, rather than only on imports from other MERCOSUR countries.[970] Accordingly, Brazil had a reasonable alternative available which it failed to take.

4.448 Finally, the European Communities stresses that the MERCOSUR exemption would also not fulfil the requirements of the chapeau of Article XX. In particular, as already explained in respect to Article XX(b), the MERCOSUR exemption constitutes an unjustifiable and arbitrary discrimination between countries where the same conditions prevail.[971] This is particularly obvious since Brazil even allows the imports of tyres from MERCOSUR countries which are made from used tyres originating in the European Communities.

4. The Enabling Clause

4.449 **Brazil** did not defend its measures under the Enabling Clause.

4.450 The **European Communities** claims that Brazil could not invoke the Enabling Clause, either. The European Communities submits that the Enabling Clause constitutes an exemption from Article I:1. However, the European Communities contends that the exemption of Brazil's MERCOSUR partners from the ban and the fines are not only incompatible with Article I:1, but equally with Article XIII:1. The European Communities notes that in accordance with the Appellate Body's conclusion in *EC – Bananas*, Articles I:1 and XIII:1 are distinct obligations. Therefore, the European Communities argues that the Enabling Clause cannot be interpreted to justify violations of Article XIII:1.[972]

4.451 Moreover, the European Communities argues that the CONTRACTING PARTIES have not established the criteria and conditions applicable to the elimination of non-tariff measures under paragraph 2(c) of the Enabling Clause. Accordingly, for the European Communities, the Enabling Clause cannot be invoked to justify the reduction or elimination of non-tariff measures such as an import ban.[973]

4.452 The European Communities argues further that Brazil's measures must also be regarded as creating undue difficulties for the trade of other parties contrary to paragraph 3(a) of the Enabling Clause. In addition, the European Communities argues that with its measure, Brazil is also impeding the elimination of restrictions to trade on a most-favoured nation basis contrary to paragraph 3(b) of the Enabling Clause.[974]

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[969] European Communities' second written submission, executive summary, para. 154.
[970] European Communities' second written submission, executive summary, para. 155.
[971] European Communities' first oral statement, executive summary, para. 40; European Communities' second written submission, executive summary, para. 156.
[972] European Communities' first written submission, executive summary, para. 63.
[973] European Communities' first written submission, executive summary, para. 64.
[974] European Communities' first written submission, executive summary, para. 65.

V. ARGUMENTS OF THIRD PARTIES[975]

A. ARGENTINA'S ORAL STATEMENT[976]

5.1 Argentina addresses a number of issues relating to the admissibility of the exception invoked under Article XX(b), with regard to the interpretation of the legal requirements for invoking that exception, and the possibility for a MERCOSUR member country to invoke the exception provided for in Article XXIV.5.

1. Conditions for the application of Article XX(b)

5.2 Argentina deems it relevant to examine the actual conditions of the exception under paragraph (b) namely: (i) that the policy pursued by the measure in question should come within the scope of policies designed to protect human, animal or plant life or health, and (ii) that the measure in question should be "necessary" to fulfil the objective of that policy.

(a) Policy for the protection of human, animal or plant life or health

5.3 Concerning the first point, it may be recalled that, in the *EC – Asbestos* case[977], the Appellate Body held that every WTO Member has the "right to determine a level of protection of health that [it considers] appropriate in a given situation". The Appellate Body also stated that "there is no requirement under Article XX(b) to quantify, as such, the risk to human life or health (emphasis added).

5.4 Argentina notes that, in analysing the exception provided for in Article XX(b) with respect to the measures at issue, the European Communities maintains that "... there are no differences between retreaded tyres and new tyres that would be relevant for the question at issue".[978] (Emphasis added)

5.5 Argentina does not share this view and considers that there are fundamental differences between retreaded and new tyres. Such differences are relevant for analysing and weighing the increase in waste materials generated by the massive importation of retreaded tyres and, hence, for the conditions of application of the Article XX(b) exception, as is explained below.

5.6 The European Communities maintains in its written submission that retreaded tyres "are as safe and durable as new tyres"[979], that they "are comparable to new tyres in all aspects of performance, quality, safety, and durability"[980], and that "retreaded and new tyres can be substituted with one another".[981]

5.7 However, Argentina considers that these assertions do not properly reflect the reality. Thus, with regard to:

- Performance, quality, safety and durability: from the technical standpoint, the lifespan of retreaded tyres is approximately 30 per cent of that of new tyres. A reconstructed tyre (despite having the appearance of a new tyre) continues to exhibit the limitations caused by the ageing of the basic component: the used tyre.

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[975] The summaries of third parties' arguments are based on the executive summaries submitted by third parties to the Panel, where available. Footnotes in this section are those of third parties.

[976] This oral statement was originally made in Spanish.

[977] Appellate Body Report on *EC – Asbestos*, paras. 167-168.

[978] European Communities' first written submission, para. 102.

[979] European Communities' first written submission, section D.

[980] European Communities' first written submission, para. 32.

[981] European Communities' first written submission, para. 46.

- Consumer prices: these technical differences have a logical correlation to other aspects of the retreaded tyre, such as the consumer price gap between a new tyre and a retreaded one. This disparity, together with those referred to above in respect of durability, quality, safety and performance, contradicts the European Communities' position that a retread is comparable to a new tyre and is enough to explain the marked discrepancy in sales figures for the two types of tyre.

- Tariff classification: in the Harmonized System, retreaded and used tyres come under the same tariff heading (4012), while new tyres are classified under a different heading (4011).

5.8 Moreover, the European Communities itself clearly distinguishes, within its internal market, between new tyres and used tyres or tyres reprocessed from used tyres, by means of regulations specific to each category. And it even recognizes that: "There are no types of retreaded tyres as they are products remanufactured from used tyres. In addition, they are not new products as such, as they are remanufactured products and, therefore, they are not put into circulation on the market for the first time."[982]

5.9 Consequently, in view of all the differences mentioned, including some highlighted by the European Communities itself, Argentina considers that it is no way possible to consider a retreaded tyre as equivalent to a new tyre. Argentina thus deems it important to draw the Panel's attention to this point for the sake of a proper analysis of the conditions governing application of the exception provided for in Article XX(b) in respect of the measures at issue.

(b) The measure is "necessary" to protect human health and the environment

5.10 The determination relating to the "necessity" of an allegedly inconsistent measure requires a process of "weighing and balancing" a series of factors, which must be looked at collectively, i.e. in terms of the relative weight of the interests or values protected by the measure, the degree to which the measure contributes to the realization of the end pursued and the degree to which the measure produces restrictive effects on international commerce. Essentially, on this point, Argentina considers that the Panel cannot fail to note the developing country status of one of the parties involved in the "factual context"[983] of this dispute.

5.11 In this connection, the Appellate Body's jurisprudence makes it clear that the party relying on the Article XX(b) exception has the burden of establishing prima facie that no less trade-restrictive alternatives were "reasonably available". However, in the *US – Gambling* dispute, the Appellate Body held that an alternative is not reasonably available where it is merely theoretical in nature, either because the Member concerned is not capable of applying it, or where the alternative measure imposes an undue burden on that Member, owing to its prohibitive cost or technical complexity.[984]

5.12 In Argentina's view, when a developing country invokes Article XX (b), the necessity test and the "reasonably available" alternatives must be looked at in the light of the actual possibilities available to developing countries, and in particular their economic cost and technical complexity in relation to the scarcity of financial and technical resources characteristic of such countries.

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[982] "Explanatory memorandum to the Proposal for a Council Decision presented by the Commission, amending Decisions 2001/507/EC and 2001/509/EC. Decision approved by the Council of Ministers in March 2006. COM (2004) 774 final, 2004/0271 (AVC).

[983] Appellate Body Report on *US – Gasoline*, p. 18.

[984] Appellate Body Report on *US – Gambling*, para. 308.

5.13 In the present case, Argentina considers that Brazil has amply demonstrated that, as a developing country, it had no reasonably available alternatives to banning imports of retreaded tyres in order to maintain a manageable stockpile of waste tyres, so that final disposal would not adversely affect public health and the environment. The adoption by Brazil of alternative measures to the ban on imports of retreaded tyres would have made it impossible in practice to attain the desired level of protection of health and the environment.

2. MERCOSUR and Article XXIV

5.14 Argentina challenges the assertion by the United States, in its third party submission, that MERCOSUR could not be covered by Article XXIV.5 since it was notified under the Enabling Clause.

5.15 In this connection, as is indicated by the European Communities, although MERCOSUR was notified under the Enabling Clause, the terms of reference of the Committee on Trade and Development, under which MERCOSUR is examined, include both the Enabling Clause and Article XXIV.[985] Furthermore, MERCOSUR has been subjected to four rounds of review in the Committee on Regional Trade Agreements, and in May 2005 the WTO Secretariat circulated document WT/COMTD/1/Add.15 containing the evaluation of the general incidence of MERCOSUR customs duties, in accordance with the provisions of paragraph 2 of the Understanding on the Interpretation of Article XXIV, which refers expressly to the evaluation of customs unions under paragraph 5(a) of Article XXIV.

B. AUSTRALIA'S ORAL STATEMENT

5.16 Australia joined this dispute as a third party in view of its systemic interests in the questions under consideration by the Panel. Australia therefore refrains from taking a position on the specific facts of this dispute.

5.17 In Australia's view, the panel's determination of the Article XX and Article XXIV issues before it in this dispute will be of significance for Members. GATT 1994 is of vital importance to WTO Members– it specifies Members rights and responsibilities with regard to international trade in goods. Article XX offers Members important exceptions from other GATT provisions, where the application of a measure is justifiable in order to achieve a particular policy objective – meeting all the requirements both of the specific exception cited and the chapeau to Article XX. The application of Article XX to a measure is of critical significance, in that such an outcome permits a Member to derogate from the GATT rules on trade in goods. Accordingly, each exception made under Article XX requires cautious weighing of Members' rights, and careful application of the Article XX exceptions and the chapeau.

5.18 Australia does not offer an assessment as to whether the challenged Brazilian measure satisfies the requirements of Article XX. The resolution of this question will require the Panel to determine complex factual and legal issues. In undertaking this task, Australia encourages the Panel to evaluate carefully the factual evidence before it, including by drawing on expert opinion as necessary.

5.19 As to the legal issues, Australia notes that the Appellate Body has clarified significant aspects of the operation of Article XX. In particular, Australia draws the attention of the Panel to the

[985] The terms of reference for the review of MERCOSUR, as contained in document WT/COMTD/5/Rev.1 of 25 October 1995, are "to examine the Southern Common Market Agreement, (MERCOSUR) in the light of the relevant provisions of the Enabling Clause and of the GATT 1994, including Article XXIV ... ".

Appellate Body's jurisprudence concerning the interpretation and application of the chapeau of Article XX. The Panel's views on whether Brazil's measures can pass the tests set out in the chapeau will be important in this case. In relation to Brazil's reliance on Article XX(b), Australia notes that it claims the obligation to comply with the MERCOSUR arbitral decision means that its discrimination between MERCOSUR Members and other WTO Members is neither arbitrary nor unjustifiable in the terms of the chapeau to Article XX. Australia encourages the Panel to apply carefully the terms of the chapeau, mindful of the broad purpose – namely, the prevention of abuse of the general exceptions listed under Article XX paragraphs (a) to (g). The implementation of the MERCOSUR arbitral decision is also of relevance to Brazil's arguments concerning the application of Article XX(d). The Panel will need to consider carefully whether Article XX(d) covers arbitral decisions such as this.

5.20 Brazil's submission also raises the interpretation and application of Article XXIV. Australia notes that there is limited Appellate Body jurisprudence on this provision. Accordingly, the Panel may be required to traverse new ground in dealing with the arguments of the Parties on Article XXIV. The questions arising include:

(a) What is the scope of the requirements of Article XXIV:5(a) and XXIV:8(a) and their application in time?;

(b) Is MERCOSUR a customs union which has met these requirements as between its Members and as between its Members and other WTO Members? and

(c) How are the challenged measures to be assessed against these requirements?

5.21 Australia recognises that this dispute may also present an opportunity for the Panel to clarify the relationship between Articles XX and XXIV.

C. CHINA'S WRITTEN SUBMISSION AND ORAL STATEMENT

5.22 The People's Republic of China notes that it is needless to stress the importance of the present dispute. It concerns how WTO Members can protect the environment and human health in a manner consistent with WTO obligation. China focuses its submission on the subject "product" of this dispute and the analytical approaches related to Article XX(b) and (d) and Article XXIV.

1. The product

5.23 The subject product of this dispute is really special. It is not a totally newly manufactured product. It is not a used product, either. Rather, a reconditioned product is a product which could be used like a "new" one whereas with a shorter lifespan.

5.24 Tyres are indispensable for modern human society, and on the other side, waste tyres could pose a serious threat to environment. It seems both parties of this dispute agree that retreaded tyres are not equivalent to waste tyres while the main difference between a retreaded tyre and a new tyre is that the former has a shorter lifespan. Specifically, both parties mention that passenger car tyres can only be retreaded once and other tyres, such as commercial vehicle tyres and airplane tyres can be retreaded for several times.[986] Accordingly, it is important for the panel to ascertain the interchangeability of retreaded tyres with new ones. China believes that it is necessary for the panel to investigate the nature of the retreaded tyres in depth before it continues its legal analysis.

[986] See paragraph 16 of Brazil's first written submission and paragraph 23 of the European Communities' first written submission.

2. Issues under Article XX(b)

5.25 In this dispute, Brail invoked Article XX(b) to justify its measures under dispute. According to WTO jurisprudence, it is the party who is to invoke the exceptions contained in Article XX to assume the burden of proof.[987] With respect to paragraph (b) of Article XX, the defendant should establish two elements:

(a) There is a policy designed to protect human, animal or plant life or health; and

(b) the inconsistent measures for which the exception is being invoked were necessary to fulfil the policy objective.[988]

5.26 Furthermore, the Appellate Body has established that the analysis of justification protection of Article XX is two-tiered, that is, the measure at issue must not only come under one or another of the particular exceptions under paragraphs (a) to (j) listed under Article XX, it must also satisfy the requirements imposed by the chapeau of Article XX.[989] The chapeau required that the measure should not constitute arbitrary or unjustifiable discrimination or disguised restriction on international trade.

5.27 Such sequence of analysis should be followed in this dispute because exceptions under Article XX are invoked. Moreover, in the examination of the measures at issue in this case, China thinks it is proper for the Panel to take into consideration the ever-growing attention given to environmental protection among the international community and in WTO itself. The preamble of Marrakech Agreement declares that one objective of WTO is to pursue "the optimal use of the world's resources in accordance with the objective of sustainable development" and "seeking both to protect and preserve the environment". Under the guidance of these statements, the Appellate Body, in several disputes, accepted the identification of certain disputed measures with environmental concern as under paragraph (b) of Article XX.[990]

3. The MERCOSUR exemption

5.28 Brazil's ban and restriction on the importation of retreated tyres do not apply to other members of MERCOSUR and Brazil cited Article XXIV and Article XX(d) to justify the exemption. To China's understanding, the question of whether the exemption is justified would arise only after the import ban itself being determined by the Panel to be legitimate. If the import ban itself is found to be inconsistent with Brazil's WTO obligation, the Panel does not need to touch the MERCOSUR exemption at all.

5.29 According to the Appellate Body, Article XXIV may justify a measure that is inconsistent with certain other GATT provisions when two conditions are fulfilled:

5.30 First, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV. And, second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue.[991]

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[987] Appellate Body Report on *US-Gasoline* pp. 22-23.
[988] Panel Report on *US-Gasoline*, para. 6.20.
[989] Appellate Body Report on *US-Gasoline*, p. 22.
[990] For example, in the cases of *US-Gasoline*, and *US – Shrimp*.
[991] Appellate Body Report on *Turkey – Textiles*, para. 58.

5.31 In China's view, jurisprudence set up by the Appellate Body in the *Turkey-Textiles* case seems to apply to the scenario of a measure being introduced upon the formation of a customs union, which is different from the present case. Clearly, Brazil introduced the import ban of retreaded tyres after the formation of MERCOSUR, rather than upon the formation of the customs union. It remains to be decided by the panel what kind of conditions should be met by Brazil in order to invoke Article XXIV as a justification of its measures.

5.32 Furthermore, China notices that measures which are permitted under Article XX are explicitly excluded by Article XXIV:8(a)(i) from the requirement to eliminate restrictive regulations of commerce with respect to substantially all trade. Therefore, if Brazilian import ban is exempted by Article XX from the discipline of Article XI:1, Brazil is entitled to impose the ban on all importing sources, including other MERCOSUR members. What needs to be examined by the Panel is whether Brazil could further rely on Article XXIV as an exception clause to exempt its exclusion of MERCOSUR members from the import ban which might otherwise violate the most favoured nation treatment principle contained in Article I. China believes that the finding on this issue to be rendered by this Panel will definitely have systematic implication on further disputes.

5.33 Brazil also invoked Article XX(d) to justify the exemption for MERCOSUR countries. According to the Appellate Body, a Member intending to rely on Article XX(d) must show that (1) the measure is "designed to 'secure compliance' with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994," and (2) the measure is "'necessary' to secure such compliance."[992]

5.34 Brazil submitted that the subject exemption is to secure the compliance with a ruling of MERCOSUR Ad Hoc Tribunal and Brazilian domestic laws regulation that implemented the MERCOSUR Treaty.[993] A systematic issue that might emerge in this context is whether the obligation of a WTO Member under international treaties could be deemed its municipal law and constitutes the "laws or regulations" under Article XX(d). This needs the Panel to clarify.

5.35 On this point, China noted that Article XX(d) requires that the "laws and regulations" being secured must be WTO-consistent. Hence, Article XX(d) does not cover all pieces of "laws and regulations" without condition.

5.36 As the facts submitted by both parties show, it seems that the ruling of MERCOSUR Ad Hoc Tribunal only prohibits Brazil's import ban for imports of retreaded tyres from other MERCOSUR members, but does not authorize Brazil's import ban on other WTO members. China has stated above that the essence of this dispute is that whether the import ban against non-members is WTO-consistent and the MERCOSUR Tribunal's decision has little relevance to such ban.

4. Conclusion

5.37 China hopes that the Panel will give considerations to the fact that the defending party in this case is a developing country. In fact, developing countries are facing more difficulties than developed countries in balancing their economic development and environment protection. In addition, in dealing with environmental problems, developing countries usually are less sufficient in terms of funding and less efficient in terms of technology. Therefore, the multilateral trade system should give more support and tolerance to developing countries' endeavour to improve the environment.

[992] Appellate Body Report on *Korea – Beef*, at para. 157.
[993] See pp. 61-63 of Brazil's first written submission

D. CUBA'S ORAL STATEMENT[994]

5.38 Cuba has a systemic interest in the dispute under consideration and shares Brazil's concerns regarding the harmful effects on the environment and human health resulting from the accumulation and destruction of retreaded tyres.

5.39 Retreaded tyres are tyres that have been used and remoulded so that they can be used again, after which they become waste products. Their mass manufacture and the difficulties in disposing of them after use constitute one of the world's most serious environmental problems of recent years. Tyres need large amounts of energy for their manufacture and also cause environmental pollution if not properly recycled, as they are usually consigned to unregulated landfills.

5.40 Retreaded tyre waste is frequently eliminated by means of direct burning which causes serious environmental problems through smoke-induced air, water and ground contamination. Stockpiling also has seriously detrimental effects. The high volume of such tyres, the difficulty of disposal in landfills and the ease of exposure to water – which, when stagnant, promotes the proliferation of various disease-carrying insects – result in problems of stability and safety caused by their partial chemical degradation. The mountains of stored tyres are breeding grounds for rodents, insects and other animals, and this is an additional problem. Certain mosquitoes whose bite transmits fever and encephalitis are 4,000 times more likely to reproduce in the stagnant water in a tyre than in nature. Retreaded tyres may also start fires in landfills when methane gas is present, producing large quantities of hydrocarbons and emissions harmful to the atmosphere.

5.41 Obviously, each country has to bear the cost of disposing of waste generated on its territory, and this explains why many developed countries appear to promote exports of used and retreaded tyres. However, wastes of this kind should not be eliminated by transferring them to other countries. Retreaded tyres are much cheaper than new ones, and it is easy to see why underdeveloped countries are the main users of such tyres. As a result, their exportation is in practice tantamount to a transfer to other, essentially underdeveloped, countries of the social, economic and environmental burden implicit in the disposal of the waste they generate.

5.42 The position of the Brazilian Government appears to be somewhat similar to the position taken by the European Communities when in 1999 it adopted a Directive banning the disposal of whole tyres in landfills, and when in July 2006 it proposed to ban the disposal of cut or shredded tyres. The developed countries, the world's main users of means of transport, must find the most appropriate technological solution to prevent this type of waste from continuing to harm the environment. The worsening situation is exemplified by increasingly repetitive and severe natural disasters in different parts of the world, which means that the ill-conceived strategies of certain countries are damaging the global environment.

5.43 Cuba reiterates that all countries, whether or not they are Members of the WTO, have the right to adopt the measures they deem necessary to alleviate the harmful effects on the environment and human health caused by the growing accumulation of waste tyres. Having a healthy environment and thereby contributing to an improved quality of life and human health are fundamental rights enshrined in all the world's national constitutions. Accordingly, Cuba reiterates its support for the restrictive measures introduced by Brazil on imports of retreaded tyres, which are designed essentially to protect the environment and public health.

[994] This oral statement was originally made in Spanish.

E. JAPAN'S WRITTEN SUBMISSION AND ORAL STATEMENT

1. Inconsistency of Brazil's import ban on retreaded tyres with Article XI:1

5.44 Brazilian law Portaria SECEX 14/2004 provides that no import licenses shall be granted for the importation of retreaded tyres into Brazil, and based on the law Brazil has prohibited importation of the retreaded tyres from WTO Members, including the European Communities, other than MERCOSUR countries. With regard to general elimination of quantitative restrictions, Article XI:1 provides that "[n]o prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, *import or export licences* or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party (emphasis added)…". Therefore, Brazil's adoption of import ban is inconsistent with Article XI:1.

2. Inconsistency of the fines on importation, marketing, transportation, storage, keeping or warehousing of imported retreaded tyres with Article XI:1 or, in the alternative, Article III:4

5.45 Brazilian President Decree 3919 of 14 September 2001 provides the imposition of fine of R$400 per unit for importation, marketing, transportation, storage, keeping or warehousing of used and retreaded tyres. According to Brazil's first written submission, paragraph 157, such fines are imposed as an "anti-circumvention measure that safeguards the integrity of the import ban by penalizing traders that circumvent import controls". If this is the case, imposition of such fine for importation of retreaded tyres is nothing more than a part of quantitative restriction for trade, and therefore the fine is inconsistent with Article XI:1, which prohibits restrictions other than duties, taxes or other charges for the purpose of controlling the quantity of imports.

5.46 Besides, the fine is applied only to imported retreaded tyres and not to domestic ones. In this regard, Article III:4 provides the National Treatment requirements, and the Appellate Body in *Korea – Various Measures on Beef* has indicated that three elements should be examined in determining a measure's inconsistency with Article III:4: (i) whether imported and domestic products at issue are *"like products"*; (ii) whether the measure at issue is a *"law, regulation, or requirement"* affecting their internal sale, offering for sale, purchase, transportation, distribution, or use; and (iii) whether the imported products are accorded *"less favourable"* treatment than that accorded to like domestic products.

5.47 Regarding the first element, the Appellate Body in *EC-Asbestos* has stated the general criteria for determining the *likeness* mainly consists of (i) the properties, nature and quality of the products, (ii) the end-uses of the products, (iii) consumers' tastes and habits – more comprehensively termed consumers' perceptions and behaviour – in respect of the products, and (iv) the tariff classification of the products. The Appellate Body in *EC-Asbestos* has also stated that "under Article III:4, the term 'like products' is concerned with *competitive relationships* between and among products". (emphasis added)

5.48 Imported retreaded tyres and domestic retreaded tyres have the same physical characteristics and their end-uses are the same. In addition, since the adoption of the import ban: (i) the European Communities' exports of retreaded tyres to Brazil have declined dramatically and at the same time (ii) the European Communities' export of used tyres to be used by Brazil's domestic retreaders have increased rapidly. This shows that imported and domestic retreaded tyres are in a competitive relationship, and thus they should be deemed *like products* under Article III:4.

5.49 Regarding the second element, Brazil's imposition of the fine is based on the above mentioned Brazilian President Decree 3919 of 14 September 2001.

5.50 Finally, regarding the third element, imported retreaded tyres are obviously treated less favourable than domestic retreaded tyres because the fine is imposed only on imported retreaded tyres.

5.51 Therefore, Brazil's discriminatory imposition of the fine is, in the alternative, inconsistent with Article III:4.

3. Inconsistency of the restriction on the marketing for imported retreaded tyres at state level with Article III:4

5.52 Based on the Law 12.114 of 05.07.2004, Brazilian State of Rio Grande do Sul prohibits marketing of retreaded tyres produced outside Brazil, while the law does not prohibit the marketing of those produced in Brazil. Further, based on a recent amendment, used tyres, including retreaded tyres, imported from outside Brazil is subject to discriminatory obligation in disposal of unusable tyres. For the same reason argued above in Section 2, Japan considers that the State of Rio Grande do Sul's measure is also inconsistent with Article III:4 in light of the three elements set forth by the Appellate Body in *Korea – Various Measures on Beef*.

4. Applicability of Article XX to Brazil's measures on retreaded tyres

5.53 Brazil's measures may be justified, as Brazil has argued in its first written submission, when such measures satisfy the requirements of paragraph (b) or paragraph (d) and the chapeau of Article XX.

5.54 Regarding the methods of analysis concerning Article XX defence, the Appellate Body in *US – Gasoline* sets forth the two-tiered test: (i) first the measure at issue must come under one or another of the particular exceptions – paragraphs (a) to (j) – listed under Article XX; and then (ii) it must also satisfy the requirements imposed by the opening clause of Article XX.

5.55 According to the two-tiered test, this case should also be analyzed by examining the applicability of paragraph (b) and (d) first, and then the applicability of the chapeau of Article XX.

(a) Applicability of Article XX(b)

5.56 With regard to the applicability of Article XX(b), the WTO jurisprudence provides that the party invoking that provision must prove that: (i) the policy in respect of the measures for which the provision was invoked fell within the range of policies designed *to protect human, animal or plant life or health*; and (ii) the inconsistent measures for which the exception was being invoked were *necessary* to fulfil the policy objective

5.57 Concerning the first element, the panel in *EC – Asbestos* has stated that "…'policies designed to protect human life or health' imply the existence of a *health risk*. (emphasis added)" Japan believes that the Panel should follow the same approach adopted by the panel in *EC – Asbestos* in examining the applicability of Article XX(b) as a defence for the WTO consistency of Brazil's measures in question.

5.58 Regarding the health risk of retreaded tyres, it should be noted that there is a clear difference between asbestos and retreaded tyres; while the former itself contains very high risk for causing cancer and mesothelioma directly, the latter does not contain any risk for human health by itself, unless inappropriately disposed of. Retreaded tyres are stored, sold and then installed in vehicles, in the same way as new tyres. There is no health risk contained in retreaded tyres as new tyres are not harmful to health.

5.59 In any event, as the panel in *EC – Asbestos* conducted the analysis of a health risk with sufficient and various kinds of scientific evidence, this Panel should examine the applicability of Article XX(b) taking full account of a risk analysis based on a great deal of scientific evidence issued by credible international bodies and experts, which shows direct relationship between retreaded or waste tyres and health risk.

5.60 As regards the second element, the panel in *EC – Asbestos* has indicated, following the panel Report in *Thailand – Cigarettes*, that "…[the measure in question] could be considered to be 'necessary' in terms of Article XX(b) only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives." Besides, in relation to a determination of whether measures are "necessary" in the context of Article XX(d), the Appellate Body in *Dominican Republic – Import and Sale of Cigarettes* has set out the following three factors: (i) trade impact of the measure; (ii) importance of the interests protected by the measure; and (iii) contribution of the measure to the realization of the end pursued. In this case, Brazil fails to make a prima facie case on these necessity requirements.

5.61 *First*, Japan considers that Brazil's measures do not contribute to the pursued end. Brazil insists that the objective of its measures in question is to reduce the volume of waste tyres in its territory. However, according to the European Communities' first written submission, Brazil's importation of used tyres from the European Communities has increased dramatically year by year since the adoption of the ban, which Brazil has not rebutted in its first written submission. Accordingly, the total amount of imported tyres, including retreaded tyres and used tyres, from the European Communities has increased rather than decreased since the adoption of the import ban on retreaded tyres.

5.62 In this regard, Brazil has stated that although the Brazilian government adopted the restrictive measures for importation of both used and retreaded tyres, some court authorized used and retreaded tyres imports through preliminary injunctions. However, according to the Appellate Body in *US-Shrimp*, where it has indicated that a WTO Member bears responsibility for acts of all its departments of government, including its judiciary, Brazil can not bring domestic court decision for justifying the consequence of its measures in a WTO dispute.

5.63 Moreover, as quoted in paragraph 132 of the European Communities' first written submission, the Brazilian High Court of Justice ("Superior Tribunal de Justica") has judged on 12 December 2003 that there does not seem to be alleged injury to *public health* and that imports of retreaded tyres from MERCOSUR member countries be permitted. This fact undermines the argument of injury to the *public health*.

5.64 *Second*, Brazil's measures have the highest negative impact on trade because it is a total import ban. Concerning the determination on whether a measure has restrictive effects on trade, the panel in *Dominican Republic – Import and Sale of Cigarettes* has indicated that "…Honduras has still been able to export cigarettes to the Dominican Republic and, in fact, its exports have increased quite significantly over the last few years", and therefore "…the Panel may assume that the measure has not had any intense restrictive effects on trade." This indication by the panel supports the notion that whether imports are totally banned or not is an important criterion in considering a measure's impact on trade. In this case, the European Communities is totally forbidden to export retreaded tyres to Brazil and its export amount has reduced to reach close to zero in fact due to Brazil's import ban. When a Member employs a measure with the highest negative impact on trade and claims that such measure is justified under an exemption clause including Article XX, the Member is responsible for providing well-founded explanations that the introduction of the measure is worth the price of the measure's negative impact.

5.65 *Third*, Japan considers there exists alternative measures that Brazil could reasonably be expected to employ. Brazil's measures in question aim at reducing the volume of waste tyres in its territory. In light of such objective, Japan agrees with the European Communities' view that Brazil's regulation called Resolution CONAMA 258/1999 is one of the alternative measures. The regulation obligates domestic producers of new tyre and retreaded tyre importers to dispose waste tyres in specified proportions in an environmentally appropriate and safe manner. If the regulation enforced correctly, the volume of waste tyres left without being disposed of will not increase because the more retreaded tyres are imported, the more waste tyres are to be disposed of. The problem which needs to be addressed here is not the existence of used tyres or retreaded tyres itself but the existence of waste tyres which are left without being disposed of.

5.66 Brazil argues that the import ban is the best way to reduce the risk to human health resulting from waste tyres because there is no known completely safe disposal option. Although Brazil admits that there exist the least harmful disposal methods such as certain civil engineering use, crumbing, and devocalization, it insists that these methods are not practicable because of the cost. In this regard, there should still be several alternative measures. One of the examples is collecting disposal cost from domestic producers of the retreaded tyres, as well as retreaded tyre importers. Other example is recycling used retreaded tyres. In Japan, most of used tyres are recycled in various ways, about half of them are for fuels.

(b) Applicability of Article XX(d)

5.67 Brazil claims that "anti-circumvention fines" are justified by Article XX(d) because they are necessary to "secure compliance" with the import ban, which falls into, according to the Brazil's argument, the "laws or regulations which are not inconsistent with the provisions of the GATT 1994" under Article XX(d).

5.68 Brazil's argument is based on an unproved assumption that the import ban is justified by Article XX(b). Whether or not "laws or regulations [in question] are not inconsistent with the provisions of this Agreement" depends on the demonstration to meet not only the requirement of paragraphs (a) to (j) of Article XX, but also the criteria set forth in the chapeau of Article XX. Without a finding of consistency with the chapeau of Article XX, it cannot be found that laws or regulations are "not inconsistent with the provisions of the GATT 1994" in terms of Article XX(d). Thus, Brazil's argument is not well-grounded and therefore not persuasive.

(c) Applicability of the chapeau of Article XX

5.69 Even if, *arguendo*, the Panel finds that Brazil's measures satisfy the requirement of paragraph (b) or (d) of Article XX, it is still necessary for Brazil to prove that its measures also satisfy the requirement of the chapeau of Article XX.

5.70 Concerning the element of "unjustifiable discrimination", the Appellate Body in *US – Shrimp* has indicated that, among other things, "[c]learly, the United States negotiated seriously with some, but not with other Members (including the appellees), that export shrimp to the United States. The effect is plainly discriminatory and, in our view, unjustifiable." Although the Appellate Body did not indicate that a Member is required to have consultations with other Members in order to justify a measure under the Article XX, in light of the said Appellate Body's reasoning, it is still assumed that it was desirable for Brazil to have consulted with other Members which are major exporting countries of retreaded tyres as well when Brazil lifted the import ban on retreaded tyres only for MERCOSUR countries in accordance with the order of the MERCOSUR Ad Hoc Tribunal in 2002.

5. Brazil's limited exemption of MERCOSUR countries

(a) Inconsistency of the MERCOSUR exemption with Articles XIII:1 and I:1

5.71 Based on Article 40 of Portaria SECEX 14/2004, retreaded tyres imported from MERCOSUR countries are exempted from the import ban. Similarly, based on Presidential Decree 4592, retreaded tyres from these countries are exempted from the fines imposed on their importation, marketing, transportation, storage, keeping or warehousing.

5.72 Article XIII:1 sets forth that "…unless the importation of the like product of all third countries … is similarly prohibited or restricted", no prohibition or restriction shall be applied on the importation of any product. The MERCOSUR exemption contradicts to this condition and, therefore, is inconsistent with Article XIII:1. In addition, the MERCOSUR exemption is also inconsistent with Article I:1, which provides the Most-Favoured-Nation Treatment principle.

(b) Brazil's limited exemption of MERCOSUR countries is not justified by Article XXIV

5.73 In its first written submission, Brazil asserts that its MERCOSUR limited exemption from the import ban and the fines may be inconsistent with Article I or XIII, but it is justified by Article XXIV. Japan points out some defects contained in such assertion, setting aside the question whether MERCOSUR itself is WTO-consistent or not.

5.74 Firstly, Brazil argues that it is not necessary to examine the conditions indicated by the Appellate Body in *Turkey – Textiles* concerning the Article XXIV defence, because the exemption in question "did not raise trade-barriers to [the WTO Members not participating in MERCOSUR]". Japan does not see the reason why it is not necessary to examine the conditions when the measure in question did not raise trade-barriers to non-parties.

5.75 Such argument of Brazil seems to be based on its understanding that "... Article XXIV authorizes customs union members to adopt measures that would otherwise be contrary to their WTO obligations (such as most-favoured nation treatment obligation under Article I) provided that such measures do not raise trade-barriers to non-parties." The footnote to this remark refers to "GATT 1994, Art. XXIV 5, 8".

5.76 In *Turkey – Textiles*, the Appellate Body has conducted an analysis on Article XXIV defence, particularly through the interpretation of paragraphs 5 and 8 of the Article. Japan does not consider that the Appellate Body's analysis regarding these provisions supports the said explanation of Brazil. In *Turkey – Textiles*, the Appellate Body has indicated as follows. First, the term "shall not prevent" in the chapeau of paragraph 5 of Article XXIV shows that "Article XXIV may, under certain conditions, justify the adoption of a measure which is inconsistent with certain other GATT provisions, and may be invoked as a possible 'defence' to a finding of inconsistency." Next, the term "the formation of a customs union" in the same chapeau indicates that "Article XXIV can justify the adoption of a measure which is inconsistent with certain other GATT provisions only if the measure is introduced upon the formation of a customs union, and only to the extent that the formation of the customs union would be prevented if the introduction of the measure were not allowed." The term "customs union" here, of course, needs to be interpreted in the context of subparagraph 8(a) of Article XXIV, which provides the definition of the term. Third, the relevant proviso concerning the term "Provided that" in the chapeau of paragraph 5 of Article XXIV is set out in subparagraph 5(a) of the Article. The party invoking Article XXIV defence, therefore, needs to show that a customs union in question "meets the requirement in subparagraph 5(a) of Article XXIV relating the 'duties and other regulations of commerce' applied by the constituent members of the customs union to trade with third parties." Subparagraph 5(a) provides that the "duties and other regulations of commerce" imposed under a customs union, "shall not on the whole be higher or more

restrictive than the general incidence of the duties and regulations of commerce in the constituent territories prior to the formation of such union" in respect of trade with "[WTO Members] not parties to such union."

5.77 The Appellate Body's analysis mentioned so far indeed refers to the condition that a measure introduced under a customs union shall not be more restrictive than before in relation to the trade with non-parties to such union. However, the Appellate Body refers to it only as one of the conditions which needs to be satisfied among others in applying Article XXIV defence. Moreover, it has referred to such condition in relation to the time-line between before and after the formation of a customs union. In light of the Appellate Body's interpretation of paragraphs 5 and 8 of Article XXIV, therefore, it cannot be concluded that these provisions allow any measure to be justified only if the measure does not raise trade barriers to non-parties. Japan also notes that the Appellate Body has not mentioned that the conditions for the Article XXIV defence are required to be satisfied only when the measure in question raises trade-barriers to non-parties. Japan therefore does not agree to Brazil's explanation that the MERCOSUR limited exemption is automatically justified by paragraphs 5 and 8 of Article XXIV just because it did not raise trade-barriers to non-parties.

5.78 Secondly, Brazil asserts that the exemption was indispensable for the formation of MERCOSUR in preparation for a possible counterargument that Brazil should demonstrate the WTO consistency of the MERCOSUR limited exemption in the light of the conditions indicated by the Appellate Body in *Turkey – Textiles*. According to Brazil, it was Brazil's obligation under MERCOSUR to introduce such an exemption in accordance with the order by the MERCOSUR Ad Hoc Tribunal. Brazil claims that MERCOSUR's formation would have been prevented without MERCOSUR Members' compliance with its obligations.

5.79 Regarding such an explanation of Brazil, Japan points out first that Brazil touched upon only one of the conditions indicated by the Appellate Body in *Turkey-Textiles*. While Brazil provided a partial explanation on the condition that a measure can be introduced only to the extent necessary for the formation of the customs union, it did not mention at all on other requirements such as that "the measure at issue is introduced *upon the formation* of a customs union".

5.80 Further, with regard to the condition of "necessity", on which Brazil seems to have mentioned briefly, Japan considers that Brazil's explanation is far from enough. Brazil argues that it was required to exempt MERCOSUR countries from the import ban and the fines because of its obligation under MERCOSUR to comply with the order by the Ad Hoc Tribunal. Although Japan does not object to Brazil's compliance with its obligation under an international agreement other than the WTO Agreement, Japan believes that the MERCOSUR *limited* exemption was not the only way for Brazil to comply with the order of the Tribunal. In other words, Brazil could have complied with the Tribunal's order by lifting the import ban and the fines not only for MERCOSUR countries but also for all the other WTO Members in this case where the Ad Hoc Tribunal just found that Brazil's import ban was inconsistent with MERCOSUR agreement.

5.81 A similar argument occurred in *Turkey – Textiles* concerning this "necessity" requirement. In that case, the defendant claimed that the introduction of certain quantitative restrictions were necessary because the defendant would have been prevented from forming a customs union without the restrictions, and, therefore, such restrictions were justified by Article XXIV. The Appellate Body has declined the argument. It agreed with the panel in that not adopting the quantitative restrictions in question would not have prevented the formation of a customs union. It has also supported the panel's observation that there were other alternatives available to the defendant to form the customs union.

5.82 For the same reason indicated by the panel and the Appellate Body in *Turkey – Textiles*, Japan considers that the MERCOSUR limited exemption is not justified by Article XXIV because an alternative is available to Brazil for the formation of MERCOSUR. The formation of MERCOSUR

would not have been prevented even if Brazil had not introduced the exemption limited to MERCOSUR countries. Brazil could have introduced alternatively lifting the import ban and the fines to all the WTO Members, which also complies with the Ad Hoc Tribunal's order. As a member of not only MERCOSUR but also the WTO, Brazil is required to satisfy its obligations under both agreements at the same time.

5.83 For all the reasons mentioned so far, Japan considers that Brazil did not establish prima facie case in justifying the MERCOSUR limited exemption by Article XXIV.

(c) Brazil's limited exemption for MERCOSUR countries is not justified by Article XX(d)

5.84 In its first written submission, Brazil asserts that its MERCOSUR limited exemption is also justified by Article XX(d), because the exemption is the measure "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of [the GATT 1994]". Setting aside the question whether Brazil's municipal law falls under such laws or regulations, Japan considers that MERCOSUR limited exemption cannot be a measure "necessary" to comply with such laws or regulations. As has already mentioned in this statement, Japan believes that the MERCOSUR limited exemption was not the only way to comply with the municipal law or the Ad Hoc Tribunal's order, and therefore such an exemption does not satisfy the requirement of "necessity". Brazil could have alternatively lifted the import ban and the fines not only for MERCOSUR countries but also for the other WTO Members.

5.85 Relating to this point, the Appellate Body in *Korea – Various Measures on Beef* has indicated that the meaning of the term "necessary" in Article XX(d) has a range from that of "indispensable" or "of absolute necessity" to that of "making a contribution to". Japan believes that, in examining whether the MERCOSUR limited exemption is justified under Article XX(d), the term "necessary" means "indispensable" or "of absolute necessity" in the light of the obligation of the most-favoured-nation treatment under the WTO Agreement and the chapeau of Article XX.

5.86 Even if, *arguendo*, the Panel finds that Brazil's measures satisfy the requirement of paragraph (d) of Article XX, Brazil still needs to prove that its measures also satisfy the requirement of the chapeau of Article XX. The chapeau provides that a WTO Member may take measures which fall under any of the categories set forth in the Article "[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail". Japan does not see any reasons that justify or necessitate Brazil's discrimination between MERCOSUR countries and other WTO Members, both of which equally export retreaded tyres.

5.87 In this regard, decisions of the Ad Hoc Tribunal has no bearing with the WTO dispute settlement proceeding here. Thus, Brazil cannot justify the favourable treatment of MERCOSUR countries compared to other WTO Members.

5.88 Therefore, Japan considers that Brazil has not established a prima facie case in justifying the MERCOSUR limited exemption by Article XX(d) either.

5.89 In addition, relating to the chapeau of Article XX, Japan reiterates that Brazil did not make sufficient effort to consult with other non-MERCOSUR countries before or after the imposition of the measures in question. Contrary to the finding of the Appellate Body in *US – Gasoline* and *US - Shrimp*, non-MERCOSUR countries such as the European Communities or Japan did not even have any opportunity to participate in the discussion and consultation concerning the justifiability of the measure. In contrast, Brazil made serious effort to convince MERCOSUR countries in the course of the Ad Hoc Tribunal proceeding, obviously recognizing the need for concerted and cooperative efforts.

5.90 Assuming the existence of the emergent need to address a threat to human health and environment, Brazil should have pursued international cooperation through serious consultations with interested countries. By failing to engage in such consultation seeking for international cooperation "as far as possible," Brazil made an unjustifiable discrimination among WTO Members.

6. Conclusion

5.91 For the foregoing reasons, Japan considers that Brazil's measures are inconsistent with Articles I, III:4, XI and XIII and Brazil has not established prima facie case that such measures are justified by Articles XX or XXIV.

F. KOREA'S WRITTEN SUBMISSION AND ORAL STATEMENT

5.92 Korea considers that Brazil's measures affecting the imports of retreaded tyres are inconsistent with the relevant provisions of the GATT 1994 and cannot be justified under Articles XX or XXIV. Therefore, Korea generally supports the arguments raised by the European Communities in its First Written Submission.

1. Brazil's import ban on retreaded tyres cannot be justified under Article XX(b)

5.93 Korea considers that Brazil's import ban applied by Portaria SECEX 14/2004, is not justified by Article XX(b) because it is not a measure necessary to protect human, animal or plant life or health.

5.94 Korea will now examine whether the import ban is justified under both the requirements of Article XX(b) and the chapeau of Article XX.

5.95 Under Article XX(b), the Panel in *US-Gasoline* requires that Brazil prove that 1) the policy in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or plant life or health and 2) the otherwise inconsistent measures for which the exception was being invoked, were necessary to fulfill the policy objective.

5.96 In Korea's view it does not seem that banning the imports of retreaded tyres protects human life, health or the environment against the unnecessary generation of additional tyre waste. Certain imported new tyres and retreaded tyres from MERCOSUR that cannot be retreaded are being imported to accumulate as waste. Brazil also admits there are retreaded tyres that can be retreaded again but all retreaded tyres are banned under the import ban regardless. Therefore it does not seem that the import ban is designed to protect human life, health and environment to the extent the latter is being threatened by the generation of additional waste tyres.

5.97 Even if the Panel finds that Brazil has satisfied the first requirement, Brazil must still prove that the import ban is "necessary" to fulfill its objective. In determining whether a measure is "necessary," *Korea – Beef, EC – Asbestos,* and *Thailand – Cigarettes* indicate several factors that are weighed and balanced, including whether the measure contributes to the realization of the end pursued, and whether there is an alternative measure which could reasonably be expected to be employed that would achieve the same end and that is less trade restrictive than a prohibition.

5.98 In Korea's view the ban on imports of retreaded tyres does not seem to contribute to avoiding the unnecessary generation of additional tyre waste when new imported and domestic tyres, retreaded tyres from MERCOSUR and domestic retreaded tyres that cannot be retreaded are generating such waste despite the ban. Korea considers that the collecting and disposing of waste tyres provided for by the Resolutions CONAMA 258 and 301 of 26 August 1999 and 21 March 2002 respectively, which the European Communities sets forth as alternatives, would achieve the same end the import

ban seeks to fulfil of avoiding the generation of additional waste tyres. Korea believes that dealing with unusable tyres already accumulated and setting proportionate disposal requirements for all waste tyres for the importation or manufacture of tyres, not only deals with disposal but also the generation of waste tyres, providing a more effective, and less trade restrictive measure in avoiding the unnecessary generation of additional waste tyres in Brazil than the import ban. Therefore, Korea does not view the import ban as "necessary" in protecting human life, health or the environment from the unnecessary generation of additional waste tyres.

5.99 The import ban in Korea's view does not fulfil the requirements of the chapeau of Article XX. The chapeau requires that a measure shall not be applied in a manner which would 1) constitute a means of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" or 2) a "disguised restriction on international trade." In *US – Gasoline*, the Appellate Body stated that the "purpose and object of the introductory clauses of Article XX is generally the prevention of 'abuse of the exceptions of Article [XX]'." Jurisprudence has also imposed a reasonableness requirement.

5.100 The Appellate Body in *US – Shrimp* stated that:

> "in order for a measure to be applied in a manner which would constitute 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail,' three elements must exist. First, the application of the measure must result in *discrimination*... Second, the discrimination must be *arbitrary* or *unjustifiable* in character... Third, this discrimination must occur *between countries where the same conditions prevail*."

5.101 Brazil does not dispute the fact that the import ban results in discrimination. Applying the purpose and object of Article XX in interpreting "arbitrary" and "unjustifiable," these two terms can be seen to indicate measures that are not reasonable in nature and abusive in the application of Article XX(b). Although certain retreaded tyres that can be retreaded again would not contribute to the "unnecessary generation of additional rubber waste," all imported retreaded tyres are banned. Moreover, retreaded tyres from MERCOSUR are allowed. Korea considers that the import ban is "arbitrary" and "unjustifiable" in nature because of this unreasonable and abusive application of the import ban. Korea also considers that the import ban discriminates between countries where the same conditions prevail, since the ban does not apply to retreaded tyres from MERCOSUR.

5.102 The Appellate Body in *US – Gasoline* ruled that concepts of "arbitrary or unjustifiable discrimination" and "disguised restriction on international trade" were related concepts which "imparted meaning to one another" and "the fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exception to substantive rules available in Article XX." Thus, Korea considers the import ban as a disguised restriction on international trade pursuant to its discussions above.

2. Brazil's fines on importation, marketing, transportation, storage, keeping or warehousing of imported retreaded tyres cannot be justified under Articles XX(b) or XX(d)

5.103 Korea considers that the fines on importation, marketing, transportation, storage, keeping or warehousing of imported retreaded tyres applied through Presidential Decree 3919 and 4592 of 14 September 2001 and 11 February 2003 respectively, are not justified under Articles XX(b) or XX(d).

5.104 Korea considers that the fines do not meet the requirements of Article XX(b) nor the chapeau of Article XX as discussed above.

5.105 The Appellate Body in *Korea – Beef* provided for two requirements that the Member invoking Article XX(d) as a justification has the burden of meeting. First, it must be shown that "the measure must be one designed to 'secure compliance' with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994" and second that "the measure must be 'necessary' to secure such compliance."

5.106 Article XX(d) clearly provides that only those "laws or regulations which are *not inconsistent with the provisions of this Agreement* [emphasis added]" are justified under the exception of Article XX(d). Brazil argues that the import ban which it does not contest is inconsistent with the relevant articles of the GATT 1994, is justified by Article XX(b) and this makes the import ban "not inconsistent" with the GATT 1994. However, Korea believes that a measure which has already been deemed GATT inconsistent will not become consistent through the intermediary of an Article XX exception. Therefore, Korea considers that the fines cannot be justified under Article XX(d).

3. The State of Rio Grande do Sul's prohibition on marketing of imported retreaded tyres cannot be justified under Article XX(b)

5.107 Korea considers that State Rio Grande do Sul's prohibition on the marketing of imported retreaded tyres applied by Law 12.114 of 5 July 2004 and Law 12.381 of 28 November 2005 of the State Rio Grande do Sul are not justified under Article XX(b). Korea respectfully refers the Panel to the discussions above.

4. The MERCOSUR exemption from the import ban and fines cannot be justified under Articles XXIV:5 or XX(d)

5.108 In *Turkey – Textiles*, the Appellate Body set out a two-prong test for assessing whether Article XXIV may justify a measure inconsistent with other WTO provisions:

> "First, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs-union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV. And, second, that party must demonstrate that the formation of a customs union would be prevented if it were not allowed to introduce the measure at issue."

5.109 In regard to the second prong, Korea does not consider that were Brazil not allowed to introduce the import ban and fines, the formation of a customs union would be prevented. Article XXIV:8(a)(i) allows restrictive regulations that are justified under Article XX in the formation of a customs union. Therefore, arguing that the import ban and fines are necessary in the formation of a customs union while claiming that the import ban and fines are justified under Article XX raises a logical contradiction in Brazil's argument. Since the second prong is not satisfied, Korea considers that the MERCOSUR exemption cannot be justified by Article XXIV:5.

5.110 In Korea's view the MERCOSUR exemption also cannot be justified under Article XX(d). Brazil claims that the exemption to the import ban and fines are necessary to secure Brazil's compliance with its own laws and regulations which provide for the implementation of its MERCOSUR obligations, that by virtue of Articles XXIV:5 and 8 these laws and regulations are not inconsistent with GATT 1994. However, as discussed above, "laws or regulations" which can only be claimed, at most, to be justified under an exception of the GATT 1994, cannot be a basis for justification under Article XX(d). Therefore, Korea considers that the MERCOSUR exemption cannot be justified as an exception under Article XX(d).

5. Necessity requirement under Article XX(b)

5.111 In determining whether a measure is "necessary" under Article XX(b), *Korea – Beef, EC - Asbestos* and *Thailand – Cigarettes* indicate several factors that are weighed and balanced. Among them, in Korea's view, a critical factor is whether there is an alternative measure which could reasonably be expected to be employed that would achieve the same end and that is less trade restrictive than a prohibition. Korea believes that Brazil has failed to rebut the European Communities' argument that the Resolution CONAMA can be such an alternative.

5.112 The Resolution CONAMA sets certain proportionate disposal requirements of unusable tyres for the domestic manufacture of new tyres and importation of new and reconditioned tyres. Brazil argues that the Resolution CONAMA cannot be an alternative because the Resolution deals with the final "disposal" of waste tyres in Brazil whereas the import ban deals with the "generation" of waste tyres. However, in Korea's view, the Resolution CONAMA provides for the disposal as well as the "generation" of waste tyres. Disposal requirements for the import of new and retreaded tyres, and the manufacture of domestic new tyres, impose a high cost to the manufacture and imports of these tyres, decreasing the manufacture of new tyres and imports of new and retreaded tyres. Moreover, the absence of a disposal requirement on the production of domestic retreaded tyres will also reduce the amount of waste tyres by promoting the domestic retreading of tyres. Thus, in Korea's view, the Resolution CONAMA restricts the "generation" of waste tyres. Therefore, Korea believes, in protecting human, animal or plant life or health, the Resolution would be a more effective, less trade restrictive alternative.

6. Chapeau of Article XX

5.113 To satisfy the "arbitrary or unjustifiable discrimination" requirement of the chapeau of Article XX, which seeks to guarantee reasonable and non-abusive application of each of the exceptions, *US-Shrimp* provides that the measures must result in discrimination and the discrimination must be arbitrary or unjustifiable in character.

5.114 Brazil argues in its first submission that its exemption of MERCOSUR countries from the measures on imports of retreaded tyres is not "arbitrary or unjustifiable discrimination" under the chapeau of Article XX because Brazil exempted them by the order of a MERCOSUR tribunal. Korea disagrees. Korea believes that whether a measure constitutes "arbitrary or unjustifiable discrimination" should be based on the reasonableness of the measure. If Brazil's argument is supported by the Panel, it will provoke serious systemic concerns because a member's action can be regarded as non-arbitrary and justifiable as long as the action is taken to comply with other international agreements. It means that the rights and obligations of a member can be added or diminished by an international agreement to which the member has not committed.

5.115 With respect to the relationship between Article XXIV:5 and the chapeau of Article XX, Brazil also seems to argue that Article XXIV:5 justifies its obligations under the chapeau of Article XX. Korea considers that the text of Article XXIV does not support this argument. The Appellate Body in *Turkey – Textiles* sets forth two conditions in using Article XXIV:5 as a defence for a measure that is inconsistent with other provisions: the measure has to be introduced upon the formation of a customs union and the formation of the customs union would be prevented if the measure was not introduced. In particular, with regard to the second condition, Article XXIV:8(a)(i) explicitly provides that a measure justified under Article XX is not within the scope of restrictive regulations that need to be liberalized for the formation of a customs union. It means that the inconsistency of Brazil's discriminatory measures under the chapeau of Article XX may not be cured by Article XXIV:5.

7. Conclusion

5.116 For the foregoing reasons, Korea respectfully submits that Brazil has failed to justify its measures affecting the imports of retreaded tyres at issue under the GATT 1994, therefore its measures are inconsistent with the relevant Articles of the GATT 1994.

G. MEXICO'S ORAL STATEMENT[995]

5.117 Mexico's participation as a third party in these proceedings is a reflection of the importance of the questions under consideration. Mexico is referring to the interaction between trade and the environment, and the relationship between obligations and agreements and treaties pursuant to Article XXIV and WTO obligations. These are undoubtedly two of the most controversial issues on the agenda of WTO panels and the WTO Appellate Body.

5.118 Mexico thus has a purely systemic interest in this dispute. Mexico is confident that this Panel will make every effort to meet its obligation to secure a positive solution to the dispute, without adding to or diminishing rights and obligations, particularly as regards any measures that may be adopted under Article XX and with respect to the objectives of Article XXIV.

H. WRITTEN SUBMISSION AND ORAL STATEMENT OF THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU

5.119 The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu ("Chinese Taipei") joins this case as a third party because of the systemic concerns it has, especially with regard to the interpretation of Article XXIV. The submission focuses on the interpretation of the exception under Article XXIV without taking a position on whether MERCOSUR meets the definition of a customs union.

5.120 In its submission, Chinese Taipei shows that Article XXIV has not been properly asserted by Brazil to justify its measure, even assuming that MERCOSUR is a customs union. The submission also addresses Article XX to the extent that Brazil asserts the MERCOSUR exemption as arguments to support its Article XX(b) and (d) defences that the import ban and the fines are not arbitrary and unjustifiable under the chapeau.[996] In the view of Chinese Taipei, Article XX chapeau has not been correctly interpreted by Brazil. Finally, the submission discusses briefly the relationship between Article XXIV and Article XX chapeau.

5.121 With regard to the other issues raised by the European Communities and Brazil, Chinese Taipei does not take any position but reserves the right to express any views at a later stage should it choose to do so.

1. Article XXIV

5.122 At the outset, Chinese Taipei would like to reiterate that there are four measures of Brazil that the European Communities is alleging to be violating WTO rules: the import ban on retreaded tyres, the fines on importation, marketing, transportation, storage, keeping or warehousing of imported retreaded tyres, restrictions on marketing at state level, and the exemption from the ban and the fines of imports of retreaded tyres from MERCOSUR countries.[997] Brazil, in its first written submission,

[995] This oral statement was originally made in Spanish.

[996] Brazil's first written submission, 8 June 2006, paras. 136-138 (in reference to consistency with chapeau of Article XX pursuant to the assertion of (b) as a defence); paras. 173-185 (in reference to the assertion of Article XX(d) as a defence and consistency with chapeau).

[997] European Communities' first written submission, 27 April 2006, para. 47.

applies different exceptions to different measures. In its discussion of Article XXIV, Brazil makes reference only to the exemption.[998] Therefore, Brazil, as the respondent party with the burden of asserting and proving its defences, seems to be asserting the Article XXIV:5 defence with regard only to the exemption but not the ban and the fines.

5.123 However, despite this separation for the purpose of the allegation of specific WTO violations between the ban and the fines on the one hand, and the exemption on the other, in application of the measures, the exemption's existence depends on the import ban and the fines, and cannot be separated. Therefore, it stands to reason that if the import ban and the fines are determined by the Panel to be inconsistent with provisions of the GATT, the exemption could not stand on its own as a separate measure. In this event, the Panel should exercise judicial economy on Brazil's Article XXIV defence for the exemption. Chinese Taipei thus discusses the exemption and Brazil's Article XXIV defence under the assumption that the Panel did not find the import ban or the fine to be inconsistent.

5.124 Brazil did not specifically point to Article XXIV:5 as the provision in Article XXIV that gives rise to the respondent's right to assert a defence. Nevertheless, it is the text of Article XXIV:5 chapeau that sets the legal basis for the defence:

> "Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area."

5.125 The Appellate Body, in *Turkey – Textiles*, in examining the text of the chapeau, recognized Article XXIV as an exception that "under certain conditions, justify the adoption of a measure which is inconsistent with certain other GATT provisions, and may be invoked as a possible 'defence' to a finding of inconsistency."[999] The Appellate Body then went on to say that two conditions must be met in order to benefit from the defence: first, the measure in question has to be introduced upon the formation of a customs union that is consistent with subparagraphs 8(a)(i) and 5(a); and second, the formation of the customs union would be prevented if the measure in question was not introduced.[1000] Chinese Taipei submits that these two conditions are relevant in this case.

5.126 These conditions derived from the Appellate Body's examination of the text of the above-quoted provision as well as the context, which included the rest of Article XXIV:5, paragraph 4 and subparagraph 8(a), in accordance with the customary rules of interpretation of the Vienna Convention. Therefore, this interpretation is generally applicable and not dependent on the specific factual situation as Brazil argues.[1001] The factual situation to keep in mind in this case is that Brazil first raised restrictions in the form of an import ban on retreaded tyres. The exemption that followed did not further liberalize trade among MERCOSUR countries as claimed by Brazil,[1002] but should be viewed as a rather dangerous partial reversal of the ban, which was implemented, if Brazil's claim were to be accepted, for the protection of human, animal or plant life and health. Indeed, even if the facts were taken into account, considering the import ban, Chinese Taipei sees no reason for this Panel to depart from the Appellate Body's interpretation of Article XXIV:5.

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[998] Brazil's first written submission, paras. 163-172. Brazil does not seem to be making a Article XXIV:5 defence with regard to European Communities' allegation of violation of WTO rules on the state level restrictions, choosing only to raise the Article XX(b) defence in Section D of the submission. Therefore, Chinese Taipei will refrain from dealing with these measures under the Article XXIV:5 discussion.

[999] Appellate Body Report on *Turkey – Textiles*, para. 45.

[1000] Ibid., para. 58.

[1001] Brazil's first written submission, para. 170.

[1002] Ibid., para. 170.

5.127 In the view of Chinese Taipei, Brazil does not meet the above conditions as set out by the Appellate Body concerning the measures that exempt imports of retreaded tyres from MERCOSUR countries from the ban and the fines. Regarding the first condition that the measures at issue were introduced upon the formation of the customs union, Brazil, despite its burden of proof, did not discuss it at all in its first written submission. In the view of Chinese Taipei, the phrase "upon the formation" denotes more than a temporal element, because in most cases the formation of the customs union is a gradual event that may require additional adjustments even after the official date of the formation. However, the timing of introduction of the measure certainly can be relevant evidence, depending on the facts of the case. The longer the period of time is between the official formation date and the introduction of the measure, the less likely the measure was introduced "upon the formation of the customs union." In this case, the import ban itself, which has nothing to do with the "formation", was introduced in September 2000. The exemptions were introduced in March 2002 only after the MERCOSUR Arbitral Tribunal ruled against Brazil on the import ban, and more than seven years after the official formation of MERCOSUR.

5.128 What is more important to the formation is that the measure in question conforms to the purpose of a customs union stated in Article XXIV:4. This is confirmed by the Appellate Body in *Turkey – Textiles* that "paragraph 4 of Article XXIV constitutes an important element of the context of the chapeau of paragraph 5."[1003] Paragraph 4 states that "the purpose of a customs union… should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories." A measure that does not go toward fulfilling that purpose, or ensure that a related measure go toward fulfilling the purpose, cannot be relevant to the "formation". In the present case, the exemptions are the result of a MERCOSUR ruling regarding the import ban and the fines, and have more to do with the initial ban and the fines, rather than facilitating trade. As already stated above, the exemption should be viewed as a partial reversal of the ban, which was implemented, according to Brazil, for the protection of human, animal or plant life and health. Therefore, the exemption cannot be considered to be introduced "upon the formation of the customs union."

5.129 Turning to the second condition, a measure that is not introduced "upon the formation" and does not conform to the purpose stated in paragraph 4 cannot prevent the formation of the customs union had it not been allowed to be introduced. Brazil argued in its submission that "the formation of MERCOSUR indeed would have been prevented if its constituent territories had not been allowed to introduce a measure prohibiting the adoption of new trade restrictions among the parties,"[1004] and that Brazil is required to comply with a MERCOSUR decision to eliminate restrictive regulations of commerce within the constituent territories. However, again, the exemptions are measures exempting the application of import ban and fines that Brazil itself introduced, which a MERCOSUR dispute tribunal had deemed to be violating an existing MERCOSUR rule that precisely prohibits the adoption of new trade restrictions among the parties. The rule that Brazil claims to be essential to the formation of the customs territory already exists and Brazil should already have been complying with it. Brazil's introduction of the ban and the fines violated that rule, and the introduction of the exemption corrects that violation. At most, the exemption restored the trade within MERCOSUR prior to the introduction of the ban and provided a remedy for the an act of violation in the MERCOSUR. Brazil cannot subsequently come back and claim that the continued non-introduction of the measures that corrected the initial violation would have prevented the formation of the customs union, since Brazil violated the rule in the first place.

5.130 It bears reminding that Brazil, as the respondent, bears the burden of proof in its assertion of the Article XXIV:5 defence. As the above discussion shows, Brazil has not adequately shown that the

[1003] *Turkey – Textiles*, para. 56.
[1004] Brazil's first written submission, para. 171.

exemption meets the two conditions outlined by the Appellate Body. Therefore, Brazil cannot benefit from the Article XXIV:5 defence.

2. Article XX chapeau

5.131 Brazil argues in its first written submission that the import ban and the fines are consistent with the chapeau of Article XX because the MERCOSUR exemptions were introduced to comply with a MERCOSUR decision and dispute ruling, and thus are not arbitrary or unjustifiable.[1005] In Chinese Taipei's view, Brazil bases its argument on an incorrect reading of Article XX chapeau.

5.132 The application of Article XX exceptions is dependent on "the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail."[1006] While Chinese Taipei does not disagree with Brazil's position, as confirmed by the Appellate Body in *US – Gasoline*,[1007] that the "discrimination" Article XX chapeau should not be interpreted in the same manner as the MFN treatment obligation in Article I or the national treatment obligation in Article III, Brazil unfortunately did not examine the chapeau in the context of the specific exceptions under which it seeks to justify its measures.

5.133 Brazil states that, "[t]o be contrary to the chapeau, the distinction between Mercosul countries and other WTO Members would have to be 'arbitrary or unjustifiable'."[1008] Brazil then went on to conclude that its measures were not arbitrary or unjustifiable because there exists a valid reason for the exemption of MERCOSUR countries. However, the obligation under Article XX chapeau is not met by the asserting Member simply for having a reason for its discrimination. Whether the measures constitute "arbitrary or unjustifiable discrimination" must be viewed pursuant to an examination of "countries where the same conditions prevail."

5.134 The "countries" are WTO Members between whom the discrimination is alleged, and in this case, the European Communities and the countries of the MERCOSUR except Brazil. "The same conditions prevail" cannot simply mean any conditions, otherwise the asserting Member can easily argue in every case that the same conditions do not prevail between the countries being compared, thus the discrimination is not arbitrary or unjustified. This would render the chapeau meaningless. The only reasonable way of finding whether "the same conditions" indeed prevail between the countries being compared would be to examine these conditions in the context of specific exception asserted under Article XX.

5.135 For the import ban and the fines, Brazil asserts the Article XX(b) defence.[1009] Therefore, in examining whether there is "arbitrary or unjustifiable discrimination between countries where the same conditions prevail," the conditions must relate to the necessity, as Brazil argues, "to protect human, animal or plant life or health."[1010] The same conditions would prevail if the countries being compared have similar impact on human, animal or plant life or health.

5.136 In the present case, MERCOSUR and the European Communities, and presumably other WTO Members that export retreaded tyres, assuming that Brazil is justified in considering retreaded tyres to be harmful, are in the same conditions to impact human, animal or plant life or health. Given the import ban on retreaded tyres is as important as Brazil claims to the protection of human, animal

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[1005] Ibid., paras. 130-138 (relating to XX(b)), 182-185 (relating to XX(d)).
[1006] GATT Article XX chapeau.
[1007] Appellate Body Report on *US – Gasoline*, p. 23.
[1008] Brazil's first written submission, para. 136.
[1009] Ibid., paras. 86-156 (relating to the import ban),157-162 (relating to the fines).
[1010] GATT Article XX(b).

or plant life or health, Brazil would have no justification in treating imported retreaded tyres, or countries that export retreaded tyres for that matter, differently. In other words, if the ability to jeopardize human, animal or plant life or health necessitates an import ban, any loophole in the ban would seriously jeopardize that total protection. Viewed from this perspective, an exemption only to MERCOSUR countries seems to be an arbitrary or unjustifiable discrimination between countries where the same conditions prevail. The MERCOSUR exemption thus cannot be the reason that the ban and the fines are consistent with the chapeau.

5.137 Brazil also argues that the fines are "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement" pursuant to Article XX(d).[1011] There may be other arguments that the fines are not "necessary" for compliance with the import ban. But for the same reason as above, the MERCOSUR exemption cannot be the reason that the fines are consistent with the chapeau. Again, in relation to the necessity of securing compliance to the import ban, the same conditions prevail for the MERCOSUR countries and other WTO Members. An exemption would be a big loophole in the overall compliance scheme to the import ban. Therefore, an exemption that favors only the MERCOSUR countries still cannot be consistent with Article XX chapeau.

3. Relationship between Article XXIV and Article XX Chapeau

5.138 Brazil, in using the MERCOSUR exemption justifying the consistency of Article XX chapeau, seems to be also implicitly arguing that Article XXIV may be interpreted as an exception to the requirements in the chapeau. Such an argument cannot stand. It is worth bearing in mind that the goals of the two provisions are diametrically opposed. Article XX and its chapeau deal with restrictions or barriers that are justifiable under certain exceptional reasons. Article XXIV deals with further liberalization of trade among certain territories. Precisely because the goals are dissimilar, Article XX measures are explicitly exempted from further liberalization of customs unions under Article XXIV:8(a)(i) and (ii). No similar explicit exemption exists with respect to Article XXIV anywhere in Article XX. This is significant because it shows that the drafters of the Agreement did not contemplate Article XXIV overriding Article XX, but does allow Article XX to override certain requirements under Article XXIV.

5.139 From a policy perspective, it is also important that the exceptional reasons to maintain restrictive measures can override other provisions of GATT, and precisely because of this broad ability to override other provisions, the integrity of the chapeau is preserved to prevent abuse. As the Appellate Body states in *US – Gasoline*,

> "[t]he chapeau is animated by the principle that while the exceptions of Article XX may be asserted as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement. If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned."[1012]

5.140 Therefore, in order to maintain the balance of obligation and rights under Article XX, the ability to assert the general exception must be checked by the chapeau to prevent abuse. Article XXIV cannot be interpreted as to allow the Member asserting the Article XX defence to escape the scrutiny under the chapeau.

[1011] Brazil's first written submission, para. 161.
[1012] *US – Gasoline*, p. 22.

I. THAILAND'S ORAL STATEMENT

5.141 In general, Thailand recognizes the environmental concerns relating to retreaded tyres raised by Brazil in its first written submission.[1013] However, Thailand does not address the details of the Brazilian measure at issue. Thailand simply notes that the disposal of shorter lifespan used and retreaded tyres raises significant concerns for both the environment and human, animal or plant life or health. These include, for example, the accumulation of landfill and resultant release of contaminants.

5.142 Thailand considers that Members, including Brazil, are entitled to take necessary measures to protect human, animal or plant life or health so long as the measures are not applied in a manner constituting arbitrary or unjustifiable discrimination, and in accordance with the other conditions set forth under Article XX.

5.143 Therefore, Thailand requests the Panel to give careful consideration to the environmental and health issues raised in this proceeding and to ensure that its ruling fully protects the rights of Members under Article XX to take necessary steps to safeguard the environment and to protect public health.

J. UNITED STATES' WRITTEN SUBMISSION AND ORAL STATEMENT

5.144 The European Communities argues – and Brazil does not dispute – that Brazil's ban on importation of retreaded tyres is inconsistent with Article XI, and that certain additional restrictions imposed at the federal and state level are inconsistent with Articles XI and III:4. Thus, the question remains as to whether Brazil's measures are nonetheless permissible under Article XX.

1. Legal analysis of Article XX(b)

5.145 While the United States does not express a view in its submission as to whether the particular facts of this case would support the conclusion that Brazil's measures are justified under Article XX(b), several statements by the parties regarding the legal requirements for establishing an Article XX(b) defence merit comment.

5.146 As both parties appear to agree, in evaluating whether Brazil has established that the import ban is covered by Article XX(b), the Panel must first determine whether the measure is "necessary to protect human, animal or plant life or health," and then assess whether it satisfies the terms of the chapeau to Article XX.

5.147 With respect to establishing whether a measure is "necessary", the Appellate Body has described the word "necessary" as "normally denot[ing] something 'that cannot be disposed with or done without, requisite, essential, needful.'"[1014] While "necessary… 'is not limited to that which is 'indispensable' or 'of absolute necessity' or inevitable'," the Appellate Body has stated that a "'necessary measure" is "located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'."[1015] To evaluate whether a measure meets this requirement, the Appellate Body has used a weighing and balancing approach, taking into account a number of different factors, including the impact on trade of the measure being challenged, the importance of the interests or values pursued, and whether there exists a reasonably available alternative that is consistent with a Member's WTO obligations.[1016]

[1013] Brazil's first written submission.

[1014] Appellate Body Report on *Korea – Various Measures on Beef*, paras. 160-61.

[1015] Appellate Body Report on *Korea – Various Measures on Beef*, paras. 160-61.

[1016] The United States notes that in their submissions, both Brazil and the European Communities appear to suggest that where a measure causes particular impacts or is intended to achieve particular objectives, that fact is dispositive of whether the measure is "necessary." As a legal matter, the United States does not, for

5.148 In applying this analysis to the measure at issue, Brazil makes several arguments that do not accord with a proper interpretation of Article XX(b). First, Brazil argues that the impact of the import ban is "balanced by disposal obligations on domestic producers."[1017] Whether or not true, the statement that domestic producers may be required to comply with other costly obligations is irrelevant to establishing whether or not maintaining the challenged measure is "necessary" within the meaning of Article XX(b).

5.149 Second, in discussing whether an alternate measure is "reasonably available," Brazil appears to misstate the burden of proof. Article XX(b) is an affirmative defence;[1018] as the party invoking that provision, Brazil has the burden of demonstrating that the import ban is "necessary." In examining a parallel provision under the GATS in *US – Gambling*, the Appellate Body stated that "it is not the responding party's burden to show, in the first instance, that there are no reasonably available alternatives to achieve its objectives," but that "[i]f … the complaining party raises a WTO-consistent alternative measure that, in its view, the responding party should have taken, the responding party will be required to demonstrate … why the proposed alternative is not, in fact, 'reasonably available'."[1019] Similarly, in *Korea – Beef*, the Appellate Body upheld the panel's examination of alternatives and finding that it was up to the responding party, Korea, to demonstrate that the alternatives were not reasonably available.[1020]

5.150 Contrary to the reasoning in *Korea – Beef and US – Gambling*, Brazil states that "[t]he European Communities … has the burden of demonstrating that there is an alternative measure that is reasonably available to Brazil."[1021] However, Brazil retains the burden of demonstrating "necessity," including the unavailability of alternatives described by the European Communities. The European Communities' description of alternative measures in its submission was sufficient such that the burden of demonstrating that the measures identified by the European Communities are not "reasonably available" lies with Brazil. Third, Brazil suggests that the alternative reasonably available measure must be "less trade-restrictive."[1022] There is no basis in the text of Article XX(b) for this requirement. In this regard, it is worth noting that the concept of less trade restrictive measures arises in two WTO agreements only: the SPS Agreement and the TBT Agreement. Incorporating such a requirement into Article XX(b) would "add to" or "diminish" the rights and obligations of Members under the covered agreements, contrary to Articles 3.2 and 19.2 of the DSU. Rather, as the Appellate Body has explained, the trade impact of the challenged measure is one element that may be useful in determining whether the measure is "necessary."[1023]

5.151 The United States contends that certain aspects of Brazil's analysis of its measures under Article XX(b) do not accord with a proper interpretation of that provision. In particular, the United States disagrees with Brazil's arguments that disposal obligations imposed on domestic producers are relevant to establishing necessity, that the European Communities bears the burden of

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example, agree that simply because, as Brazil claims, the import ban is designed to achieve the policy goal of protecting human life or health, "it must be accepted" that the ban is "necessary" or that because, as the European Communities argues, the measure challenged is a "total import ban," it is "impossible to consider" it necessary. Brazil's first written submission, para. 101; European Communities's first written submission, para. 115.

[1017] Brazil's first written submission, para. 110.

[1018] E.g., Appellate Body Report on *US – Wool Shirts and Blouses*, p. 14 (noting that Article XX is "in the nature of [an] affirmative defence" and that "[i]t is only reasonable that the burden of establishing such a defence should rest on the party asserting it").

[1019] Appellate Body Report on *US – Gambling*, paras. 309-311.

[1020] Appellate Body Report on *Korea – Various Measures on Beef*, paras. 172-173.

[1021] Brazil's first written submission, para. 117.

[1022] Ibid., para. 116.

[1023] Appellate Body Report on *Korea – Various Measures on Beef*, para. 164.

proof in establishing that the alternative measure it described is reasonably available, and that the test under Article XX(b) is whether any such alternative measure must be less trade restrictive.

5.152 In addition to these legal issues, as the European Communities, Japan[1024], and Korea[1025] have observed, Brazil's characterization of the effect of the import ban raises several important factual questions. These questions may also bear on the Panel's analysis of the measures under Article XX(b).

5.153 While Brazil asserts that "[f]or every retreaded tyre that is not imported into Brazil, there is one more used tyre that is collected in Brazil and retreaded,"[1026] it elsewhere says that retreaded tyres in Brazil are often derived from *imported* used tyres.[1027] Therefore, the ban may not result in retreading of additional domestic used tyres but may simply increase the number of used tyres being imported and retreaded in Brazil. As a result, Brazil may have the same number of tyres to dispose of as it would without the ban. Furthermore, while Brazil argues that "a retreaded tyre has a shorter lifespan than a new tyre" because new passenger car tyres can be retreaded only once,[1028] it also acknowledges that most new passenger car tyres produced in Brazil are not in fact retreaded,[1029] and therefore, under Brazil's reasoning, typically have a lifespan comparable to that of a retreaded tyre. Brazil also acknowledges that a retreaded truck tyre can be retreaded several times;[1030] therefore, it does not necessarily have a shorter lifespan than a new tyre.

5.154 Given these various assertions, even if one accepts for the sake of argument that a reduction in waste tyres is a relevant test for Article XX(b) purposes, it is unclear whether the ban in fact results in an appreciable reduction in waste tyres, as Brazil asserts. Should the Panel conclude that the ban does not in fact result in an appreciable reduction in waste tyres, this factor may appropriately weigh against a finding that the measure is "necessary": the ban would not contribute appreciably to the end pursued.[1031] Similarly, such a conclusion may also, as Korea suggests, indicate that the measure does not fall within the range of policies designed to protect human, animal or plant life or health.

2. Brazil's reliance on Article XXIV is misplaced

5.155 In its submission, Brazil does not dispute that the application of import restrictions to tyres from Members that are not parties to MERCOSUR is inconsistent with Article I:1 and Article XIII. Rather, it argues that the exemption of MERCOSUR parties from its import ban on retreaded tyres is authorized under Article XXIV:5,[1032] which provides that "the provisions of [the GATT 1994] shall not prevent … the formation of a customs union or of a free-trade area."

5.156 However, the United States submits that Brazil's reliance on Article XXIV is misplaced: MERCOSUR has not been notified under Article XXIV as a customs union within the meaning of that provision, as required by Article XXIV:7. The Understanding on the Interpretation of Article XXIV, which is an integral part of the GATT 1994,[1033] makes clear that satisfaction of the notification requirement contained in Article XXIV:7(a) is a prerequisite to demonstrating that a

[1024] Third Party Submission of Japan, paras. 31-33.
[1025] Third Party Submission by the Republic of Korea, para. 12.
[1026] Brazil's first written submission, para. 107.
[1027] Ibid., para. 153.
[1028] Ibid., para. 16.
[1029] Ibid., para. 79.
[1030] Ibid., para. 16.
[1031] *Mexico – Taxes on Soft Drinks*, para. 74 (in context of Mexico's Article XX(d) defence, stating that "a measure that is not suitable or capable of securing compliance", or whose design does not "contribute 'to secur[ing] compliance,' is not "necessary").
[1032] Brazil's first written submission, para. 163 *et seq.*
[1033] See GATT 1994 para. 1(c)(iv).

regional arrangement is a customs union or free-trade area consistent with Article XXIV. As Members agreed in Article 1 of the Understanding, "Customs unions, free-trade areas, and interim agreements leading to the formation of a customs union or free-trade area, to be consistent with Article XXIV, must satisfy, *inter alia,* the provisions of paragraphs 5, 6, 7 and 8 of that Article." Absent notification, Brazil cannot demonstrate that MERCOSUR in fact so complies. Brazil's limited analysis of MERCOSUR's compatibility with Article XXIV:5 is plainly insufficient to support its claim that MERCOSUR "complies with the requirements of Article XXIV" as a whole.[1034]

5.157 Rather than notifying the arrangement under Article XXIV, MERCOSUR parties notified the MERCOSUR treaty instruments pursuant to paragraph 4(a) of the Ministerial Decision of 28 November 1979 regarding "Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries" (the "Enabling Clause").[1035] In notifying the agreement pursuant to paragraph 4(a) of the Enabling Clause rather than Article XXIV:7(a), MERCOSUR parties identified the agreement as an "action to induce an arrangement" described in paragraphs 1, 2, and 3 of the Enabling Clause. Regional arrangements as defined in these provisions have different characteristics and are subject to different obligations than customs unions and free-trade areas described in Article XXIV.[1036] Brazil has not asserted that the measures in question, if inconsistent with either or both Articles I and XIII, could be justified by the Enabling Clause.[1037]

3. The *Amicus Curiae* submission of Humane Society International.

5.158 Finally, with respect to the *amicus curiae* submissions received by the Panel, pursuant to the authority given to the Panel under DSU Article 12 to establish its own working procedures, the Panel may consider these submissions to the extent they are relevant to issues in dispute in this proceeding. Should the Panel choose to consider the submission of Humane Society International in this proceeding, the United States would like to clarify one reference to a statement made by the Unites States Environmental Protection Agency (EPA). The statement, which appears in paragraph 10 of the Humane Society submission, describes certain "downsides" to exporting "scrap tyres". The United States would like to note that it does not consider marketable retreaded tyres to be "scrap tyres"; therefore, the EPA statement does not relate to the exportation of the products subject to the measures at issue in this dispute.

VI. INTERIM REVIEW

6.1 On 12 March 2007, the Panel submitted its Interim Report to the parties. On 26 March 2007, Brazil submitted a written request for review of the Interim Report and the European Communities informed the Panel that it did not have any comments on the Interim Report. On 2 April 2007, the European Communities submitted written comments on Brazil's request for interim review.

6.2 In accordance with Article 15.3 of the DSU, this section of the Panel's report sets out the Panel's response to the arguments made at the interim review stage, to the extent that an explanation is necessary. The Panel has modified aspects of its report in light of the parties' comments where it considered appropriate, as explained below. The Panel has also made certain editorial corrections to the Interim Report for the purposes of clarity and accuracy. References to sections, paragraph numbers and footnotes in this Section VI relate to the Interim Report.

[1034] Brazil's first written submission, para. 169.

[1035] L/4903, adopted 28 November 1979, BISD 26S/203. *See* L/6985 (March 5, 1992) (notifying MERCOSUR agreements "in pursuance of paragraph 4(a) of the Ministerial Decision of 28 November 1979 regarding 'Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries', known as the Enabling Clause").

[1036] Compare GATT 1994 Article XXIV to Enabling Clause, para. 2.

[1037] The United States expresses no view at this time as to whether the MERCOSUR arrangement meets the requirements of the Enabling Clause.

A. BRAZIL'S COMMENTS ON SECTION VII.A.2(A) OF THE INTERIM REPORT

1. Risks from the disposal of waste tyres

6.3 **Brazil** submitted that it consistently argued throughout the dispute that the risks that make the import ban necessary arise not only from the accumulation and transportation, but also from the disposal of waste tyres. Brazil therefore requested that the Panel acknowledge, in paragraph 7.65, the existence of disposal risks in addressing the existence of risks within the meaning of paragraph (b) of Article XX and refer to the section on the reasonable availability of alternative measures for specific risks arising from the disposal of waste tyres. Brazil also suggested to have this change reflected in relevant parts of Section VII.A.2.(a) of the report, in particular paragraphs 7.65, 7.109, 7.146, 7.177, 7.213 and 7.214.

6.4 The **European Communities** objected to Brazil's request and argued that Brazil never presented a case that the protection of human, animal and plant life and health from the disposal risks was the objective of the import ban and that Brazil's arguments relating to such risks were related to the existence of alternative measures. The European Communities also considered that it is not the function of the interim review stage to allow the parties to correct or modify their submissions made at earlier stages of the proceeding.

6.5 The **Panel** confirms its view that Brazil did not sufficiently substantiate its arguments on the disposal risks in the context of its arguments in respect of risks within the meaning of paragraph (b) of Article XX, although it referred in general terms to the risks from both the accumulation and disposal throughout its written submissions. We note Brazil's comment that it addressed the disposal risks in more detail when discussing available alternatives because it wanted to avoid redundancy and not because disposal risks were not among the risks targeted by the import ban. However, Brazil made no reference, in addressing the existence of a risk under paragraph (b) of Article XX, to its discussion on the disposal risks in the alternative measures section during the course of the dispute. The Panel therefore declines to accept Brazil's request, and has revised footnote 1066 to paragraph 7.39 to reflect additional support for the Panel's view.

2. Contribution of the measure to the objective

6.6 **Brazil** requested that since it has argued that a retreaded tyre that is not imported is replaced by either a retreaded tyre or a new tyre, capable of future retreading, this be reflected in paragraphs 7.123 and 7.125.

6.7 The **European Communities** disagreed with Brazil's request because according to the European Communities, it is incorrect to say that the parties agreed that an imported retreaded tyre would be replaced by a tyre retreaded domestically or a new tyre, capable of future retreading. The European Communities argued that although it agreed that imported retreaded tyres would, to some extent, be in competition both with retreaded tyres produced domestically, normally using imported used tyres, or with new tyres, it disagreed that new tyres sold in Brazil were capable of future retreading.

6.8 The **Panel** notes that the parties agree that a retreaded tyre that is not imported will, at least to some extent, be replaced by either a retreaded tyre or a new tyre. Where the parties disagree, however, is whether new tyres sold in Brazil are retreadable and if so, whether they are actually retreaded. The Panel has revised paragraphs 7.123 and 7.125 to clarify the parties' arguments in this regard.

3. Preliminary issue: retreaded tyres

6.9 **Brazil** submitted that Brazil did not take a position on whether retreaded tyres themselves pose any particular risks to human health. For Brazil, the safety of retreaded tyres was not a legally relevant issue in this dispute. Therefore, Brazil requested that Brazil's position on this point be clarified in paragraph 7.48. The **European Communities** did not provide any comments on this request.

6.10 The **Panel** has revised paragraph 7.48 as requested by Brazil.

4. Mosquito-borne diseases

6.11 **Brazil** recalled that it never suggested that mosquito-borne diseases present "the greatest risk" arising from waste tyres as indicated in paragraph 7.56. Brazil requested to have paragraph 7.56 changed to reflect that the risks caused by tyres and certain disposal options are no less significant. The **European Communities** did not provide any comments on this request.

6.12 The **Panel** has made the requested change to paragraph 7.56.

6.13 **Brazil** also requested that since it never argued that mosquito-borne diseases pose a risk to plant life or health, the Panel change paragraph 7.92, which appeared to suggest that Brazil had made such an argument. The **European Communities** did not provide any comments on this request.

6.14 In light of Brazil's clarification, the **Panel** has deleted the last sentence of paragraph 7.92.

5. Alternative measures

6.15 **Brazil** considered that devulcanization could be more properly classified as material recovery than material recycling. Brazil thus requested that the Panel change paragraphs 7.199 and 7.208 in the alternative measures section to have this point clarified. The **European Communities** did not provide any comments on this request.

6.16 In assessing devulcanization as an alternative to the import ban, the **Panel** took into account, *inter alia*, Brazil's statement that it was practically impossible to recycle a tyre because devulcanization, which was breaking down of a tyre, was cost-prohibitive, resulted in pollution and produced poor-quality rubber with limited demand and applications. The Panel also observes that Brazil did not make a distinction, in the course of the dispute, between material recycling methods and other methods that could be more properly classified as material recovery. Accordingly, the Panel declines to accept Brazil's request.

B. BRAZIL'S COMMENTS ON SECTION VII.A.2(B) OF THE INTERIM REPORT

6.17 **Brazil** considered that it consistently treated the import ban and the MERCOSUR exemption as two separate measures, contained in the same legal instrument. In Brazil's view, the MERCOSUR exemption is not part of the design of the import ban, although it is part of the design of the same legal instrument containing the import ban. Brazil also clarified that it did not argue that the exemption should not be considered under the chapeau of Article XX. Therefore, Brazil requested that the Panel change paragraph 7.237 accordingly.

6.18 The **European Communities** disagreed with Brazil and asked that the Panel not accept Brazil's request since paragraph 7.237 referred correctly to Brazil's argument during the Panel proceeding.

6.19 In paragraph 7.237, the **Panel** found that Brazil held an inconsistent position with respect to the MERCOSUR exemption and its relevance to the Panel's analysis of the import ban under the chapeau of Article XX in light of Brazil's argument that the exemption is *not part* of the design of *the import ban*, but at the same time is *part* of the design of *the measure* rather than part of its application. Brazil clarified, however, that its position is not inconsistent in stating that the exemption was not part of the design of the import ban, but it was *part* of the design of *the same legal instrument* containing the import ban. The Panel also recalls Brazil's response to Panel question No. 49:

> "There is no defined set of factors on the basis of which it may be determined whether a measure is being applied in an arbitrary or unjustifiable manner. ... It is concerned with the manner in which the measure is applied. Any and all factors that would help determine whether the Member acted in good faith and had good cause for applying the measure in the manner that it did are relevant. ... Also relevant in this case are the reasons and circumstances that led Brazil to exempt MERCOSUR countries from the import ban. ..."

In light of Brazil's clarifications and given that the Panel's findings in 7.237 are not essential for the Panel's analyses in paragraphs 7.238 and 7.239, the Panel has decided to delete paragraph 7.237 and has added a sentence in the beginning of paragraph 7.238 to clarify the fact that the MERCOSUR exemption is contained in Portaria 14/2004.

VII. FINDINGS

A. THE BAN ON THE IMPORTATION OF RETREADED TYRES

7.1 The **European Communities** claims that Brazil imposes a prohibition on the importation of retreaded tyres into Brazil inconsistent with Article XI of GATT 1994.[1038] The European Communities also submits that its challenge extends to any prohibition on the importation of used goods to the extent that such prohibitions are applied to retreaded tyres.[1039]

7.2 **Brazil** presents no arguments in relation to the violation of Article XI itself and states that it does not contest that the import prohibition is prima facie inconsistent with Article XI:1.[1040] Brazil, however, claims that its import prohibition is justified under Article XX(b).

7.3 The **Panel** will thus consider the European Communities' claim under Article XI:1 first and then, as necessary, the parties' arguments on Brazil's defence under Article XX(b) of GATT 1994.

[1038] European Communities' first written submission, paras. 88-91. In its panel request, the European Communities identified Portaria SECEX 14/2004 in relation to its claim under Article XI:1:

> "The imposition of an import ban on retreaded tyres, notably by virtue of Portaria No. 14 of 17 November 2004 of the Secretariat of Foreign Trade of the Brazilian Ministry of Development, Industry and International Commerce that prohibits the issuance of import licenses for retreaded tyres".

[1039] European Communities' first written submission, para. 59 and footnotes 34 and 48.

[1040] Brazil's answer to Panel question No. 33. Brazil itself refers to Portaria SECEX 14/2004 as "the import ban" throughout its written submissions. See, for example, the legal argument section of Brazil's first written submission.

1. Does Brazil impose an import prohibition on retreaded tyres inconsistent with Article XI:1 of GATT 1994?

7.4 In its panel request, the European Communities identifies Portaria SECEX 14/2004 as the legal basis of an import ban on retreaded tyres.[1041] The European Communities has also indicated in its first written submission that it is challenging Portaria SECEX 14/2004 as the "current legal basis of the ban on importation of retreaded tyres into Brazil". In this connection, the Panel notes that the European Communities also identifies, in its panel request, an additional set of measures that it claims also constitute an import prohibition on retreaded tyres.

7.5 The Panel will first examine the European Communities' claim in relation to Portaria SECEX 14/2004[1042], and then turn to the additional set of measures identified by the European Communities in its panel request.

(a) Portaria SECEX 14/2004

7.6 Under Chapter III of Portaria SECEX 14/2004 (Import Licensing), imports into Brazil are divided into three categories: imports *exempt from licensing*; imports subject to *automatic licensing*; and imports subject to *non-automatic licensing*. Articles 9 and 35 identify "used materials" as goods subject to non-automatic licensing. Within Chapter VI, which further addresses the category of "used materials", Article 40 specifies that import licences will not be issued for imports of "retreaded and used tyres".

7.7 The relevant provisions of Portaria SECEX 14/2004 read as follows:

> "TITLE I (Importation)
>
> CHAPTER III (Import Licensing)
>
> Section III (Non-Automatic Licensing)
>
> Article 9 – The following imports are subject to non-automatic licensing:
>
> ...
>
> II – when imported in the following situations:
>
> ...
>
> e) used materials;

[1041] As noted above in paragraph 2.4 of the descriptive part of this report, the products at issue in this case are retreaded tyres classified under HS subheadings 4012.11, 4012.12, 4012.13, and 4012.19 and thus cover all types of retreaded tyres listed under these subheadings, namely tyres used on motor cars, buses and lorries, aircrafts and all other types of retreaded tyres. UNECE Regulations No. 108 and 109, which cover respectively passenger cars and commercial vehicles and their trailers, provide that "retreading" means the generic term for reconditioning a used tyre by replacing the worn tread with new material and may also include renovation of the outermost sidewall surface (Exhibit EC-6, para. 2.37). According to the Regulations, "retreading" covers three process methods, namely (1) top-capping (replacement of the tread), (2) re-capping (replacement of the tread and with the new material extending over part of the sidewall) and (3) bead to bead (or referred to as remoulding by Brazil) (replacement of the tread and renovation of the sidewall including all or part of the lower area of the tyre). (See the parties' responses to panel question No.1).

[1042] European Communities' panel request, European Communities' first written submission, paras. 49, 56, 59, 88, and European Communities' answer to panel question No. 27.

...

CHAPTER VI (Imports of Used Materials)

Article 35 – Importing used goods requires a non-automatic license before shipping the goods from abroad.

...

Article 40 – An import license will not be granted for retreaded and used tyres, whether as a consumer produce or feedstock, classified under NCM code 4012, except for remoulded tyres, classified under NCM codes 4012.11.00, 4012.12.00, 4012.13.00 and 4012.19.00, originating and proceeding from the MERCOSUR Member States under the Economic Complementation Agreement No. 18.

Sole paragraph – Imports originating in and coming from MERCOSUR must comply with the technical regulations adopted by the National Institute for Metrology, Standardization and Industrial Quality (INMETRO) for the product in question and with the regulations under MERCOSUR rules of origin and regulations of the environmental authorities."

7.8 With respect to how Portaria SECEX 14/2004 operates in relation to the imports of retreaded tyres, the **European Communities** argues that Article 40 of Portaria SECEX 14/2004 provides that no import licences shall be granted for the importation of retreaded tyres into Brazil, and since, according to Brazilian law, such licences are necessary in order to import retreaded tyres, Portaria SECEX 14/2004 prohibits the importation of retreaded tyres into Brazil (except for MERCOSUR members). In other words, the European Communities claims that the denial of the right to an import licence amounts to a denial of the right to import.

7.9 To assess the European Communities' claim in this regard, the **Panel** will first consider the obligations under Article XI:1.

7.10 Article XI:1 of GATT 1994 provides:

"No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any [Member] on the importation of any product of the territory of any [Member] or on the exportation or sale for export of any product of the territory of any [Member]."

7.11 Article XI:1 prohibits both "prohibitions" and "restrictions" with respect to the importation of any goods from other Members. There is no ambiguity as to what "prohibitions" on importation means: Members shall not forbid the importation of any product of any other Member into their markets. As to "restrictions" on importation, Article XI:1 provides that restrictive measures in the form of "quotas, import or export licenses or other measures" are "restrictions" on importation within the meaning of Article XI.

7.12 In light of this, we will consider whether Portaria SECEX 14/2004 operates to "prohibit or restrict" the importation of retreaded tyres in a manner inconsistent with Article XI:1.

7.13 Although the terms of Portaria SECEX 14/2004 do not provide for an outright prohibition on the importation of "retreaded tyres", the language of Article 40 is clear, as confirmed by Brazil, in prohibiting the issuance of import licences for "used and retreaded" tyres, except for remoulded tyres

from MERCOSUR countries.[1043] Brazil has also clarified that this wording should be understood to refer to both "used tyres" *and* "retreaded tyres".[1044]

7.14 Reading Article 40 in the overall context of Portaria SECEX 14/2004, including Article 9II(e) which requires import licences for the importation of used materials, and taking into account the fact that the category of "used materials" in Portaria SECEX 14/2004 *a priori* covers retreaded tyres (so that an import licence would in principle be required to import retreaded tyres)[1045], it is clear that Portaria SECEX 14/2004 operates so as to prohibit the importation of retreaded tyres and, thus, constitutes a prohibition on importation that falls within the scope of Article XI:1. Indeed, as noted above, Brazil itself refers to the measure as "the import ban" and, thus, does not contest the fact that Portaria SECEX 14/2004 is an import prohibition contrary to Article XI:1.

7.15 In sum, although Portaria SECEX 14/2004 does not provide for an outright ban on importation, by prohibiting the issuance of import licences for retreaded tyres, which would be necessary for their importation, it has the effect of prohibiting the importation of retreaded tyres. The **Panel** thus finds that Portaria SECEX 14/2004 is inconsistent with Article XI:1 of GATT 1994.

(b) Other measures

7.16 The **European Communities** submits that its challenge against Brazil's ban on the importation of retreaded tyres also extends to any prohibition on the importation of "used goods" to the extent that such prohibitions are applied to retreaded tyres.[1046]

7.17 In its panel request, the European Communities identifies a set of other measures relating to its claim under Article XI:1 as follows:

> "The adoption of a set of measures banning the importation of used tyres, which are sometimes applied against imports of retreaded tyres, despite the fact that these are not used tyres."

7.18 Then, in a footnote to its panel request, the European Communities lists the following seven measures: (1) Portaria DECEX 8 of 13 May 1991; (2) Portaria DECEX 18 of 19 July 1992; (3) Portaria IBAMA 138-N of 22 December 1992; (4) Portaria MICT 370 of 28 November 1994; (5) Interministerial Portaria 3 of 12 September 1994 of the Ministry of Industry, Commerce and Tourism and of the Ministry of the Economy; (6) Resolution CONAMA 23 of 12 December 1996; and (7) Resolution CONAMA 235 of 7 January 1998.[1047]

[1043] The European Communities also submits in the factual part of its submission that although retreaded tyres are not specifically mentioned in Articles 9 and 35, which require import licences for the importation of used goods, the Brazilian authorities *in fact* apply the same requirement of an import licence also to the importation of retreaded tyres. Thus, according to the European Communities, the prohibition on the granting of import licences for retreaded tyres in Article 40 of Portaria SECEX 14/2004 *amounts to* a prohibition on the importation of "retreaded tyres". (European Communities' first written submission, paras. 57 and 90) See also Brazil's answer to panel question No. 113.

[1044] Brazil's answer to panel question No. 30. Throughout the report, the terms "used tyres", "used tyre carcasses" and "casings" have the meaning provided by parties in panel question 1.

[1045] Brazil's answer to panel question No. 1. Brazil has confirmed that "[h]ad imports of used and retreaded tyres been permitted, import licences would have been required under Articles 9(II)(e) and 35 of Portaria SECEX No. 14/2004. These provisions provide for "non-automatic licensing" for used goods, which means that import licences are required to import these products. (Brazil's answer to panel question No. 113)

[1046] European Communities' first written submission, para. 59 and footnotes 34 and 48.

[1047] See footnote 1 in the European Communities' panel request.

7.19 Among these seven measures, the European Communities further elaborates on three of them, in a footnote to the factual argument part of its first submission:

> "Such measures include the following:
>
> Portaria DECEX 8 of 13 May 1991, today in force in the version of Portaria MICT 370 of 28 November 1994, which bans the importation of used consumer goods (Article 27), includes used tyres.
>
> Resolution CONAMA 23 of 12 December 1996 provides in its Article 4 that inert waste is not subject to import restrictions, but exempts from this the importation of used tyres, which is prohibited."[1048] (underline added)

7.20 It is well established that the complaining party bears the burden of proving, based on evidence and arguments, an inconsistency with specific provisions of the covered agreements to establish a prima facie case in respect of its claim.[1049] In this regard, the **Panel** recalls the Appellate Body's observation that the evidence and arguments underlying a prima facie case must be sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision.[1050]

7.21 Given that the European Communities singles out in its first written submission Portaria DECEX 8/1991 as amended by Portaria MICT 370/1994[1051] and Resolution CONAMA 23/1996, among the seven measures on used goods listed in its panel request, we consider these three measures to be the specific legal bases of the European Communities' claim that its challenge to Brazil's import ban on retreaded tyres is also related to certain Brazilian measures on importation of used goods. Moreover, the European Communities submits the legal texts of these measures as part of its exhibits.[1052]

7.22 In respect of the other four measures listed in its panel request, however, the European Communities has neither identified nor provided any evidence or arguments relating to them in the course of its submissions to the Panel, despite its assertion that the European Communities' challenge against Brazil's ban on the importation of retreaded tyres also relates to "any" prohibition on the importation of used goods. As recalled above, the European Communities as the party complaining in the present case bears the burden of proving, based on evidence and arguments, an inconsistency with specific provisions of the covered

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[1048] European Communities' first written submission, footnote 34 to para. 59. In its factual argument section, the European Communities also refers to two other measures (Portaria 8 of 25 September 2000 and Portaria 17 of 1 December 2003) (European Communities' first written submission, paras. 50 and 54) and to a draft law of October 2005 (European Communities' first written submission para. 58). These measures, which are not expressly referred to in the European Communities' panel request, appear to be mentioned for background rather than as legal basis for a claim.

[1049] Appellate Body Report on *US – Gambling*, para. 138, citing Appellate Body Report on *Canada – Dairy* (*Article 21.5 – New Zealand and US II)*, para. 66.

[1050] Appellate Body Report on *US – Gambling*, paras. 140-141, quoting the Appellate Body Report on *US –Wool Shirts and Blouses,* p.16.

[1051] Brazil has confirmed that Portaria DECEX No. 8/1991, as amended by Portaria MICT No. 370/1994, is currently legally in force, with the exception of its Articles 19 to 21 and 29 to 32, which were revoked by Article 55(II) of Portaria SECEX No. 17/03. According to Brazil, the parts revoked do not affect trade in used or retreaded tyres. (Brazil's answer to panel question 111) As such, the Panel will consider Portaria DECEX No. 8/1991 as the measure at issue for the purpose of this case, since the provisions pertinent to the European Communities' claim in this case are not amended by Portaria MICT No. 370/1994.

[1052] Exhibits EC-31, 32, 33.

agreements to establish a prima facie case in respect of its claim. We also recall that the evidence and arguments underlying a prima facie case must be sufficient, *inter alia*, to "identify" the challenged measure and its basic import.[1053] We do not consider that the European Communities has established its prima facie case in respect of its claim on these four measures.

7.23 We will now proceed to examine whether the European Communities has made a prima facie case of its claim that Portaria DECEX 8/1991 and Resolution CONAMA 23/1996 also operate so as to constitute a prohibition on the importation of retreaded tyres.

(i) Portaria DECEX 8/1991

7.24 As noted above, the **European Communities** claims that Portaria DECEX 8/1991 and Resolution CONAMA 23/1996, as measures prohibiting the importation of used goods, also apply to the importation of retreaded tyres and, to that extent, these measures are in violation of Article XI:1 of GATT 1994.

7.25 In this connection, **Brazil** has explained that "used tyres", at least for the purpose of Brazilian internal regulations, include "retreaded tyres"[1054] and that its measures prohibiting the importation of used goods, in particular Portaria DECEX 8/1991, had also been applied to retreaded tyres until it clarified the import prohibition on retreaded tyres by introducing Portaria SECEX 8/2000[1055], which now exists in the form of Portaria SECEX 14/2004.[1056]

7.26 Portaria DECEX 8/1991 reads, in relevant part, as follows:

"Article 27 – Imports of used consumer goods shall not be authorised. ..."[1057]

[1053] See above para. 7.20 The Appellate Body in *US – Gambling* also stated: "Given that such a requirement applies to panel requests at the outset of a panel proceeding, we are of the view that a prima facie case – made in the course of submissions to the panel – demands no less of the complaining party." We also note the Appellate Body's observation in *US – Carbon Steel*: "The party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion. Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars." (para. 157, citing Appellate Body Report on *US – Wool Shirts and Blouses*, p. 14)

[1054] Brazil's answer to panel question No. 1.

[1055] Portaria SECEX No. 8/2000 provides:

"Rule no. 8, DATED SEPTEMBER 25, 2000
(published in the Official Gazette (DOU) of 09/27/2000)
The BUREAU OF FOREIGN TRADE, empowered under item I of article 17, Annex I of Decree no. 3405, dated April 6, 2000, resolves:
Art. 1. No import license will be granted for retreaded and used tyres, whether as a consumer product or feedstock, classified under the code 4012 of the MERCOSUR Common Nomenclature (NCM).
Art. 2. Decree Rule no. 18 dated July 13, 1992 is hereby cancelled.
Art. 3. The Rule herein takes effect on the date of its publication."

(Exhibits BRA-71 and EC-26).

[1056] Brazil's answer to panel question 29 and Brazil's first written submission, para. 65. In response to a question from the Panel to explain how Brazil clarified its policy that its existing import ban on used consumer goods included retreaded tyres, Brazil explains that it clarified the rules by adopting Portaria SECEX 8/2000 to explicitly prohibit imports of retreads and used tyres, because some courts and customs authorities erroneously concluded that those regulations dealt with used consumer goods in general and did not apply to retreaded tyres.

[1057] Exhibits EC-31 and 32.

7.27 The text of Article 27 of Portaria DECEX 8/1991 is clear in prohibiting imports of used consumer goods. Thus, if the term "used consumer goods" can be proven to include "retreaded tyres", then it would follow that Portaria DECEX 8/1991 operates to prohibit the importation of retreaded tyres inconsistently with the requirements of Article XI:1.

7.28 In this regard, the Panel recalls Brazil's explanation above that its measures prohibiting the importation of used goods, in particular Portaria DECEX 8/1991, had also been applied to retreaded tyres until Portaria SECEX 8/2000 was introduced to specifically prohibit the importation of retreaded tyres.

7.29 In light of the clear language of Portaria DECEX 8/1991 prohibiting "used consumer goods" and Brazil's own admission that it has applied that measure to retreaded tyres, the **Panel** finds that Portaria DECEX 8/1991 constitutes an import prohibition inconsistent with the requirements of Article XI:1 of GATT 1994.

(ii) Resolution CONAMA 23/1996

7.30 Resolution CONAMA 23 of 12 December 1996 provides, in relevant part:

> "Article 4 – Inert waste (Category III) is not subject to import restrictions with the exception of used tyres whose importation is prohibited. ..."[1058]

7.31 According to the preamble of Resolution CONAMA 23/1996, the purpose of the regulation is to control and prohibit the entry of waste into Brazil due to the real and potential risks of waste handling for public health and the environment.[1059] Resolution CONAMA 23/1996 then sets out the definitions of different categories of waste, such as hazardous waste (Category I), non-inert waste (Category II) and inert waste (Category III) and contains provisions on whether the imports of each category of wastes are allowed.

7.32 As shown above, Resolution CONAMA 23/1996 stipulates in Article 4 that "Inert waste is not subject to import restrictions", but "with the exception of "used tyres" whose importation is prohibited." From an initial reading of the provision, it appears that used tyres are considered as part of inert waste that should not be subject to import restrictions. However, it is followed by a clause stating that the importation of used tyres is, by exception, prohibited. Thus, as in the case of Portaria DECEX 8/1991 above, if "used tyres" in Resolution CONAMA 23/1996 also include "retreaded tyres", Resolution CONAMA 23/1996 will be found to be inconsistent with Article XI:1.

7.33 In this respect, however, Brazil has clarified that Resolution CONAMA 23/1996 does not refer to retreaded tyres because they are not waste, while used tyres are waste as they are traded under HS code 4012.20 and expressly referred to in Annex 10 of the Resolution.[1060] In light of Brazil's clarification to the effect that Resolution CONAMA 23/1996 does not operate to prohibit the importation of retreaded tyres and given the absence of evidence showing otherwise, the **Panel** finds that Resolution CONAMA 23/1996 is not in violation of Article XI:1.

[1058] Exhibit EC-33. Brazil has confirmed that Resolution CONAMA 23/1996 is currently legally in force (Brazil's answer to panel question No. 112).

[1059] Brazil has also confirmed that Resolution CONAMA 23/1996 regulates management and importation of wastes into Brazil (Brazil's answer to panel question No. 112).

[1060] Brazil's answer to panel question No. 112.

(c) Conclusion

7.34 For the reasons provided above, the **Panel** finds that the prohibition on granting of import licences under Portaria SECEX 14/2004 is an import prohibition inconsistent with the requirements under Article XI:1 of the GATT 1994. We also find that Portaria DECEX 8/1991, to the extent that it prohibits the importation of retreaded tyres, is also an import prohibition inconsistent with Article XI:1. We do not find, however, that Resolution CONAMA 23/1996 is inconsistent with Article XI:1 in respect of the importation of retreaded tyres. As for the other four measures listed in the European Communities' panel request, the Panel considers that the European Communities has not established a prima facie case regarding these claims.

2. Is Brazil's import prohibition justified under Article XX of GATT 1994?

7.35 **Brazil** argues that the import prohibition is justified pursuant to Article XX(b) of GATT 1994.[1061] The **European Communities** considers that the measure is not justified under that provision.[1062]

7.36 The **European Communities** and **Brazil** agree that a responding party invoking an affirmative defence bears the burden of demonstrating that its measure satisfies the requirements of the invoked defence.[1063] If Brazil adduces sufficient evidence to raise a presumption that its defence is justified, then the burden shifts to the European Communities to rebut the presumption.

7.37 The **Panel** notes that as outlined by the Appellate Body in the *US – Gasoline* case, a two-tiered test must be presented under Article XX: it must be demonstrated that the measure (i) falls under at least one of the ten exceptions listed under Article XX, and (ii) satisfies the requirements of the preamble. These are cumulative requirements and as confirmed by the Appellate Body in the *US – Shrimp* case, this sequence of steps "reflects, not inadvertence or random choice, but rather the fundamental structure and logic of Article XX".[1064] Moreover, in the *US – Gasoline* case, the Appellate Body found that the burden of showing that a measure complies with the requirements of the introductory clause of Article XX falls on the defending party, even after that party has established that the measure qualifies under one of the paragraphs of Article XX.[1065]

7.38 Therefore, Brazil, as the party invoking an exception under Article XX, is required to show first, that the measure[1066] falls within the scope of paragraph (b) of Article XX, and second, that the measure is applied in a manner that is consistent with the chapeau of Article XX.[1067]

[1061] Brazil's first written submission, para. 83.

[1062] European Communities' first written submission, para. 116.

[1063] Brazil's first written submission, para. 89; European Communities' first written submission, para. 95.

[1064] Appellate Body Report on *US – Shrimp*, para. 119.

[1065] Appellate Body Report on *US – Gasoline*, p. 21.

[1066] We recall our earlier findings that two measures, Portaria SECEX 14/2004 and DECEX 8/1991, are inconsistent with Article XI, in that they prohibit the importation into Brazil of retreaded tyres. We understand Brazil's defence under Article XX to relate to both of these measures. Therefore, references to the "measure at issue" in this section of the findings should be understood to refer to the import prohibition on retreaded tyres, as it is contained in both of these instruments.

[1067] European Communities' first written submission, para. 95; Brazil's first written submission, para. 89.

(a) Is Brazil's import prohibition justified under paragraph (b) of Article XX?

7.39 **Brazil** argues that the measure is justified under Article XX(b) because it is necessary to protect "human health and the environment"[1068] against risks arising from the accumulation of waste tyres.[1069]

7.40 Article XX(b) covers measures "necessary to protect human, animal or plant life or health". As outlined by the Panel in *US – Gasoline*, two elements must exist for a measure to be justified under paragraph (b):

> (a) the policy in respect of the measures for which the provision is invoked falls within the range of policies designed to protect human, animal or plant life or health; and
>
> (b) the inconsistent measure for which the exception is invoked is *necessary* to fulfil the policy objective.[1070]

7.41 The **European Communities** and **Brazil** agree that Brazil, as the party invoking Article XX(b), must prove, first, that the policy pursued falls within the range of policies designed to protect human, animal or plant life or health and, secondly, that the inconsistent measures for which the exception is invoked are necessary to fulfil the policy objective. We will therefore consider both aspects in turn.

(i) "To protect human, animal or plant life or health"

7.42 As recalled above, a party invoking Article XX(b) as a defence needs to establish, *inter alia*, that "the *policy* in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or plant life or health."[1071] To address this question, the

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[1068] Brazil defines "the environment", in this context, as comprising animal or plant life or health. See para. 7.46.

[1069] Brazil's first written submission, paras. 6, 94; Brazil's second written submission, paras. 1, 3, 4, 10. We note in this regard that Brazil claims that its import ban is necessary to protect human health and the environment against risks arising from both *accumulation* and *disposal* of waste tyres. However, in identifying a risk within the meaning of Article XX(b) (i.e. "to protect human, animal or plant life or health"), Brazil has substantiated only its arguments relating to the risks arising from the accumulation of waste tyres (See Brazil's arguments in Section II.A of its second written submission (section on policies designed to protect human, animal, and plant life and health) in which Brazil has provided only its arguments on the accumlation risks (paras. 17-34) For example, the subheadings of this section are as follows: 1. Accumulation of waste tyres creates a risk of dengue, yellow fever, and other dangerous diseases in Brazil; 2. Accumulation of waste tyres creates a risk of tyre fires and toxic leaching, which have substantial adverse effects on human haealth and the environment; and 3. The import ban is designed to reduce the risks of waste tyres accumulation and disposal). On the other hand, Brazil had addressed its arguments on the disposal risks in the context of the reasonable availability of alternative measures (See Brazil's arguments on alternative measures in its first written submission, paras. 122-124 and in its second written submission, paras. 41-100). We note that the third sub-heading of Section II.A of Brazil's second written submission noted above addresses both the accumulation and disposal risks. However, despite Brazil's reference to the disposal risks in that heading, Brazil addresses only the risks associated with the accumulation of waste tyres in the main text following that sub-heading. Brazil starts its argument by stating that "the import ban on retreaded tyres is designed to reduce the risks of mosquito-borne diseases and tyre fires by reducing the *accumulation* of waste tyres in Brazil". (emphasis added) (Brazil's second written submission, para. 34). Therefore, our analysis of whether there exists a risk in relation to the product at issue will be limited to the parties' arguments on the risks that allegedly arise from the accumulation of waste tyres. We will address the risks arising from the disposal of waste tyres in the context of our analysis of proposed alternative measures below.

[1070] Panel Report on *US – Gasoline*, para. 6.20. See also *US – Tuna (EEC)*, para. 5.29.

[1071] Panel Report on *US – Gasoline*, para. 6.20.

Panel in *EC – Asbestos* considered it necessary first to determine the existence of *a health risk*, i.e. whether the product at issue (i.e. chrysotile-asbestos in that case) posed a risk to, in that case, human life or health.[1072] Once such a risk is found to exist, the objective of the measure should be assessed to determine whether the policy underlying the measure is to reduce such a risk and thus falls within the range of policies covered by Article XX(b).

7.43 Therefore, to determine whether Brazil's policy in respect of its import prohibition for which Article XX(b) is invoked falls within the range of policies designed to protect human, animal or plant life or health, the Panel will examine first whether a risk exists to "human" and "animal or plant" life or health respectively and, if so, whether the objective of the import ban, as declared by Brazil, is to reduce such risk. Before turning to these issues, however, the Panel will address some preliminary issues.

Preliminary issues

7.44 First, the **Panel** considers it necessary to clarify the scope of interests to be protected under Article XX(b). As noted above, Article XX(b) allows WTO Members to introduce a measure necessary to protect "human, animal or plant life or health". Thus, the risk to be identified within the meaning of Article XX(b) is that posed to "human, animal or plant life or health". **Brazil**, however, has used the term "environment" throughout its submissions in the context of this provision, and claims that its import ban is justified by Article XX(b) because it is a measure necessary to protect "human life and health and *the environment*". Brazil further submits that the exceptions embodied in Article XX(b) preserve the ability of Members to prohibit imports that endanger human life or health and *the environment*.

7.45 Concerning Brazil's use of the term "environment" in the context of its arguments relating to Article XX(b), the **European Communities** submits that Article XX(b) is not a provision which covers measures designed to protect the environment in general.[1073] According to the European Communities, a measure designed to protect other concerns, including issues of environmental protection not related to human, animal or plant life or health, cannot be justified under Article XX(b). The European Communities emphasizes that a justification under Article XX(b) requires a sufficiently close link between the measure at issue and the protection of health, as general references to environmental protection are not sufficient to meet the threshold of Article XX(b).

7.46 In this regard, the **Panel** notes that Brazil has clarified that it uses the term "environment" to refer to "animal or plant life or health" within the meaning of Article XX(b).[1074] The Panel thus understands that Brazil uses the term "environment" in this case as shorthand for "animal or plant life or health". In our view, therefore, to the extent that Brazil is invoking the existence of a risk to animal or plant life or health within the meaning of Article XX(b), it has to establish the existence not just of risks to "the environment" generally, but specifically of risks to animal or plant life or health.[1075] This is consistent with the terms of Article XX(b). We will therefore examine in the following sections whether Brazil's import prohibition is designed to protect "human, animal or plant life or health."

[1072] Panel Report on *EC – Asbestos*, para. 8.170. The panel in that case said that "the use of the word "protection" implies the existence of a risk." See Panel Report on *EC– Asbestos*, para. 8.184.

[1073] European Communities' first oral statement, paras. 12-16, 20.

[1074] Brazil's first written submission, footnote 1; Brazil's second written submission, footnote 1.

[1075] We note in this regard the scope of "animal" and "plant" provided in the footnote to Annex A ("Definitions") of the SPS Agreement. It states, "['animal'] includes *fish and wild fauna*; 'plant' includes *forests and wild flora*..." (emphasis added) Although addressed in the context of the SPS Agreement, we will keep these scopes in mind in examining the evidence before us on the existence of risks to animals and plants within the meaning of Article XX(b); the SPS Agreement, in its preamble, sets out that the SPS Agreement elaborates rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b).

7.47 The second preliminary issue relating to the identification of the risk concerns the product affected by Brazil's import prohibition. In this instance, **Brazil** argues that its ban on *retreaded* tyres is justified in order to address risks arising from the accumulation of *waste* tyres. The **European Communities** submits that the product at issue in the measure is not waste tyres, but retreaded tyres, which do not create any particular risk, and thus the ban imposed on *retreaded* tyres cannot be justified under Article XX(b).[1076] The European Communities argues that the health concerns identified by Brazil are not caused directly by retreaded tyres and thus the ban has no direct relationship with life and health protection.

7.48 First, the **Panel** recognizes that retreaded tyres are not the same as waste tyres. Retreaded tyres[1077] are products that are intended to be utilized on vehicles. They differ both from new tyres, in that they are produced using used tyre casings and thus are not "new" to that extent, and from waste tyres[1078], which are tyres that have reached the end of their useful life and must be managed as waste. We also note that neither party has suggested that retreaded tyres in themselves pose any particular risks, provided they comply with appropriate safety standards.[1079] In the present case, the product subject to the import ban (i.e. retreaded tyres) is not the product (i.e. waste tyres) generating the risks to human, animal or plant life or health that the import ban purports to address. The European Communities' argument appears to assume that a measure regulating a given product can only be justified under Article XX(b) if that product directly gives rise to the risk concerned.

7.49 We note that there have been other cases in which the characterization of the risk being addressed through the measure did not necessarily involve the exact product affected by the measure. For example, the type of risks found to exist within the meaning of Article XX(b) in *US – Gasoline* was health risks that did not, strictly speaking, directly relate to gasoline itself (i.e. the product targeted by the measure) but rather to air pollution caused by the consumption of gasoline. We also note that, in its Report on *EC – Approval and Marketing of Biotech Products*, the Panel states that "there is nothing in the text of Annex A(1) [to the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)] to suggest that the product subject to an SPS measure – in this case, a GM plant to be released into the environment – need itself be the pest which gives rise to the risks from which the measure seeks to protect."[1080]

7.50 In respect of the specific measure before us, we note that Brazil claims that it seeks to prevent further generation of waste tyres as much as possible, in order to address the problems associated with the accumulation of waste tyres, in particular the alleged risks caused by waste tyres. While retreaded tyres are distinct from waste tyres, we note that waste tyres are nothing other than tyres that have reached the end of their lifecycle as tyres. In these circumstances, we see no reason to assume at this stage of our analysis that a measure relating to retreaded tyres is incapable of bearing a relationship to risks arising from the accumulation of waste tyres.

7.51 In light of these clarifications, the **Panel** will now proceed to the question of whether Brazil has provided sufficient evidence to demonstrate the existence of risks to human, animal or plant life or health in relation to the accumulation of waste tyres. In this regard, we recall the statement by the Appellate Body that the panel is entitled, in the exercise of its discretion as the trier of facts, to

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[1076] European Communities' first written submission, paras. 102-103; European Communities' first oral statement, paras. 16-18; European Communities' answer to panel question 34.

[1077] For the definition and scope of retreaded tyres, see footnote 1041 above.

[1078] Both parties submit that "waste tyres" are included in a category of "used tyres", classified under HS subheading 4012.20 (The parties' responses to panel question No. 1).

[1079] European Communities' first written submission, paras. 32-34; Brazil's first written submission, para. 62; European Communities' first oral statement, paras. 3, 17; Brazil's first oral statement, paras. 6-7; European Communities' answer to panel question No. 34.

[1080] Panel Report on *EC – Approval and Marketing of Biotech Products*, para. 7.258.

determine that certain elements of evidence should be accorded more weight than other elements and that that is the essence of the task of appreciating evidence.[1081]

7.52 We will address first the aspects relating to "human life or health", and then the aspects relating to "animal or plant life or health".

Risks posed to human life or health by the accumulation of waste tyres

7.53 **Brazil** submits that the accumulation of waste tyres creates a risk of mosquito-borne diseases such as dengue and yellow fever in Brazil because waste tyres create perfect breeding grounds for disease carrying mosquitoes and that these diseases are also spread through interstate transportation of waste tyres for disposal operations.[1082] Brazil also argues that the accumulation of waste tyres creates a risk of tyre fires and toxic leaching and that this risk has substantial adverse effects on human health and the environment.[1083]

7.54 The **European Communities** does not dispute the existence of health risks to humans in connection with mosquito-borne diseases.[1084] The European Communities argues, however, that Brazil has not demonstrated that there is a specific link between the spread of mosquito-borne diseases or the harmful effects of tyre fires and the accumulation of waste tyres. The European Communities is also of the view that not all waste tyres cause health risks, but only incorrectly managed waste tyres.[1085]

7.55 The **Panel** notes that Brazil identifies mosquito-borne diseases and toxic emissions from tyre fires as health risks posed by the accumulation[1086] of waste tyres to humans. The Panel will address these risks in turn, starting with the alleged health risks associated with mosquito-borne diseases.

[1081] Appellate Body Report on *EC – Asbestos*, para. 161. The Appellate Body also stated in that case:

> "In justifying a measure under Article XX(b) of the GATT 1994, a Member may also rely, in good faith, on scientific sources which, at that time, may represent a divergent, but qualified and respected, opinion. A Member is not obliged, in setting health policy, automatically to follow what, at a given time, may constitute a majority scientific opinion. Therefore, a panel need not, necessarily, reach a decision under Article XX(b) of the GATT 1994 on the basis of the "preponderant" weight of the evidence." (Appellate Body Report on *EC – Asbestos*, para. 178)

[1082] Brazil's first written submission, paras. 22-28; Brazil's first oral statement, paras. 13-20; Brazil's second written submission, paras. 15-33, 94; Brazil's second oral statement, para. 8.

[1083] Brazil's second written submission, paras. 33, 61.

[1084] European Communities' second oral statement, para. 16; European Communities' answer to panel question No. 34.

[1085] European Communities' response to panel question 34.

[1086] Although Brazil does not define the term "accumulation" of waste tyres, it refers to the following concepts throughout its submissions: "dumped or stockpiled"; "discarded or stockpiled"; "widespread dumping and stockpiling and landfilling"; "abandoned on the side of the road or stockpiled in a large tyre dump"; "stockpiled and illegally dumped"; "in stockpiles and in the countryside"; and "tyres discarded into the environment" (Brazil's first written submission, paras. 3, 17, 18, 20, 22; Brazil's first oral statement, paras. 11, 27; Brazil's second written submission, paras, 17, 33). The European Communities also refers, for example, to both "abandoned or negligently placed in monofills" (European Communities' response to panel question No. 34).

Thus, in light of the parties' descriptions of various forms of "accumulated" waste tyres, we understand that "accumulation" of waste tyres in the context of the present case refers to the fact that waste tyres may accumulate. The term "accumulate" is commonly defined as "heap up; gradually get an increasing number or quantity of; form an increasing mass or quantity" and "accumulation" as "the action of accumulating something; the process of growing in amount or number; an accumulated mass; a quantity formed by successive

Mosquito-borne diseases

7.56 As noted above, Brazil identifies mosquito-borne diseases, notably dengue, yellow-fever and malaria, as a major risk to human health and life caused by the accumulation of waste tyres. We will thus now examine whether Brazil has demonstrated the existence of each of these mosquito-borne diseases in Brazil and, if it has, whether it has also demonstrated the link between the accumulation of waste tyres and such diseases.

7.57 First, as regards dengue, Brazil submits that the WHO has recognized dengue as "the most important emerging tropical viral disease" and "a major international public health concern."[1087] A WHO fact sheet states that dengue is found in tropical and sub-tropical regions around the world, including the Americas.[1088] We also note that Brazil's current dengue epidemic, which is country-wide, escalated from 1994 to 2002, and, in particular the complications resulting from the disease (e.g. dengue haemorrhagic fever (DHF)) in Brazil resulted in a 4.3 per cent fatality rate, which is eight times the rate in South-East Asia, and accounted for 70 per cent of all cases reported in the Americas between 1998 and 2002.[1089] The European Communities does not contest these facts. Thus, based on the evidence before us, we find that Brazil has demonstrated the existence of health risks relating to dengue in Brazil.

7.58 Brazil also submits that other mosquito-borne diseases such as yellow fever and malaria are endemic in Brazil.[1090] We note that the WHO fact sheet does indicate that Brazil is one of the countries in South America with the greatest risk of yellow fever, which is transmitted by mosquitoes and has a higher fatality rate than dengue.[1091] The fact sheet also states that yellow fever causes a wide spectrum of diseases ranging from mild symptoms to severe illness and death and that 15 per cent of yellow fever patients enter into a "toxic phase" and half of the patients in the "toxic phase" die within 10-14 days. Thus, we find that the evidence submitted by Brazil supports its argument that yellow fever is an endemic disease transmitted by mosquitoes in Brazil.

7.59 The evidence before us also shows that malaria is one of the diseases transmitted by mosquitoes and that Brazil is included in the WHO list of the countries where malaria occurs.[1092] In fact, the 2005 World Malaria Report by the WHO states that, in 2002, Brazil reported approximately 40 per cent of the total number of malaria cases in the Americas.[1093] According to the evidence, malaria can cause not only variable clinical features such as fever, chills, headache, muscular aching and weakness, vomiting, cough, diarrhoea and abdominal pain, but also other symptoms related to organ failure such as acute renal failure, generalized convulsions, circulatory collapse, followed by

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additions" (*The Shorter Oxford English Dictionary*, L. Brown (ed.) (Oxford University Press, 2002), Vol. 1, p. 16).

[1087] Brazil's first written submission, para. 23; Exhibits BRA-13-14. See also, exhibits BRA-15, 16, 17, 19, 20, 92, 109, 112, 113, 118, 119, 120, 121 and 145.

[1088] WHO Fact sheet No. 117, "Dengue and dengue haemorrhagic fever" (April 2002) (Exhibit BRA-13).

[1089] Brazil's first written submission, para. 24, referring to exhibits BRA-13, 16, 18; Brazil's first oral statement, paras. 13-16.

[1090] Brazil's first written submission, paras. 27, 28; Brazil's first oral statement, paras. 17-20; Brazil's second written submission, para. 21; Brazil's second oral statement, para. 8.

[1091] WHO Fact Sheet N°100, "Yellow Fever" (December 2001) (Exhibit BRA-22). Also, "Update on Yellow Fever in Americas" by Pan American Health Organization states that "yellow fever continues to be an important public health problem in the Americas," and that "the overwhelming spread of the *Aedes aegypti* mosquito threatens to re-urbanize the disease" (Exhibit BRA-23). See also exhibits BRA-17, 92, 109, 111, 145.

[1092] WHO, "International Travel and Health" (January 2005) (Exhibit BRA-21). Also, Exhibits BRA-24, 119, 145.

[1093] WHO, "2005 World Malaria Report," p. 1 (Exhibit BRA-24).

coma and death.[1094] Thus, we find that Brazil has also demonstrated that health risks relating to malaria exist in Brazil.[1095]

7.60 The European Communities does not contest that these diseases pose health risks that potentially fall within the scope of Article XX(b).[1096] However, the European Communities considers that health risks may arise from waste tyres only in case of incorrect management.[1097] We therefore now consider whether the accumulation of waste tyres plays a role in the dissemination of the mosquito-borne diseases identified above, as claimed by Brazil.

7.61 Brazil submits that accumulated waste tyres provide a particularly fertile breeding ground for disease-carrying mosquitoes and thus contribute to the spread of the disease. According to Brazil, these disease-carrying mosquitoes breed in receptacles that collect rainwater, in particular used tyres. Furthermore, Brazil argues that a single tyre can spawn thousands of mosquitoes in just one summer.[1098] Various studies as well as the exhibits submitted by Brazil suggest that there is indeed a correlation between the spread of dengue and the accumulation of waste tyres[1099], in particular in

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[1094] WHO, "International Travel and Health," pp. 132-133, 150 (January 2005) (Exhibit BRA-21). According to this paper, *P. falciparum*, one of the four different species of the protozoan parasite causing malaria (i.e. *Plasmodium falciparum*, *P. vivax*, *P. ovale* and *P. malariae*), causes the most severe form of illness as indicated in para. 7.59 above. It also states, "[i]n endemic areas it is estimated that about 1 per cent of patients with *P. falciparum* infection die of the disease... The forms of malaria caused by other *Plasmodium* species are less severe and rarely life-threatening." It also explains that Brazil is one of the countries with malicious areas where the risk is not limited to *P. vivax* only: this shows that all four forms of malaria, including the most severe form – *P. falciparum* – exist in Brazil.

[1095] In this regard, the Panel notes that Brazil has not provided in its submissions any argument on the existence in Brazil of health risks posed to humans by West Nile virus and refers to West Nile virus only in its response to a question from the Panel on the exact environmental risks posed by the disposal of tyres: Brazil has responded that stockpiling leads to propagation of mosquitoes that carry diseases, such as dengue, yellow fever, malaria, and *West Nile virus* and that these diseases impact both humans and animals (emphasis added) (Brazil's answer to panel question No. 34*bis*). In light of the fact that Brazil has not provided any arguments on West Nile virus and any health risks posed by it to humans in Brazil, the Panel does not consider that Brazil has demonstrated the existence of health risks posed by West Nile virus in Brazil.

[1096] European Communities' first written submission, para. 16; European Communities' second written submission, para. 16.

[1097] European Communities' answer to panel question No. 34.

[1098] Brazil's first written submission, para. 25; Brazil's second written submission, paras. 22-25; Exhibits BRA-13, 19; Brazil's second oral statement, para. 8.

[1099] Brazil's second written submission, paras. 19-24: (a) a 1997 study in the region of Sao Paulo documenting the presence of disease-bearing mosquitoes mostly in tyres ("Tires were the main culprits for the passive spread of mosquito, which occurs through intense tire commerce conducted among the municipalities of the region, between the region and other municipalities of the state of Sao Paulo ... with the presence of mosquitoes that transmit both dengue and yellow fever, the region began to undergo the risk of epidemics"); (b) a 2005 study also in the region of Sao Paulo also showing tyres as a favoured breeding ground ("the average positivity of the types of containers presented significant differences, being the highest value for tyres ..."); and (c) various studies in the state of Paraná, showing the presence of mosquitoes capable of transmitting yellow fever in tyres, as a "preferred" breeding site. Furthermore, the fact sheet of the WHO provides that in Asia and the Americas, dengue-spreading mosquito, in particular, *Aedes aegypti*, breeds primarily in man-made containers like earthenware jars, metal drums and concrete cisterns..., used automobile tyres and other items that collect rainwater (Exhibit BRA-13). The Panel also notes the following: "Tire dumps provide excellent breeding grounds for mosquitoes, and elevated incidents of mosquito-borne diseases have been noted near large tire piles" (Ohio Department of Natural Resources, "Recycling Tyres: Introduction" (2005) (Exhibit BRA-7)); "it is well known among mosquito entomologists and mosquito abatement personnel that scrap automobile and truck tires often support large populations of certain mosquito species. In southern U.S. two exotic species predominate in tires. These two species...are known to be the principle vectors of Yellow Fever and Dengue, diseases which afflict millions of people in the tropics. ... eliminating scrap tires will eliminate a prolific mosquito habitat and the associated disease risks..." (University of Rhode Island, Office of Mosquito Abatement

countries with tropical climates such as Brazil.[1100] For example, the Basel Convention Technical Guidelines on the Identification and Management of Used Tyres provide:

> "Under certain specifically defined climatic conditions waste tyres dumps or stockpiles can become the breeding grounds for insects, such as mosquitoes, which are capable of transmitting diseases to humans. This is of particular concern in tropical or sub-tropical regions."[1101]

7.62 We also note the Australian Environmental Department's observation that "tyres trap water, and this in turn provides a breeding site for mosquitoes. In tropical areas, particularly, this can pose a significant threat to human health due to diseases carried by mosquitoes."[1102]

7.63 In this connection, we recall the European Communities' argument that health risks associated with waste tyres could arise only if waste tyres are incorrectly managed.[1103] The European Communities submits that waste tyres themselves are considered inert in Brazilian legislation and non-hazardous in the European Communities' legislation and that only abandoned tyres or tyres negligently placed in monofills[1104] may become breeding places for mosquitoes. In response, Brazil submits that the European Communities' argument in this respect is without merit because stockpiles are frequently dangerous and the European Communities itself recognizes the risks and actively promotes the clearing of stockpiles.[1105] In the view of Brazil, stockpiling also provides breeding grounds for mosquitoes and as provided in the Basel Tyre Guidelines, even with proper control, stockpiling can be used only for temporary storage before an end-of-life tyre is forwarded to a recovery operation.[1106]

7.64 The Panel recalls in this regard the Appellate Body's observation in *EC– Hormones* that the risk being addressed encompasses "risk in human societies as they actually exist, in other words, the

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Coordination, *Mosquitoes, Disease and Scrap Tires* (Exhibit BRA-92)). See also exhibits BRA-1, 5, 8, 10, 11, 15, 19, 20, 26, 40, 92, 109, 111, 114, 115, 116, 117, 119, 120, 125, 130, 145.

[1100] "Brazil is mostly tropical, extensively covered by rain forests such as the Amazon" and that "the climate in most of the country is tropical with a large diversity of flora and fauna, suitable enough for the dissemination of zoonosis caused by arthropod-borne viruses" (WHO Dengue Bulletin, "Dengue in Brazil: Past, Present and Future Perspective by Luiz Tadeu Moraes Figueiredo," p. 25 (2003) (Exhibit BRA-17)); "Most of Brazil has a tropical climate" (João Bosco Siqueira et al., "Dengue and Dengue Hemorrhagic Fever, Brazil, 1981-2002, Emerging Infectious Diseases" (2003) (Exhibit BRA-16)). See also Brazil's first written submission, paras. 22, 69.

[1101] Basel Convention Technical Guidelines on the Identification and Management of Used Tyre (1999) (Exhibit BRA-40).

[1102] Commonwealth Department of Environment (Australia), "A National Approach to Waste Tyres (2001)" (Exhibit BRA-8).

[1103] European Communities' answer to panel question No. 34.

[1104] Regarding monofills, OECD Environment Directorate (2005) explains:

> "A scrap tyre monofill is a landfill that only stores tyres. ... Monofills are more desirable than landfills as they facilitate material and energy recovery in the future. ... monofills form a temporary solution in those European countries where capacities for processing used tyres are limited. The potential advantage of such monofills is that they can be reconsidered as future used tyre collection sites and distribution centres. ..." (Exhibit BRA-58).

The Panel also notes the following explanation: "A variation of landfilling is monofilling, which means that scrap tires are not mixed with other waste materials, but stored at a dedicated, licensed location..." (Kurt Reschner, "Scrap Tyre Recycling: A Summary of Prevalent Scrap Tire Recycling Methods," p.3 (2006) (Exhibit BRA-5)).

[1105] Brazil's second written submission, paras. 33, 64-66.

[1106] Brazil's first written submission, para. 42, citing exhibit BRA 40.

actual potential for adverse effects on human health in the real world, where people live and work and die."[1107] We believe that the observation, although made in the context of the SPS Agreement, is also applicable to the situation in the present case.

7.65 First, as noted above, the European Communities does not dispute that health risks associated with waste tyres could arise if waste tyres are "incorrectly managed" by being abandoned or being negligently placed in monofills. In this connection, the evidence submitted by Brazil[1108] suggests that in reality, waste tyres do get abandoned and accumulated. We also note that the European Communities itself agrees that health risks associated with waste tyres exist in Brazil to the extent that such health risks arise from tyres that "litter the countryside" in Brazil.[1109] Specifically, the 2004 TBR Report of the European Communities' states:

> "Clearly, *waste tyres that litter the countryside* pose a significant environmental and public health problem in Brazil, notably in that they can collect rain water and thus potentially provide breeding grounds for mosquitoes (*aedes aegypti*) that can spread dengue and in some circumstances urban yellow fever. In 1999, before the current destruction programme started, the administration estimated that *the backlog of waste tyres was around 100 million*, although no accurate figures existed..."[1110] (emphasis added)

7.66 Furthermore, we note that one of the objectives of the "Paraná Rodando Limpo" – a programme created by the Brazilian state of Paraná – is to collect, *inter alia*, all existing unusable tyres currently found inappropriately discarded throughout the territory of Paraná.[1111] The Brazilian government also states in the preamble of Resolution CONAMA 258/1999 that "the dumping or inappropriate disposal of scrap tyres is an environmental liability resulting in serious environmental and public health hazards."[1112]

[1107] Appellate Body Report on *EC – Hormones*, para. 187.

[1108] See exhibits BRA-1, 5, 6, 8, 19, 36, 38, 39, 56, 58, 119, 125, 129, 132. For example, the Panel notes the following: "in most countries illegal dumping is a common way to get rid of a cumbersome waste at no financial cost" ("OECD Environmental Directorate," p. 124 (Exhibit BRA-58)); "Out of the way ravines and woods became the sites of illegal dumping, often without the property owner's knowledge. In time these illegal dumps could contain upwards of several thousand tires each.... it is estimated that US tire stockpiles contain between 700-800 million scrap tires..." (John Serumgard, "Internalization of Scrap Tire Management Costs: A Review of the North American Experience," p.6 (1998) (Exhibit BRA-125)); "the EU has millions of used tyres that have been illegally dumped or stockpiled. These historic stockpiles can, in some cases, pose a potential threat to human health (fire risk, haven for rodents or other pests such as mosquitoes...). The current estimate for these historic stockpiles throughout the enlarged EU stands at 5.5 million tons..." (European Tyre & Rubber Manufacturers' Association, "End-of-Life Tyres: A Valuable Resource with a Wealth of Potential," p. 4 (Exhibit BRA-126); and "In New Jersey, there are estimated to be 15 million tires deposited in 24 locations – called orphan tire dumps because the ownership is unclear – most of them in sparsely populated pockets of South Jersey. Untold more are thrown along roadways or stored in yards..." (Kathleen Cannon, "Where Mosquitoes And Tires Breed," New York Times (8 July 2001) (Exhibit BRA-130)).

[1109] Brazil's second written submission, para. 15, quoting a statement in the European Communities' TBR Report, which is attached as exhibit EC-2.

[1110] Report to the Trade Barriers Regulation Committee, p. 13 (2004) (Exhibit EC-2). Brazil itself has also stated, "When, in the 1990s, Brazil set out to combat dengue and other mosquito-borne diseases by, among other things, collecting *the used tyres that were scattered over its vast territory*..." (emphasis added) (Brazil's answer to panel question No. 88).

[1111] Description of the Programme "Parana Rodando Limpo," p.3 (Exhibit EC-49).

[1112] Resolutions CONAMA 258 of 26 August 1999 and. 301 of 21 March 2002 (Exhibit BRA-4; Exhibit EC-47).

7.67 Therefore, it may be that health risks associated with waste tyres can be significantly reduced with proper management of waste tyres.[1113] However, that does not negate the reality that waste tyres get abandoned and accumulated and that risks associated with accumulated waste tyres exist in Brazil.

7.68 Moreover, the evidence before the Panel does not suggest that only illegally dumped or mismanaged waste tyres can cause mosquito-borne diseases. The risk of mosquito-borne diseases, albeit to different extents, seems to exist in relation to all types of accumulated waste tyres. Indeed, this situation does not appear to be limited to Brazil, as some of the evidence presented to the Panel makes clear. For example, we note, *inter alia*, the following:

> "Scrap tyres disposed of in landfills pose increased environmental and public health risks ... and create a favourable environment for insects, which increases the risk of mosquito-borne diseases"[1114]; and
>
> "The EU has millions of used tyres that have been illegally dumped or stockpiled. These historic stockpiles can, in some cases, pose a potential threat to human health (fire risk, haven for rodents or other pests such as mosquitoes...)..."[1115]

7.69 We thus find that Brazil has demonstrated that accumulated waste tyres provide a fertile breeding ground for mosquitoes and consequentially contribute to the transmission of dengue, yellow-fever and malaria.

7.70 Further, Brazil argues that transportation of used tyres to collection points also disperses mosquitoes that could not otherwise fly more than 100 meters on their own.[1116] Brazil submits that transportation of such waste tyres cannot be avoided in some cases even though Brazil promotes disposal of tyre waste in a place close to its origin.[1117] Various studies submitted by Brazil indeed show that these mosquito-borne diseases get transmitted through transportation of waste tyres for disposal operations.[1118]

7.71 Therefore, the **Panel** finds that Brazil has demonstrated that risks posed by mosquito-borne diseases such as dengue, yellow fever and malaria to human health and life exist in Brazil in relation to the accumulation as well as transportation of waste tyres.

[1113] See paras 7.173-7.207 below for a detailed analysis of measures to improve the management of waste tyres.

[1114] OECD Environmental Directorate, *Improving Recycling Market*, p. 127 (2005) (Exhibit BRA-58).

[1115] European Tyre and Rubber Manufacturers' Association, *End-of-Life Tyres* (2006) (Exhibit EC-84).

[1116] Brazil's first written submission, para. 22; Brazil's first oral statement, paras. 17, 36; Brazil's second written submission, paras. 26-32; Brazil's second oral statement, para. 9.

[1117] For example, Brazil states, "as most waste tyre disposal sites and facilities are situated out of the Amazon region and its fragile ecosystem, the wastes generated in that part of the country frequently have to be transported to other regions to be disposed of, thus creating a serious risk of spreading mosquitoes and the diseases they carry" (Brazil's first written submission, para. 27).

[1118] Brazil submits various studies on the risks of waste tyre transportation including the following: (a) a health official in the UK illustrates that through the internal movement of these tyres, the movement of these mosquitoes through the interstate highway systems can be monitored (Exhibit BRA-119); (b) a 2002 Japanese study showing that tyres transported to disposal operations could be infested with mosquitoes (Exhibit BRA-120); (c) a study by the US Center for Disease Control and Prevention that "..the postulated relationship between dispersal and major transportation routes would be expected for a species transported largely by human activities such as the commercial movement of scrap tires for retreading, recycling, or other purposes..." (Exhibit BRA-121); and (d) the Environmental Health Committee of Québec's comment that "interregional transport of used tyres has been identified as the principal factor behind Aedes Albopictus propagation in the United States. Its distribution, for the moment, remains limited to tyre deposits" (Exhibit BRA-122).

Toxic emissions from tyre fires

7.72 Brazil also identifies tyre fires and their consequential negative impact on human health and life as another type of risk posed by accumulated waste tyres.[1119] Brazil argues that tyre fires produce highly toxic and mutagenic emissions such as a noxious plume[1120] with numerous hazardous compounds such as carbon monoxide, dioxins and furans that pose a significant potential health hazard; pyrolytic oil that contains naphthalene, anthracene, benzene, and various metals; and ash containing various heavy metals including lead, arsenic, and zinc.[1121] Brazil also refers to a number of tyre fire incidents in Brazil.[1122]

7.73 Brazil explains that highly toxic and mutagenic emissions produced by tyre fires result in a number of health problems, including, *inter alia*, the loss of short-term memory, learning disabilities, immune system suppression, cardiovascular problems, and that a noxious plume comprising dioxins emitted by tyre fires produces significant short- and long-term health hazards, including *inter alia,* cancer, premature mortality, reduced lung function, suppression of the immune system, respiratory effects, heart and chest problems.[1123]

7.74 The European Communities has not provided any direct counter-arguments in relation to these alleged health risks associated with tyre fires. Rather, the European Communities argues that the adverse consequences arising from tyre fires depend on variables such as location, cause, dimension and duration of the fires and that the risk for tyre fires is not the same between different countries.[1124] The Panel first notes that the evidence submitted by Brazil suggests that the smoke, pyrolytic oil and ash generated by a tyre fire contain numerous hazardous compounds that pose a significant potential health hazard to workers and responders to a tyre fire as well as residents in nearby areas.[1125]

[1119] Brazil's first written submission, paras. 29-36; Brazil's second written submission, para. 33. Brazil cites exhibits BRA-10, 27, 28, 29. Also, see exhibits BRA-8, 10, 29, 44, 137.

[1120] According to Brazil, numerous compounds contained in a noxious plume produce significant short- and long-term health hazards, including premature mortality, reduced lung function, suppression of the immune system, respiratory effects, heart and chest problems, depression of the central nervous system, and skin, eye, and mucous membrane irritation.

[1121] Specifically, Brazil submits that heavy metals contained in pyrolytic oil and ash are highly toxic and produce a range of adverse health effects, including the loss of short term memory, learning disabilities, immune system suppression, cardiovascular problems, kidney damage, reproductive problems, muscle wasting, partial blindness, deformities in children, and skin cancer.

[1122] For the tyre fire incidents in Brazil, see paragraph 7.76.

[1123] Brazil's first written submission, paras. 29-33; Brazil's second written submission, para. 33; Brazil's answer to panel question 88.

[1124] European Communities' comment on Brazil's answer to panel question No. 88.

[1125] California Environmental Protection Agency (US), Integrated Waste Management Board, "Tire Pile Fires: Prevention, Response, Remediation," pp. 9-1, 9-2. 9-3 (2002) (Exhibit BRA-29). See also, for example, the US Environmental Protection Agency ("EPA") research paper, "Air Emissions from Scrap Tire Combustion", provides:

> "Air emissions from open fires have been shown to be more toxic (e.g. mutagenic) than those of a combustor, regardless of fuel... emissions from an open fire can represent significant acute (short-term) and chronic (long-term) health hazards to firefighters and nearby residents. Depending on the length and degree of exposure, these health effects could include irritation of the skin, eyes, and mucous membranes, respiratory effects, central nervous system depression, and cancer... Open tire fire emissions are estimated to be 16 times more mutagenic than residential wood combustion in a fireplace, and 13,000 times more mutagenic than coal-fired utility emissions with good combustion efficiency and add-on controls." (Exhibit BRA-26)

7.75 We turn now to the European Communities' argument that Brazil has not met its burden of proof because it has not demonstrated the existence of any risks posed by tyre fires *within* Brazil.

7.76 The European Communities submits that a general reference to waste tyre fires in Brazil without providing more specific information, including an assessment of their actual negative effects on health, is not enough to meet Brazil's burden of proof under Article XX(b).[1126] We first note, in this regard, that Brazil identifies a number of incidents of tyre fires in Brazil: 338 tyre fires in Minas Gerais since 2000; 64 fires in the Federal District since 2002; and 63 fires in the State of Paraná in 2005 alone.[1127] However, Brazil has not been able to provide any evidence on the dimension of these tyre fires or an assessment of their specific negative effect on human, animal or plant life or health.[1128] Brazil nevertheless submits that it is not necessary to assess the negative health effects of tyre fires specifically in Brazil and that evidence of the risks resulting from tyre fires from other countries is sufficient.[1129]

7.77 The question before us therefore is whether Brazil was required to present more detailed information on tyre fires in Brazil such as their location, causes, dimension and duration as suggested by the European Communities as well as specific evidence of the actual negative health effects of tyre fires within Brazil.[1130] There may be situations in which such specific evidence would be required to demonstrate the existence of a risk. In this case, however, accepting the European Communities' argument would imply that a WTO Member can never prove the existence of health risks from a tyre fire until a tyre fire does in fact take place and the government of that country conducts its own assessment of the consequences of such a fire. The Panel does not consider that detailed proof of actual tyre fires and associated negative impact on health within the territory of Brazil is required in this case. This is because potential harmful effects caused by tyre fires on human health can be assessed on the basis of incidents that have occurred in other countries. The Panel is thus of the view that the incidence of such fires in Brazil, when considered in combination with evidence of the harmful impact of tyre fires on human health[1131] and the evidence of specific incidents of such fires in other countries[1132], is sufficient in this case to prove the existence of potential health risks relating to tyre fires in Brazil.

See also exhibits BRA-1, 8, 10, 27, 29, 44, 137.

[1126] European Communities' second written submission, paras. 60-61; European Communities' comments on Brazil's answer to panel question No. 88.

[1127] Brazil's first written submission, para. 36.

[1128] Brazil's answer to panel question No. 88.

[1129] Brazil's answer to panel question No. 88.

[1130] See the European Communities' comments on Brazil's answer to panel question No. 88.

[1131] See paras. 7.74 and footnote 1125 above.

[1132] Exhibits BRA-10, 26, 36, 37, 38, 139. Among the tyre fire incidents provided in these exhibits are the following: (1) A tyre fire ignited in Wales, UK involving 10 million waste tyres lasted for 14 years as of 2003 since it started in 1989 and resulted in, among others, thick black smoke releasing benzene, dioxins and particulates (Health Protection Agency (UK), "Chemical Hazard and Poisons Report" (2003) (Exhibit, BRA-10)); (2) a tyre fire at the Filbin waste tire site in Westley and one at the Royster waste tire site in Tracy, California burned more than 12 million waste tires, resulting in considerable environmental damage to the region and significant adverse impacts to local residents (California Environmental Protection Agency, "Integrated Waste Management Board, Five-Year Plan for the Waste Tire Recycling Management Program" (2003) (Exhibit BRA-36)); (3) a tyre fire ignited by lighting strike in California, US involved seven million scrap tires piled on the site as well as most of the tire pile areas and resulted in widespread concern of potential health affects from exposure to the tremendous smoke emissions. It took 30 days to extinguish the fire (Daniel M. Shane, "US EPA Region IX, "Westley Tire Fire" (undated, circa 2000) (Exhibit BRA-37)); and (4) a tyre fire ignited by arsonists in Ohio, US involved 26 million tyres piled over 140 acres at the Tyre collection facility over 5 days and produced a black column of smoke that could be seen more than 60 miles away (Ohio Department of Natural Resources, "Recycling Tyres: Problems with wasting scrap tires: Fire" (2005) (Exhibit BRA-38)).

7.78 The European Communities also argues that even if the negative consequences on health were important in the case of a tyre fire, the fire risk arising from waste tyres is low, given that tyres are very difficult to ignite.[1133] In the Panel's view however, the low probability of tyre fires occurring negates neither the fact that tyre fires do actually occur, as shown by the evidence presented in relation to tyre fires that have occurred in other countries,[1134] nor the fact that health risks exist in relation to tyre fires and that once they occur, tyre fires are very difficult to extinguish.[1135]

7.79 Finally, the European Communities argues that tyre fires are related to an incorrect management of end-of-life tyres[1136]: only accidents or arson in badly designed or uncontrolled monofills cause smoke plumes.[1137] Brazil responds that the European Communities' argument is without merit because stockpiles are frequently dangerous and the European Communities itself recognizes the risks and actively promotes the clearing of stockpiles.[1138] Brazil further argues that stockpiling poses substantial fire hazards.[1139]

7.80 Our analysis above with respect to the similar argument made by the European Communities concerning mosquito-borne diseases is also applicable here: the current reality in Brazil is that tyres do accumulate and these accumulations do in practice generate health risks arising from tyre fires as identified above.[1140] It may be that such risks can be significantly reduced with proper management. However, this does not negate the fact that waste tyres do accumulate and that, consequently, a risk of tyre fires exists in Brazil.

7.81 Furthermore, as in the case of mosquito-borne diseases, the evidence before the Panel indicates that a risk of tyre fires is not necessarily limited to badly designed or uncontrolled waste tyres: the risk, albeit to different extents, exists in relation to various types of accumulated waste tyres. For example, as cited by Brazil, the Basel Convention Technical Guidelines on the Identification and Management of Used Tyres provide that:

> "Stockpiling facilities require investments in transport, handling and fire prevention. Stockpiling with proper control can be used only for temporary storage before an end-of-life tyre is forwarded to a recovery operation. ... Precautions must be taken against the deliberate or accidental igniting of tyre stockpiles. The major risk is that a fire could gather pace without it being possible to prevent it from spreading to all of the

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[1133] European Communities' second written submission, para. 61.

[1134] For example, the evidence shows eleven tyre fires that had occurred in the UK for the period of 1972 to 1999 (see Table 1, p. 8 of Exhibit BRA-10). We also note the evidence showing two incidents of tyre fires in California and Ohio, US in 1999 (see exhibits BRA-37, 38) and eight major tyre fires in the US for the period of 1983 to 1997 (see Exhibit 1, p. 6 of Exhibit BRA-139).

[1135] California Environmental Protection Agency (US), "Tire Pile Fires: Prevention, Responses, Remediation", at 6.3.3 and 8.2 (2002) (Exhibit BRA-29). It also explains that the tyre's ability to absorb heat makes them more difficult to ignite than wood fires, but this same quality makes tyre fires more difficult to extinguish than wood fires. British Health Protection Agency states in "Mosquito-Borne Illnesses and Prevention Techniques" (Exhibit BRA-10): "tyre fires are notoriously difficult to put out owing to their own structure (no shortage of air), heat retention allowing easy reignition and the fact that water is deflected off owing to their very shape... Tyres contain highly combustible and pollutant materials." Also, Massachusetts Department of Environmental Protection states in its "Fact Sheet – Best Management Practices for Automotive Recyclers: Waste Tyres" (Exhibit BRA-137): "although tires are difficult to ignite, once they are lit the fire is almost impossible to extinguish..."

[1136] European Communities' first written submission, para. 103; European Communities' answer to panel question 34.

[1137] European Communities' answer to panel question No. 34; European Communities' second oral statement, para. 17.

[1138] Brazil's second written submission, paras. 33, 64-66.

[1139] Brazil's first written submission, para. 42, citing exhibit BRA 40.

[1140] See paras. 7.64-7.67 above.

> tyres being stored... Their scale will depend upon the quantity of the tyres being stored..."[1141]

In the Panel's view, this tends to indicate that the risk for tyre fires is not necessarily limited to badly designed or uncontrolled monofills, given that precautions against the deliberate or accidental igniting of tyre stockpiles are also required in stockpiling facilities.

7.82 In light of the foregoing, the **Panel** is of the view that Brazil has demonstrated that the accumulation of waste tyres poses a risk of tyre fires and the associated health risks arising from such tyre fires.

7.83 In conclusion, the **Panel** finds that Brazil has demonstrated the existence of risks to human life and health within the meaning of Article XX(b) in connection with the accumulation of waste tyres.[1142]

Risks posed to animal or plant life or health arising from the accumulation of waste tyres

7.84 **Brazil** submits that the types of health risks posed by the accumulation of waste tyres to humans are also posed to animals and plants.[1143] Specifically, Brazil submits that mosquito-borne diseases also pose health risks to animals. Numerous toxic chemicals and heavy metals contained in pyrolytic oil released from tyre fires harm animal and plant life and health, and hazardous substances contained in toxic plumes emitted from tyre fires harm not only humans but also animals.[1144]

7.85 The **European Communities** submits that Brazil has provided only very general arguments in relation to animal and plant life or health. According to the European Communities, Brazil has demonstrated neither how mosquito-borne diseases affect the life and health of any specific animal or

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[1141] Exhibit BRA-40, p. 12. Among other relevant evidence are as follows: "Stockpiled tyres, illegally dumped tyres and other stores are a fire risk. ... Stockpiles of tyres and landfill sites containing predominantly tyres pose a fire risk ..."(British Environment Agency, Tyres in the Environment (1998) (Exhibit BRA-1)); "Impacts due to the uncontrolled disposal of tyres to land are similar to those for stockpiles. ... Tyre stockpile fires pose a major environmental threat. The fires produce thick toxic smoke... Due to the large size of stockpiles and the intensity of tyre fires they pose a significant hazard to persons. ... Tyres trap water, and this in turn provides a breeding site for mosquitoes. In tropical areas, particularly, this can pose a significant threat to human health due to diseases carried by mosquitoes..." (Commonwealth Department of Environment (Australia), A National Approach to Waste Tyres (2001) (Exhibit BRA-8)); and "All tire and rubber storage facilities should be considered high-risk storage facilities and as such a pre-incident fire management plan should be developed..." (California Environmental Protection Agency (US), Integrated Waste Management Board, Tire Pile Fires: Prevention, Response, Remediation (2002) (Exhibit BRA-29)). The Panel notes in this regard a statement in the OECD Environment Directorate (Exhibit BRA-58): "the improper disposal of used tyres often results in health and environmental hazards... they present a fire hazard when improperly stored." This tends to support the European Communities' view that only improperly stored waste tyres are susceptible to fire hazards. However, the evaluation of the overall evidence before the Panel, including those cited above, lead the Panel to conclude that health risks (i.e. mosquito-born diseases and tyre fires) exist in relation all forms of accumulated waste tyres.

[1142] The Panel notes that Brazil also claims that the accumulation of waste tyres creates toxic leaching (Brazil's second written submission, para. 33). For the arguments and supporting evidence pertinent to its claim relating to toxic leaching, however, Brazil refers to its arguments on stockpiling under the section on the alternative measures. (See Brazil's first written submission, para. 42; Brazil's second written submission, para. 61). Brazil also presents its argument on toxic leaching in relation to landfilling (Brazil's first written submission, paras. 39, 41) Thus, we will address Brazil's argument on toxic leaching in relation to landfilling and stockpiling.

[1143] Brazil's answer to panel question No. 114.

[1144] Brazil's answer to panel question No. 114. Brazil also refers to the brief submitted by Humane Society International, paras. 15, 22, 24 (attached as Exhibit BRA-98).

plant species nor how hazardous emissions arising from tyre fires affect animal or plant life or health.[1145]

7.86 The **Panel** notes that regarding risks to animal or plant life or health, Brazil points to health risks caused by tyre fires and also, to a lesser extent, mosquito-borne diseases.[1146] Both aspects are considered in turn.

7.87 With respect to tyre fires, Brazil identifies numerous toxic chemicals and heavy metals contained in pyrolytic oil released from tyre fires that it argues pose risks to plant life through contamination of the ground as well as fish and other life through contamination of waterways.[1147] It also adds that the pollutants from pyrolytic oil are passed on to animals that drink the contaminated water. Brazil also submits that toxic plumes emitted from tyre fires contain various hazardous substances, including dioxins and furans, that harm animals in the same way as they do humans resulting in cancers, reproductive problems, and reduced immune infection. The European Communities, however, questions Brazil's unclear delimitation of the interests protected in this case and argues that Brazil has not explained with specific evidence the negative consequences of tyre fires on the life and health of animals and plants in Brazil.[1148]

7.88 The evidence before the Panel shows that there is a risk that the oil released from tyre fires could contaminate the local soil as well as watercourse and nearby aquifers.[1149] Although the evidence is less explicit in explaining the risk to animal and plant life or health than that to human health or life, the evidence before us suggests that contamination of water and soil leads to an inevitable negative impact on animal and plant life and health. For example, we note that a tyre fire in Ohio (US) resulted in the killing of thousands of fish in a nearby creek due to the oil released from the tyre fire.[1150] In this regard, we recall our earlier finding in paragraph 7.77 that specific evidence on the negative impact of tyre fires on human health or life within the territory of Brazil is not necessary to prove the existence of the risk of tyre fires in Brazil. The same reasoning also applies here. We also note the evidence indicating that the rural location of many tyre piles provides great potential for tyre fires to spread into wooded areas, including heavy bush, forest and wild land.[1151] We therefore find that Brazil has demonstrated that tyre fires pose risks to animals and plant life or health.

7.89 Regarding the risk of mosquito-borne diseases, Brazil submits that the mosquito-borne diseases identified above in the context of health risks to humans also affect animals. The European Communities agrees with Brazil to the extent that based on the evidence provided by Brazil[1152], certain animals, specifically monkeys, seem to be infected by mosquito-borne diseases such as dengue and yellow-fever. The European Communities points out, however, that as for yellow fever, monkeys seem to get infected with it in their natural environment, independently of the presence of waste

[1145] European Communities' second oral statement, para. 19; European Communities' answer to panel question No. 110.

[1146] Brazil's first written submission, para. 35; Brazil's answer to panel question No. 114; brief submitted by Humane Society International, para. 15, 22, 24.

[1147] Brazil's first written submission, paras. 30, citing exhibit BRA-29.

[1148] European Communities' second oral statement, para. 19; European Communities' answer to panel question No. 110.

[1149]British Health Protection Agency, "Chemical Hazard and Poisons Report, pp.7-8 (2003) (Exhibit BRA-10).

[1150] Ohio Department of Natural Resources, *Recycling Tires* (2005) (Exhibits BRA-7, 38). Both exhibits refer to the same fire incident.

[1151] Rubber Manufacturers Association & International Association of Fire Chiefs, "The Prevention and Management of Scrap Tyre Fires," Ch. 3 (Exhibit BRA-27).

[1152] Exhibits BRA-13, 22.

tyres.[1153] Also, the European Communities argues that these mosquito-borne diseases do not pose any threat to plant life or health.

7.90 The Panel recalls its finding above relating to the health risks posed by mosquito-borne diseases to humans. Although not as extensive as the health risks posed to humans, the same evidence tends to show that mosquito-borne diseases, specifically "dengue", also affect animals such as monkeys, through the same vectors as humans.[1154] This suggests that risks may arise for animal life or health from the accumulation of waste tyres.

7.91 However, as for "yellow fever", which is also one of the mosquito-borne diseases, the evidence shows that the mosquitoes acting as a vector of yellow fever to monkeys are wild mosquitoes rather than urban mosquitoes that breed in, *inter alia*, waste tyres as argued by the European Communities.[1155] We also note the argument contained in the brief by the Humane Society International, attached by Brazil to its second submission, that the mosquito-borne diseases that can put at risk the health of both humans and animals include malaria, filarosis, canine heartworm, dengue, yellow fever and West Nile virus.[1156] However, no specific element is provided in support of this assertion, showing how each of these diseases affects animals, in particular in relation to the accumulation of waste tyres.[1157]

7.92 In light of the above, the Panel finds that Brazil has demonstrated the existence of risks to animal health or life in relation to a certain mosquito-borne disease (dengue).

[1153] European Communities' answer to panel question No. 110.

[1154] The evidence shows that "The spread of dengue is attributed to expanding geographic distribution of the four dengue viruses and of their mosquito vectors, the most important of which is the predominantly urban species *Aedes aegypti*. Humans are the main amplifying host of the virus, although studies have shown that in some parts of the world *monkeys* may become infected [with dengue]"; and "[i]n Asia and the Americas, dengue-spreading mosquito, in particular, *Aedes aegypti*, breeds primarily in man-made containers like earthenware jars, metal drums and concrete cisterns..., used *automobile tyres* and other items that collect rainwater (emphasis added) (WHO Fact Sheet No. 117, "Dengue and Dengue Haemorrhagic Fever," (2002) (Exhibit BRA-13)). The Panel also notes the evidence suggesting that some animals such as horses and birds are affected by West Nile virus, another type of mosquito-born diseases, in some countries including the United States. For example, the Panel notes the following: (1) "[mosquitoes] then pass this [West Nile Virus] on when they feed on animals and humans... The [West Nile] virus can also be transmitted to horses..." (Exhibit BRA-119); and (2) "the [West Nile] virus was also detected in mosquitoes, horses, crows and other birds..:" (Exhibit BRA-130). We, however, are not in the position on the basis of the evidence before us to determine whether there is potential for Brazil to be subject to the spread of West Nile virus.

Also, see "*Mosquito-Borne Illness and Prevention Techniques*" (Illinois Environmental Protection Agency (US), Exhibit BRA-11). It states, "... [T]he design of tires makes them ideal breeding sites for several species of mosquitoes, some of which are very important vectors of disease. ... they provide an ideal "incubator" for mosquito larvae. Of the mosquito problems associated with waste tires, it probably is safe to say that 20 per cent of the tires are responsible for 80 per cent of the problem. If we can eliminate scrap tire dumps and ensure processors comply with used tire management standards (statutes/regulations), we will eliminate a prolific mosquito habitat and the associated disease risks. ..."

[1155] European Communities' answer to panel question No. 110. See also "WHO, 'Yellow Fever Fact Sheet'", p. 2 (2001) (Exhibit BRA-22).

[1156] Brief submitted by Humane Society International, p. 8 (Exhibit BRA-98).

[1157] Specifically, Humane Society International submits that Brazil *has previously suffered* from infestations of a mosquito species called *Aedes albopictus* and that this mosquito species attacks livestock, amphibians, reptiles and birds, as well as humans. However, it neither explains whether Brazil still suffers or has potential to suffer from infestations of this mosquito species nor provides any specific evidence to support its argument. It also states that *Aedes albopictus* has been known to transmit yellow and dengue fever, as well as Japanese Encephalitis and West Nile virus. Again, we do not find sufficient explanation or evidence supporting this argument.

7.93 In conclusion, for the above reasons, the **Panel** finds that Brazil has demonstrated the existence of risks to animal and plant life or health in relation to toxic emissions caused by tyre fires. It also finds that risks to animal life or health posed by at least one mosquito-borne disease (dengue) exist in connection with the accumulation of waste tyres.

To protect human, animal or plant life or health

7.94 **Brazil** submits that the sole policy objective behind Brazil's measures is the protection of human health and the environment.[1158] Brazil argues that as in the case of French ban on asbestos-containing products in *EC – Asbestos,* Brazil's import ban is designed to prevent the generation of additional waste tyres in Brazil and consequently to reduce the incidence of, *inter alia,* dengue, yellow fever and other risks associated with waste tyres.[1159] Accordingly, Brazil submits that its ban on retreaded tyre imports is a restriction intended to protect human health and the environment from these well-recognized risks, which falls squarely within the range of policies designed to protect human, animal or plant life or health.

7.95 The **European Communities** does not contest that measures designed to prevent the incidence of such diseases as dengue and yellow fever among humans potentially falls within the scope of Article XX(b)[1160] and that the protection of life and health, and of human life and health in particular, is important.[1161] The European Communities also states that it recognizes the right of a WTO Member to establish, within the limits of its WTO obligations, the level of protection of human health and safety that it aims to achieve for its citizens. The European Communities, however, submits that measures intended to protect the environment as such are not covered by Article XX(b) and thus the frequent references made by Brazil to the implications of waste tyres for the environment are irrelevant for the purposes of a justification of its measure under Article XX(b).[1162] The European Communities also claims that the real aim of Brazil's import ban is not the protection of life and health but the protection of Brazil's domestic industry.[1163]

7.96 Having determined that a risk to human, animal or plant life within the meaning of Article XX(b) exists, the **Panel** must determine whether the policy objective of the measure to address this risk, as declared by Brazil, falls under the range of policies covered by Article XX(b). In this regard, we recall the Appellate Body's clarification in *US – Shrimp* that "the legitimacy of the declared policy objective of the measure, and the relationship of that objective with the measure itself and its general design and structure", are examined under a specific paragraph (paragraph (g) in that case) of Article XX.[1164]

7.97 As a preliminary matter, we note that we are not, in our view, required to examine the desirability of the declared policy goal as such.[1165] In other words, we are not required to assess the policy choice declared by Brazil to protect human, animal or plant life or health against certain risks, nor the level of protection that Brazil wishes to achieve. We also recall in this respect that in the *EC –*

[1158] Brazil's first written submission, para. 19. As to Brazil's reference to the term "environment", see paragraphs 7.44-7.46 above.
[1159] Brazil's first written submission, paras. 95-96.
[1160] European Communities' first written submission, para. 16.
[1161] European Communities' second written submission, para. 12.
[1162] European Communities' second written submission, para. 11.
[1163] European Communities' answer to panel question No. 34, referring to its first written submission, paras. 130-133, 164-166 and second written submission, para. 178; and European Communities' second oral statement, paras. 9-13.
[1164] See Appellate Body Report on *US – Shrimp*, para. 149.
[1165] Panel Report on *US – Gasoline*, para. 7.1, see also para. 6.22.

Asbestos case, the Appellate Body asserted clearly that it was each WTO Member's "(…) right to determine the level of protection of health that [it] consider[s] appropriate in a given situation".[1166]

7.98 We note that a number of policies aimed at reducing risks to human health or life have been found, in previous panel and Appellate Body reports, to fall within the range of policies designed to protect human, animal or plant life or health.[1167] We note in particular the finding of the Panel in *EC – Asbestos*, that "in principle, a policy that seeks to reduce exposure to a risk should fall within the range of policies designed to protect human life or health, insofar as a risk exists".[1168] Measures specifically designed to avoid the generation of further risk, thereby contributing to the reduction of exposure to the risk, fall, in our view, within that category.

7.99 In this instance, Brazil submits that the policy objective behind the import ban is the protection of human life and health and the environment and that it is designed to prevent the generation of additional amounts of waste tyres in Brazil and, by so doing, to reduce the incidence of cancer, dengue, yellow fever, respiratory diseases, reproductive problems, environmental contamination, and other risks associated with waste tyres.[1169]

7.100 In our view, Brazil's declared policy of reducing exposure to the risks to human, animal or plant life or health arising from the accumulation of waste tyres falls within the range of policies covered by Article XX(b). In this respect, we find further confirmation for our view in the evidence presented to us showing that policies to address "waste" by non-generation of additional waste are a generally recognized means of addressing waste management issues.[1170]

[1166] Appellate Body Report on *EC – Asbestos*, para. 168.

[1167] Under GATT 1947, in the *Thailand – Cigarettes* case, the panel acknowledged, in accordance with the parties to the dispute and the expert from the World Health Organisation (WHO), that "smoking constituted a serious risk to human health and that consequently measures designed to reduce the consumption of cigarettes fell within the scope of Article XX(b)" (*Thailand – Cigarettes*, Panel Report on para. 73). More recently, in the WTO context, in the *US – Gasoline* case, the panel and the parties agreed that "the policy to reduce air pollution resulting from the consumption of gasoline was a policy within the range of those concerning the protection of human, animal and plant life or health mentioned in Article XX(b)" (Panel Report on on *US – Gasoline*, para. 6.21). In the *EC – Asbestos* case, the Appellate Body observed that "the objective pursued by the measure is the preservation of human life or health through the elimination, or reduction, of the well-known, and life-threatening, health risks posed by asbestos fibres" (Appellate Body Report on *EC – Asbestos*, para. 172).

[1168] Panel Report on *EC – Asbestos*, para. 8.186.

[1169] Brazil's first written submission, para. 96.

[1170] See the parties' answers to panel question No. 37. In this regard, the Panel notes the European Communities' answer that the reduction principle has only been recognized in Article 4(2)(a) Basel Convention with respect to hazardous waste and households waste subject to taking into account social, technological and economic aspects. However, the Panel is presented with the following evidence, which, in its view, is sufficient to support the conclusion that policies to address "waste" by non-generation of additional waste are indeed a generally recognized means of addressing waste management issues: "The most efficient way of dealing with waste is to find ways to prevent or reduce its production in the first place. ... there are ways to reduce the number of tyres we use and therefore the quantity of waste generated." (British Environment Agency, Tyres in the Environment, at §4.1, Exhibit BRA-1); "Waste avoidance is reducing the number of tyres that are disposed by reducing the number of tyres generated..." (Commonwealth Department of Environment (Australia), "A National Approach to Waste Tyres," p. xv (2001) (Exhibit BRA-8)); "Tire pile fires can be prevented simply by not creating waste or scrap tire piles in the first place." (California Environmental Protection Agency (US), Integrated Waste Management Board, *Tire Pile Fires: Prevention, Response, Remediation* (2002), Exhibit BRA-29); " ... assigns prevention of waste the first priority, followed by reuse and recovery and finally by safe disposal of waste; ... the Council reiterated its conviction that waste prevention should be the first priority of any rational waste policy in relation to minimising waste production and the hazardous properties of waste" (EU Directive 2000/76/EC of the European Parliament and of the Council, of 4 December 2000, on the incineration of waste, Recital (8), Exhibit BRA-34); "Whereas both the quantity and hazardous nature of waste intended for landfill should be reduced where appropriate" (EU Council Directive 1999/31/European Communities, of 26

7.101 We note the European Communities' argument that the real objective of Brazil's import ban on retreaded tyres is to protect Brazil's domestic retreading industry, not to protect human, animal or plant life and health.[1171] However, the Panel does not consider that this factor needs to be addressed in determining under paragraph (b) of Article XX whether the declared policy objective of a measure falls within the range of policies under that paragraph. In the Panel's view, what is relevant at this stage of the analysis is the existence of a risk and whether the policy objective to reduce such a risk, as declared by the Member taking the measure, falls within the scope of policies to protect human, animal or plant life or health.

7.102 Therefore, the **Panel** finds that Brazil's policy of reducing exposure to the risks to human, animal or plant life or health arising from the accumulation of waste tyres falls within the range of policies covered by Article XX(b).

(ii) Is the measure "necessary" within the meaning of paragraph (b) Article XX?

7.103 The **Panel** notes that Article XX(b) allows, subject to the conditions of the chapeau, measures "*necessary* to protect human, animal or plant life or health" (emphasis added). Having determined that the protection of human, animal or plant life or health against risks arising from the accumulation of waste tyres constitutes a policy that falls within the scope of paragraph (b) of Article XX, we must now determine whether the specific measure at issue is *necessary* within the meaning of the same paragraph.

7.104 The Panel notes that the term "necessary", as contained in paragraphs (b) and (d) of Article XX of GATT 1994 and paragraph (a) of Article XIV of the GATS[1172], has been interpreted in a number of previous cases by the Appellate Body:[1173] the necessity of a measure should be determined through "a process of weighing and balancing a series of factors", which usually includes the assessment of the following three factors: the relative importance of the interests or values furthered by the challenged measure, the contribution of the measure to the realization of the ends pursued by it and the restrictive impact of the measure on international commerce.[1174] Once all those factors have been analyzed, the Appellate Body said a comparison should be undertaken between the challenged measure and possible alternatives. In performing this comparison, the Appellate Body also stated that the weighing and balancing process of the factors informs the determination of whether a WTO-

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April 1999, on the landfill of waste, Recital (8), Exhibit BRA-42); "In order to implement the precautionary and preventive principles and in light with the Community strategy for waste management, the generation of waste must be avoided as much as possible" (EU Directive 2000/53/European Communities of the European Parliament and of the Council, of 18 September 2000, on end-of-life Vehicles, Recital (4), Exhibit BRA-43); "...prevention of the generation of waste shall remain the first priority, followed by the recovery of waste and finally by the safe disposal of waste" (EU Community Strategy for Waste Management, COM(96)399 final, 30 July 1996, para. 20, Exhibit BRA-106); and "... Achieving a significant overall reduction in the volumes of waste generated through waste prevention initiatives, better resource efficiency and a shift towards more sustainable production and consumption patterns; a significant reduction in the quantity of waste going to disposal ..." (EU Decision n° 1600/2002/CE of the European Parliament and of the Council, of 22 July 2002, laying down the Sixth Community Environment Action Programme, Art. (8), Exhibit BRA-107). Also, Exhibits BRA-8, 9, 108.

[1171] European Communities' second oral statement, paras. 10-13.

[1172] Article XIV(a) of the GATS reads: "necessary to protect public morals or to maintain public order".

[1173] E.g. *Korea – Various Measures on Beef*, *EC – Asbestos, Dominican Republic – Imports and Sales of Cigarettes* and *US – Gambling*.

[1174] Appellate Body Report on *Korea – Various Measures on Beef*, para. 164; Appellate Body Report on *EC – Asbestos*, para. 172; Appellate Body Report on *US – Gambling,* para. 306; Appellate Body Report on *Dominican Republic – Import and Sale of Cigarettes*, para. 70.

consistent alternative measure, or a less WTO-inconsistent measure, which the Member concerned could reasonably be expected to employ, is available.[1175]

7.105 The Panel notes that both parties agreed that the elements identified by the Appellate Body were relevant to this case (including the assessment of the three factors, i.e. trade impact of the measure, importance of the interests protected and contribution of the measure to the realization of the end pursued). The Panel will be guided by this approach in its analysis of the necessity of Brazil's measure.[1176] Given that the three factors should be taken into account in the assessment of whether a WTO-consistent, or less WTO-inconsistent, alternative measure exists, the Panel will first consider those factors in more detail, and then examine, in light of this analysis, the alternatives identified by the European Communities.[1177]

7.106 Before turning to the examination of these factors, the Panel notes that, as stated by the Appellate Body in *US – Gasoline*, what is to be reviewed, under the paragraph of Article XX that is being invoked, is the specific measure that has been found inconsistent with other GATT provisions in the first place.[1178] In the present case, the specific measure[1179] that has been found inconsistent with Article XI is the import ban on retreaded tyres. The Panel will focus its analysis in the following sections on this measure.

7.107 The Panel will not therefore examine here the manner in which the measure is implemented *in practice*, including any elements extraneous to the measure itself that could affect its ability to perform its function (i.e. the court injunctions leading to imports of used tyres)[1180], or consider situations in which the ban does *not* apply (i.e. the exemption of MERCOSUR imports).[1181] These elements will, however, be relevant to later parts of the Panel's assessment, especially under the chapeau of Article XX, where the focus will be, by contrast, primarily on the manner in which the measure is applied.

Importance of the objective pursued

7.108 As outlined by the Appellate Body in *Korea – Various Measures on Beef* [1182] and recalled in *US – Gambling* [1183], in its assessment of the measure claimed to be "necessary" to protect human, animal or plant life or health, the **Panel** may take into account the importance of the common interests or values that the measure is intended to protect. The Panel notes Brazil's argument that few interests are more "vital" and "important" than protecting human beings from health risks, and that protecting the environment is no less important.[1184] WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation, as acknowledged by the European Communities.[1185] The Panel notes that Brazil's chosen level of protection is the reduction of the risks of waste tyre accumulation to the maximum extent possible.[1186]

[1175] Appellate Body Report on *Dominican Republic – Import and Sale of Cigarettes*, para. 70.

[1176] Brazil's first written submission, para. 99; Brazil's first oral statement, para. 45; European Communities, second oral statement, para. 7; first oral statement, para. 10.

[1177] Brazil adopts the reverse approach in its second written submission, discussing first the alternatives proposed by the European Communities, and then the effectiveness of its chosen measure, the import ban.

[1178] See Appellate Body Report on *US – Gasoline*, p. 13.

[1179] Portaria SECEX 14/2004.

[1180] See e.g. European Communities, first written submission, para. 127.

[1181] See e.g. European Communities' answer to Panel Question 118.

[1182] Appellate Body Report on *Korea – Various Measures on Beef*, para. 162.

[1183] Appellate Body Report on *US – Gambling*, para. 306.

[1184] Brazil's first written submission, para. 101.

[1185] European Communities' second written submission, para. 12. Appellate Body Report on *EC – Asbestos*, para. 168. The European Communities claims however that the real objective of Brazil's import ban

7.109 The Panel recalls its findings in the previous section that Brazil has demonstrated the existence of risks to human, animal and plant life and health posed by mosquito-borne diseases and tyre fires. In relation to *risks to human health and life*, the Panel notes that the human pathologies which Brazil identified as being associated with the accumulation of waste tyres are of a very serious nature. They relate to: (i) the transmission of dengue, yellow fever and malaria through mosquitoes which use tyres as breeding grounds; and (ii) the exposure of human beings to toxic emissions caused by tyre fires which may cause loss of short-term memory, learning disabilities, immune system suppression, cardiovascular problems, but also cancer, premature mortality, reduced lung function, suppression of the immune system, respiratory effects, heart and chest problems.[1187]

7.110 We note in this respect that the WHO has recognized dengue as "the most important emerging tropical viral disease" and "a major international public health concern"[1188] and that malaria can cause not only variable clinical features such as fever, chills, headache, muscular aching and weakness, vomiting, cough, diarrhoea and abdominal pain, but also other symptoms related to organ failure such as acute renal failure, generalized convulsions, circulatory collapse, followed by coma and death.[1189] Protection against such serious diseases is clearly an important objective.

7.111 The importance of a number of risks to human life or health has already been recognized in past cases. In *EC – Asbestos*, the Panel identified two pathologies associated with chrysotile, namely lung cancer and mesothelioma, which is also a form of cancer.[1190] The Appellate Body found that the objective pursued by the measure was the preservation of human life and health through the elimination, or reduction, of the health risks posed by asbestos fibres and that the value pursued was both vital and important in the highest degree.[1191] To the extent that this same value is being protected here, the same reasoning would apply. Therefore, the Panel is of the view that the objective of protecting human health and life against life-threatening diseases, such as dengue fever and malaria, is both vital and important in the highest degree.

7.112 The objective pursued is also the protection of *animal and plant life and health*. The risks at issue relate to: (i) the exposure of animals and plants to toxic emissions caused by tyre fires; and (ii) the transmission of a mosquito-borne disease (dengue) to animals. The Panel acknowledges that the preservation of animal and plant life and health, which constitutes an essential part of the protection of the environment, is an important value, recognized in the WTO Agreement. The Panel recalls that in *US – Shrimp*[1192], the Appellate Body underlined that the preamble of the Marrakesh Agreement establishing the WTO showed that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy.[1193] Therefore, the **Panel** finds that the objective of protection of animal and plant life and health should also be considered important.

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on retreaded tyres is to protect Brazil's domestic retreading industry, not to protect human, animal or plant life and health (European Communities, second oral statement, paras. 10-13). The Panel is of the view that this question relates to the question whether the measure is a disguised restriction on international trade under the chapeau of Article XX and, more specifically, to the examination of the intent of the measure.

[1186] Brazil's second written submission, para. 43; Answer to question Nos. 36 and 73.

[1187] See paragraphs 7.53-7.83 above.

[1188] Brazil's first written submission, para. 23; Exhibits BRA-13-14.

[1189] WHO, "International Travel and Health," pp. 132-133, 150 (January 2005) (Exhibit BRA-21).

[1190] Appellate Body Report on *EC – Asbestos*, para. 167.

[1191] Appellate Body Report on *EC – Asbestos*, para. 172.

[1192] Appellate Body Report on *US – Shrimp*, para. 129.

[1193] The preamble of the Marrakech Agreement establishing the WTO reads in its relevant part: "Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, *while allowing for the*

Trade-restrictiveness of the measure

7.113 **Brazil** recognizes that an import ban, by definition, has a restrictive effect and claims that such an effect is necessary for Brazil to avoid imports of shorter-lifespan tyres.[1194] The **European Communities** contends that an import ban is the measure with the highest negative impact on international trade.[1195]

7.114 The **Panel** recalls that Article 40 of Portaria SECEX 14/2004 is the principal current legal basis of the ban on the importation of retreaded tyres into Brazil.[1196] This provision prohibits the issuance of import licences for retreaded tyres, thereby prohibiting imports of retreaded tyres, except for retreaded tyres originating from MERCOSUR countries. Article 40 targets different types of retreaded tyres: for passenger car, bus, truck and aircraft. The Panel notes, as outlined by the Appellate Body in *US – Shrimp*[1197], that an import prohibition is, ordinarily, the heaviest "weapon" in a Member's armoury of trade measures. Therefore, Brazil's measure is as trade-restrictive as can be, as far as retreaded tyres from non-MERCOSUR countries are concerned, since it aims to halt completely their entry into Brazil.

Contribution of the measure to the objective

7.115 In the previous section, the **Panel** found that Brazil's declared policy of reducing exposure to the risks to human, animal and plant life and health arising from the accumulation of waste tyres fell within the range of policies covered by paragraph (b) of Article XX.[1198] For that purpose, the Panel also assumed that a measure relating to retreaded tyres is capable of bearing a relationship to the risks arising from the accumulation of waste tyres. The Panel recalls the Appellate Body's statement that in the assessment of the necessity of a measure one of the factors that should be taken into account in the analysis is the contribution of the measure to the realization of the end pursued.[1199] The question before the Panel now is whether the import ban on retreaded tyres contributes to the realization of the policy pursued, i.e. the protection of human, animal and plant life and health from the risks posed by the accumulation of waste tyres.

7.116 The **European Communities** argues that the contribution of the measure cannot be a purely theoretical or potential contribution and that it must be demonstrated that the measure makes a real and verifiable contribution.[1200] The European Communities argues that Brazil is required to quantify,

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optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development". (emphasis added) Moreover, in the 1994 Ministerial Decision on Trade and Environment, Ministers took note, *inter alia*, of the Rio Declaration on Environment and Development and Agenda 21.[1193] Of particular relevance is paragraph 4.19 of Agenda 21, which states, in part: "(...) society needs to develop effective ways of dealing with the problem of disposing of mounting levels of waste products and materials. Governments, together with industry, households and the public, should make a concerted effort to reduce the generation of wastes and waste products (...)". The European Communities referred to the Rio Declaration and Agenda 21 in its response to question 37 by the Panel and in paragraph 138 of its first written submission.

[1194] Brazil's second written submission, para. 107; second oral statement, para. 103.

[1195] European Communities' first written submission, para. 115; European Communities' first oral statement, para. 49.

[1196] Exhibit BRA-84. See also Exhibit EC-29.

[1197] Appellate Body Report on *US – Shrimp*, para. 171.

[1198] See paragraphs 7.94-7.102 above.

[1199] Appellate Body Report on *Korea – Various Measures on Beef*, para. 164; Appellate Body Report on *EC – Asbestos*, para. 172; Appellate Body Report on *US – Gambling*, para. 306; Appellate Body Report on *Dominican Republic – Import and Sale of Cigarettes*, para. 70.

[1200] European Communities' answer to Panel question 118.

as precisely as possible, how its ban contributes to the reduction of waste tyres in Brazil.[1201] Specifically, the European Communities considers that Brazil should be able to provide information on "by how many tyres the import ban reduces the number of waste tyres accruing in Brazil".[1202] In the European Communities' view, such quantification of the impact of the import ban is a precondition in the contribution analysis required by Article XX(b).[1203] The European Communities argues that Brazil must prove its assertion that removing the import ban would result in "higher volumes of waste tyres" having to be disposed of in Brazil.[1204] In the European Communities' view, "higher volumes" is clearly a quantitative concept, and therefore requires a quantification of the volumes of waste tyres at issue.[1205]

7.117 **Brazil** replies that not every risk can be expressed in strictly numeric terms and that this is exactly why the Appellate Body in *EC – Asbestos* has noted that "a risk may be evaluated either in quantitative or *qualitative* terms".[1206] Brazil contends that the Appellate Body categorically rejected the argument that a "quantification" of risks is necessary, and held that "there is *no* requirement under Article XX(b) ... to quantify, as such, the risk to human life or health".[1207] Brazil also contends that the contribution analysis may involve both an evaluation of the measure's capacity, by design, to contribute to the desired objective and an evaluation of the actual contribution of the measure.[1208]

7.118 The **Panel** notes that the European Communities' argument concerns the issue of quantification of the reduction of waste tyres in Brazil while Brazil's answer to that argument concentrates on the quantification of the risk to human health and life. As noted above, the Panel needs to assess here whether the import ban contributes to the reduction of the number of waste tyres to be disposed of in Brazil. In the Panel's view, this demonstration could be made through a quantification, where feasible, but it could also be made through any other means that might sufficiently demonstrate whether the measure can contribute to the reduction of the number of waste tyres. Therefore, the Panel does not consider that Brazil is necessarily required to quantify exactly the impact of the import ban on the reduction of the number of waste tyres.

7.119 In the Panel's view, a determination of a measure's contribution to a particular objective is primarily an analysis of the pertinence and relevance of the chosen means for the achievement of the aim pursued. In other words, our assessment at this stage of the analysis relates essentially to the "relationship of ends and means"[1209] between the objective pursued and the chosen measure. This assessment relates to the capacity of the chosen measure to contribute to the realization of the objective.

7.120 **Brazil** claims that the import ban contributes in a significant manner to the reduction of the health and environmental risks that flow from waste tyre accumulation, transportation, and

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[1201] European Communities' second written submission, para. 25.
[1202] European Communities' second written submission, para. 29.
[1203] European Communities' second written submission, para. 30.
[1204] European Communities' second written submission, para. 28, referring to Brazil's second concluding oral statement, para. 8.
[1205] European Communities' second written submission, para. 28.
[1206] Brazil's first concluding oral statement, para. 8; Brazil's second written submission, para. 112, quoting the Appellate Body Report on *EC – Asbestos,* at para. 167 (emphasis added).
[1207] Brazil's first concluding oral statement, para. 8; Brazil's second written submission, para. 112, quoting the Appellate Body Report on *EC – Asbestos,* at para. 167 (emphasis added).
[1208] Brazil's answer to Panel question 118.
[1209] See in the context of Article XX(g), Appellate Body Report on *US – Shrimp*, para. 136. In referring to this notion, we are mindful of the fact that our analysis under Article XX(b) differs from that to be conducted under Article XX(g), as it involves, overall, an assessment of whether the measure is "necessary" and not merely whether it is a measure "relating to" the interest to be protected.

disposal.[1210] Brazil argues that imports of retreaded tyres increase waste tyre volumes, and with them the associated risks and that without the import ban, Brazil could not effectively eliminate these risks.[1211]

7.121 The **European Communities** claims that Brazil has not shown that the ban on the importation of retreaded tyres contributes to the protection of human, animal or plant life or health.[1212] The European Communities argues that the importation of retreaded tyres does not in any way increase the number of waste tyres to be disposed of in Brazil.[1213]

7.122 The **Panel** notes that both parties have linked the question of whether the import ban contributes to the reduction of the risks to human health, animal and plant life and health to its impact on the reduction of the number of waste tyres in Brazil. The Panel agrees that this approach constitutes, overall, the relevant benchmark for the assessment of the measure's contribution to the objective pursued. Therefore, the Panel will assess: (a) whether the import ban can contribute to the reduction of the number of waste tyres generated in Brazil; and (b) whether the reduction of the number of waste tyres can in turn contribute to the reduction of the risks to human, animal and plant life and health arising from waste tyres.

Contribution of the import ban to the reduction of the number of waste tyres

7.123 **Brazil** argues that, by prohibiting the importation of retreaded tyres that are at the end of their useful life – and therefore are not suitable for further retreading, Brazil is encouraging the local producers to retread the used tyres that are already in its territory, and thus avoiding the unnecessary generation of additional waste.[1214] Brazil argues that every retreaded tyre that is not imported will be replaced by a locally retreaded tyre that would not have been retreaded otherwise and that any reduction in the importation of these short lifespan products necessarily also leads to a corresponding reduction in the volume of waste tyres generated in the importing country.[1215] Brazil also argues that when imported retreaded tyres displace new tyres, they increase the waste tyre volumes.[1216] Brazil claims that it actively promotes retreading of the tyres it consumes and that the country has a robust and well-established retreading industry, dating back to the early 1950s.[1217]

7.124 The **European Communities** claims that the import ban on retreaded tyres does not reduce the rate of the accumulation of waste tyres for the following two reasons.[1218] First, imported retreaded tyres and domestic new tyres contribute equally to the accumulation of tyre waste, given that most new passenger tyres are not even suitable for retreading after a first life cycle on Brazilian roads and that not all retreadable passenger car tyres are in fact retreaded in Brazil. The European Communities argues that the import ban would only make a contribution to the reduction of the number of waste tyres arising in Brazil if it could be shown that new tyres are actually being retreaded after having been used in Brazil.[1219] Second, it can be assumed that practically every potential sale of an imported retreaded tyre is currently, due to the import ban, substituted for by a sale in Brazil of a new (domestic

[1210] Brazil's, second written submission, para. 109.
[1211] Brazil's first concluding statement, para. 13.
[1212] European Communities' first oral statement, para. 48.
[1213] European Communities' first written submission, para. 109.
[1214] Brazil's first written submission, para. 106.
[1215] Brazil's answer to panel question No. 40.
[1216] Brazil's second oral statement, para. 80.
[1217] Brazil's first written submission, para. 79.
[1218] European Communities' first written submission, para. 127.
[1219] European Communities' second written submission, para. 34; European Communities' answer to panel question No. 11, para. 30.

or imported) tyre or of a domestic retreaded tyre, most likely manufactured from an imported used tyre, neither of which will, in the case of a passenger car tyre, be retreaded again.[1220]

7.125 The **Panel** notes that Brazil's explanation of the contribution of the import ban to the objective of reduction of waste tyres assumes that imported retreaded tyres would be replaced by domestically retreaded tyres made from tyres used in Brazil or new tyres capable of future retreading. The European Communities, however, suggests that the import ban on retreaded tyres does not contribute to reducing the number of waste tyres because imported retreaded tyres are likely to be replaced either by new tyres not suitable for retreading or by domestic retreaded tyres most likely manufactured from imported used tyres. Brazil has acknowledged that imported retreaded tyres compete on the Brazilian replacement tyre market not only with *domestic retreaded* tyres but also with *new* (*domestic or imported*) tyres.[1221] Therefore, we must consider both of these possibilities in order to determine whether the import ban on retreaded tyres can contribute to the reduction of the number of waste tyres.

Substitution of new tyres for imported retreaded tyres

7.126 The question the **Panel** must consider here is whether the import ban on retreaded tyres will be able to contribute to the reduction of the number of waste tyres in Brazil, if the imported retreaded tyres are replaced on the market by new tyres.

7.127 The Panel notes Brazil's argument that imported retreaded tyres become waste sooner than new tyres, and thereby increase the waste volumes.[1222] The Panel recalls that the parties agree that under international standards, passenger car tyres may be retreaded only once, while commercial vehicle and aircraft tyres may be retreaded more than once.[1223] Therefore, the Panel notes that tyres of *passenger cars* can have a maximum of two "useful lives": (i) as new tyres; and (ii) as retreaded tyres. Thereafter, all passenger car tyres necessarily become waste. It is understood, however, that not all passenger car tyres have the capacity of having two useful lives; some of them may not be capable of being retreaded and become waste after one life only.

7.128 Assuming that on average a tyre, whether new or retreaded, can only be utilized on a passenger car for five years[1224], the cumulative useful life of a new tyre that has been retreaded after five years is ten years, while the useful life of an already retreaded tyre is only five years. Therefore, the fact that a new tyre has the potential to last twice as long as an already retreaded tyre implies that overall less tyres could fulfil the needs of the market, thereby reducing the overall number of tyres becoming waste, if imported retreaded tyres are replaced by new tyres.[1225]

[1220] European Communities' first written submission, para. 127.

[1221] Brazil's answer to panel question No. 108. The Panel notes also that new cars are not allowed to be fitted with retreaded tyres.

[1222] Brazil's first written submission. para. 76; Brazil's second written submission, para. 111; Brazil's second oral statement, para. 81.

[1223] See UNECE Regulation No. 108 (1998), para. 6.2. European Communities' first oral statement, para. 33. Brazil's first written submission, para. 16.

[1224] See the answers of Brazil and the European Communities to panel question No. 90 on the average life of a passenger car tyre. Brazil estimates that a 175/30 passenger car tyre lasts about 60,000 km or about six years and a 165/70 tyre lasts about 40,000 km or four years. The European Communities indicates that, in Europe, the average number of kilometres which are driven with a passenger car tyre before it is replaced is between 60.000 and 75.000 kilometres and that the average lifespan of a passenger car tyre may be assumed to be between four and five years. The European Communities argues that the lower mileage of Brazilian tyres would appear to reflect the rougher road conditions in Brazil and the accordingly higher wear of tyres.

[1225] In its Arbitral Award of 25 October 2005 in the dispute between Argentina and Uruguay concerning the import ban on remoulded tyres, the MERCOSUR Tribunal provided a similar analysis:

7.129 The Panel notes further Brazil's argument that "a retreaded tyre, no matter the type [passenger car, truck, or airplane retreaded tyre], will always have fewer remaining lifecycles and a shorter lifespan than a retreadable new tyre".[1226] The European Communities also contends that passenger car tyres can only be retreaded once, while commercial vehicle tyres can be retreaded up to three to four times and aircraft tyres up to eight times.[1227] Therefore, parties agree that tyres of *buses, trucks and aircraft* may be retreaded more than once.[1228] Following the same reasoning as applied to passenger car tyres, a new tyre for commercial vehicles and aircraft similarly has more useful lives than an already retreaded tyre; this implies that overall less tyres could fulfil the needs of the market of commercial and aircraft tyres, thereby reducing the overall number of tyres becoming waste. Brazil also argues that a commercial vehicle retreaded tyre that is imported closer to the end of its useful life could have less than 20 per cent of its useful life left.[1229] However, by the same token, the Panel notes that an imported commercial vehicle retreaded tyre could have up to 80 per cent of its useful life remaining.

7.130 To conclude on this point, the **Panel** is of the view that all types of retreaded tyres (i.e. for passenger car, bus, truck and aircraft) have by definition a shorter lifespan than new tyres. Therefore, an import ban on retreaded tyres may lead to a reduction in the total number of waste tyres because imported retreaded tyres may be substituted for by new tyres which have a longer lifespan. Consequently, while the extent of the reduction may vary in respect of commercial tyres depending on the stage at which they might be imported, in all cases, overall less tyres would be necessary to fulfil the needs of the market.[1230]

Substitution of retreaded tyres made from domestic used tyres for imported retreaded tyres

7.131 The **Panel** notes Brazil's argument that the contribution of the import ban to the reduction of the number of waste tyres lies in its capacity to promote retreading of domestic used tyres because imported retreaded tyres may be substituted for by retreaded tyres made from domestic used tyres that would not have been retreaded otherwise.[1231]

7.132 The Panel needs here to determine whether a *link* exists between the replacement of imported retreaded tyres by domestically retreaded tyres and a reduction in the number of waste tyres in Brazil. For Brazil, the import ban on retreaded tyres is a way of encouraging domestic producers to collect and retread the used tyres that are already in its territory thereby extending the life cycle of domestic

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> "Using simple arithmetic and on the basis of the optimistic expectation that a remoulded tyre could run the same distance as a new tyre, i.e. 60,000 km, it may be concluded that, after 120,000 km, a four-wheel vehicle that has used new tyres, subsequently remoulded, will have consumed four tyres; on the other hand, an identical vehicle that has used remoulds over the same period will have consumed eight tyres. Clearly, if the total service life of a remoulded tyre is less than that of a new tyre (since the latter can be remoulded once and the former not at all), the introduction into the domestic market of tyres remoulded abroad will over time create a greater environmental burden." (Exhibit EC-43, para. 98, translation by the WTO Secretariat)

[1226] Brazil's first concluding statement, para. 9.

[1227] European Communities' first written submission, para. 26. The European Communities also argues that the age of a casing for a passenger car tyre may not exceed 7 years when it is being retreaded, whereas no similar restriction exists for commercial vehicle and aircraft tyres. See European Communities' answer to panel question No. 4.

[1228] Brazil's first written submission, para. 16.

[1229] Brazil's answer to panel question No. 5.

[1230] In its answer to panel question No. 117, Brazil provides some data on the imports of retreaded tyres by type of tyres in 2002/2003. According to these data, it seems that in practice most imports of retreaded tyres in the past have been passenger car retreaded tyres (i.e. 99,8 per cent).

[1231] See Brazil's answer to panel questions Nos. 6 and 26.

used tyres.[1232] This argument therefore assumes that an augmentation in the number of domestic used tyres being retreaded will contribute to the reduction of waste tyre accumulation.

7.133 The Panel is of the view that if a domestic retreaded tyre is manufactured from a tyre used in Brazil, the retreading of this domestic tyre contributes to the management and reduction of the number of waste tyres in Brazil, by ensuring that a tyre already used in Brazil gets a "second life" as a retreaded tyre. Therefore, the Panel agrees that if the domestic retreading industry retreads more domestic used tyres, the overall number of waste tyres will be reduced by giving a second life to some used tyres, which otherwise would have become waste immediately after their first and only life.

7.134 The Panel will consider next whether an import ban on retreaded tyres is capable of *promoting* the retreading of domestic used tyres. The direct effect of an import ban on retreaded tyres is to compel consumers of imported retreaded tyres to switch either to retreaded tyres produced domestically or to new tyres. Assuming that domestic used tyres are the only raw material available to retreaders in Brazil and that at least part of the domestic demand is satisfied by domestic retreaded tyres (as opposed to new tyres), an increase in the demand for domestic retreaded tyres can be expected to lead to a corresponding supply response, and hence to an increase in the retreading of domestic used tyres.[1233] Therefore, the Panel finds merit in the argument that an import ban on retreaded tyres can encourage domestic retreaders to retread more domestic used tyres than they might have done otherwise.[1234] This will be possible if domestic used tyres can be retreaded in Brazil.[1235] The Panel will now assess whether this assumption can be verified.

7.135 The parties provided and discussed a number of documents and data to illustrate their views on whether domestic used tyres were retreadable and being retreaded such as: Retreadability figures prepared by a Brazilian company, Mazola[1236]; the LAFIS report and the IPT study[1237]; a report

[1232] Brazil's first written submission, paras. 106-107.

[1233] We note Brazil's argument that the fact that "local retreaders are desperately seeking to circumvent the import ban through court injunctions demonstrates ... that the ban is necessary to induce local retreaders to collect waste tyres accumulated in Brazil for retreading, rather than importing used tyres" (Brazil's answer to panel question 19).

[1234] Brazil's first written submission, para. 106.

[1235] Brazil's first written submission, para. 108.

[1236] Brazil's first written submission, para. 79 and Exhibit BRA-93. European Communities' second written submission, para. 36. Brazil claims that according to Mazola, a company that selects retreadable casings for leading tyre retailer, about 30 per cent of passenger car tyres found in Brazil are suitable for retreading. On the other hand, the European Communities argues that the Mazola figures contain a number of uncertainties, e.g. whether the table excludes only tyres which are "retreadable", or whether it also excludes tyres which can be used for other purpose, including mid-life tyres, or tyres than can be used for material recycling. According to a letter from the director of Mazola (Exhibit BRA-160), the activity of this company is to commercialize "usable (retreaded) tyres" in contrast to "unusable tyres" that are "forwarded to their final destination". It is not entirely clear whether this table excludes only retreadable tyres.

[1237] European Communities' second written submission, para. 45 and Exhibit EC-92, p. 11. Brazil's second oral statement, para. 72. The European Communities argues that a recent overview of the Brazilian Tyre market – the LAFIS Report – indicates that the rate of retreading of tyres in Brazil in 2005 is 9.9 per cent. Brazil replies that this figure comes from a study, entitled "Identifying Final Destinations of Unusable Tires" (the IPT study, Exhibit BRA-159). Brazil contends that the IPT study is "controversial" as it only surveyed "retailers and tyre repair shops" and did not account for retreadable tyres that were retained by owners neither did it account for a large part of commercial tyres because, according to Brazil, these tyres do not typically pass through the retailers or tyre repair shops. On the other hand, the European Communities argues that the retreading rate is an aggregate figure for all types of tyres, including truck tyres: this means that the percentage of passenger car tyres which are being retreaded must be considerably lower than 9.9 per cent and most likely *de minimis*.

prepared by the Association of Brazilian Retreaders (ABR)[1238]; a video produced by BS Colway[1239]; a Technical Note by INMETRO[1240]; a table on the retreadability and the retreading rate of Brazilian used tyres[1241]; and retreadability figures in other countries.[1242] There are differences of view among the parties as to the relevance and accuracy of the evidence submitted, with respect to the level of retreadability of tyres in Brazil, as well as on the extent to which tyres used in Brazil are actually

[1238] Brazil's second written submission, para. 116, Exhibit BRA-95 and 157. European Communities' second oral statement, para. 29. Brazil argues that, according to the information provided by ABR, more than 84 million tyres were retreaded in Brazil between 2001 and 2005. In the same period, Brazil argues that just 27 million used tyres were imported. For Brazil, many imported casings are not suitable for retreading, but even if all imported casings had been retreaded between 2001 and 2005, 57 million retreads would have still been manufactured from domestic casings. The European Communities notes that the ABR's report indicates that the large majority of passengers car casings retreaded in Brazil are imported. The Panel notes that the report prepared by ABR also states that: "the large majority, but not the totality, of passenger car casings reformed in Brazil are imported" and that it "is unable to precise the percentage of casings that is effectively obtained in the local market". This means, therefore, that, according to this report, Brazilian retreaders, even if to a small extent, use domestic casings.

[1239] European Communities' answer to panel question No. 21 and Exhibit EC-72. Brazil's answer to panel question No. 96 of the Panel. The European Communities contends that in the video produced by the Brazilian retreaders association ABIP and ABR, which documents the ongoing debate on the prohibition of the importation of used tyres, several Brazilian retreaders testify that they require the importation of used tyres in order to be able to carry out their retreading business in Brazil. On the other hand, Brazil submits that the video states: "Nowadays, 60 per cent of the raw material used by the Brazilian retreaders are domestic casings". The European Communities replies that the video contains no such statement and that it states: "National casings are already being used. Due to the bad conditions of the country's roads and highways, we have only been able to use enough to meet 60 per cent of our need, that is, our segment operates with 40 per cent idleness". The Panel notes that there is a disagreement between parties as to the coverage of the figure "60 per cent". The video nevertheless contains a statement indicating that domestically used tyres are being retreaded.

[1240] European Communities' first written submission, para. 81 and Exhibit EC-45. Brazil's second written submission, para. 115. The European Communities submits that the 2000 INMETRO Technical Note states that "The national tyre reconditioning industry, mainly the remoulded tyre industry, needs to import used tyres in order to use the carcasses as raw material. It is widely confirmed that using domestic used tyres to obtain the carcasses is economically unviable given our conditions of use". On the other hand, Brazil argues that the note spoke of economic viability, not of the actual suitability. Moreover, Brazil argues that the final rule issued by INMETRO as Technical Note No. 001/2006 (Exhibit No. 163) on the injunction for retreaded tyres does not contain a reference to economic viability. However, it recommends that used tyres not be imported for retreading, since the number of used tyres that need to be discharged from the domestic market already meets the demand of retreaders.

[1241] Brazil's second oral statement, paras. 57-61, Brazil's answer to panel questions Nos. 107 and 117 and Exhibit BRA-162. European Communities' answer to panel question No. 107. Brazil submits several tables that show the number of tyres retreaded in Brazil made from domestic casings during the years 2001 to 2005 and the rate of retreading from domestic casings. Brazil explains that the tables set forth two scenarios: (i) the conservative scenario assumes that all imported casings were retreadable and were, in fact, retreaded; (ii) the realistic scenario is based on the estimates by the Brazilian retreaders that approximately two-thirds of the imported casings are retreaded. Brazil argues that both scenarios show that tyres used in Brazil are retreaded in very high numbers. Brazil submits that the overall retreading rate from domestic casings (including truck, bus and passenger car tyres) peaked in 2003 at some 44 per cent under the realistic scenario, or 35 per cent under the conservative scenario. According to Brazil, this means that of all potentially retreadable used tyres in Brazil, as much as 44 per cent were not only suitable for retreading, but were, in fact, retreaded. The European Communities contends that with the exception of the number of imported used tyres, the calculations contained in Exhibit BRA-162 are full of inaccuracies and unproven assumptions. For the European Communities, Exhibit BRA-162 is inadequate for the purpose of establishing the rate of retreading of passenger car and truck tyres as well as the share of domestic casings in retreads manufactured in Brazil.

[1242] Brazil provided some example of retreadability figures for other countries: in the United Kingdom, 10-30 per cent of used tyres are suitable for retreading; in the United States, less than 12 per cent; in Australia, 15-20 per cent; in France, 33 per cent. Brazil's first written submission, para. 79. Brazil also argued that no country, including Brazil, can provide a precise suitability figure. Brazil's answer to panel question No. 17.

retreaded. Brazil claims that about 30 per cent of Brazilian casings are retreadable and that the overall rate of retreading (i.e. including passenger car, truck and bus tyres) in Brazil is as high as 44 per cent.[1243] The European Communities claims that Brazilian used tyres are generally not suitable for retreading and that the rate of retreading of domestic casings in Brazil is no higher than 9.9 per cent. The European Communities notes however that this figure includes truck tyres and that the retreading rate of domestic passenger car tyres is even lower.[1244]

7.136 The reports and studies mentioned in the previous paragraph indicate that at least some domestic used tyres are being retreaded in Brazil. For instance, the ABR report states that "the large majority, but not the totality, of passenger car casings reformed in Brazil are imported"[1245]; or the INMETRO Technical Note 001/2006 recommends that used tyres are not imported in order to be used for retreading, since "the number of used tires that need to be discharged from the domestic market already meets the demand of retreaders".[1246]

7.137 The Panel notes further that Brazil argued that it had taken a number of measures to facilitate the access of domestic retreaders to good quality used tyres.[1247] The Panel is of the view that such measures could indeed positively contribute to Brazil's capacity to retread its own tyres. First, according to Brazil, Resolution CONAMA 258/1999, as amended in 2002, provides for a collection and disposal scheme in Brazil[1248] and forces manufacturers and importers of new tyres to collect and dispose of waste tyres to a proportion of five waste tyres for every four new tyres.[1249] Brazil also indicates that Resolution CONAMA 258/1999 exempts domestic retreaders from disposal obligations, as long as they process tyres consumed within the country's territory.[1250] Moreover, Brazil claims that it has adopted demanding technical regulations for manufacturing of new tyres, which help produce better-quality tyres and, subsequently, better casings.[1251] The Panel notes the European Communities' claim concerning the existence in Brazil of cheap low-quality new tyres.[1252] Brazil replies that new tyres sold in Brazil (whether manufactured domestically or imported) are high-quality tyres that comply with strict technical and performance standards that are based on international standards and that tyres manufactured in accordance with these standards have the

[1243] Brazil's second oral statement, para. 61.

[1244] European Communities' first written submission, para. 82; European Communities' answer to panel question No. 20; European Communities' second written submission, paras. 44-46; European Communities' second oral statement, para. 30.

[1245] Exhibit BRA-95, para. 6.

[1246] Exhibit BRA-163, p. 10.

[1247] Brazil's first written submission, para. 81.

[1248] Brazil's first written submission, paras. 71-72; Brazil's second oral statement, para. 86. Exhibit BRA-4. Article 1 of this regulation states: "Tire manufacturers and importers are obliged to collect and definitively dispose of scrap tires in Brazil, in a proper manner, in the proportion stated herein with regard to quantities of manufactured and/or imported tires". Article 3.IV states: "a) manufacturers and importers should definitively dispose of *five scrap tyres* for every *four new tyres* manufactured in Brazil or new imported tires, including those fitted to imported vehicles; b) importers should definitively dispose of *four scrap tyres* for every *three imported recycled [i.e. retreaded] tyres* of any kind." [emphasis added] A scrap tyre is defined in Article 2 as a tyre "which can no longer be restored to permit further travel use". See also Resolution CONAMA 301/2002 (Exhibit Bra-68).

[1249] The Panel also notes that Brazil contends that it has enforced these obligations and imposed substantial fines in this regard; it has helped private companies set up collection centres ("*ecopontos*"); and it has intensified its own collection efforts.

[1250] Brazil's first written submission, para. 81.

[1251] Brazil's first written submission, para. 81.

[1252] European Communities' first oral statement, para. 28; European Communities' answer to panel question No. 11.

potential to be retreaded.[1253] Therefore, the Panel has no reason to believe that new tyres sold in Brazil are low-quality tyres.

7.138 Brazil has also indicated that automotive inspections are an important instrument to increase the number of retreadable casings in the country[1254] and that it continues to promote better tyre care to increase the collected tyres' suitability for retreading.[1255] However, the European Communities claims that currently there are no rules at the federal level, which would establish a mandatory vehicle inspection system.[1256] Brazil argues that the National Code of Traffic (Law 9503), enacted in 1997[1257], mandates annual safety inspections of all vehicles[1258] and Bill 5979/2001, currently before the National Congress, establishes general rules to be applied by the states in these safety inspections.[1259] Brazil contends further that because the general rules to be applied by the Brazilian states are still under consideration of the National Congress, the states are applying their own technical guidelines in mandatory inspections, which occur when a vehicle is first licensed or when the ownership of a vehicle changes.[1260] Therefore, it appears that mandatory inspections are taking place in Brazil and that more frequent inspections are to be expected once Bill 5979/2001 is approved.

7.139 Furthermore, the Panel notes that both parties agreed that if imports of both used and retreaded tyres were banned, waste volumes would be at their lowest.[1261] For the ban on retreaded tyres to contribute to the objective of a reduction of waste tyres, it should not lead to a substitution of imported used tyres for imported retreaded tyres. The Panel notes that Article 40 of Portaria SECEX 14/2004 bans the importation of both used and retreaded tyres to Brazil. Therefore, the Panel observes that the import ban on used tyres supports the effectiveness of the import ban on retreaded tyres regarding the reduction of waste tyres.

7.140 The Panel notes further the European Communities' argument that in fact it can be assumed that practically every potential sale of an imported retreaded tyre is currently, due to the import ban, substituted by a sale in Brazil of a new tyre or of a domestic retreaded tyre most likely manufactured from an imported used tyre.[1262] The Panel notes that a number of preliminary injunctions have temporarily allowed local retreaders to import casings, thereby making it possible for domestically retreaded tyres to be made from such imported casings despite the prohibition of such imports in Article 40 of Portaria SECEX 14/2004.[1263] The Panel notes Brazil's explanation that the used tyre imports through injunctions are not part of the design of the measure and are rather an attempt to undermine the measure's design and application.[1264] As noted earlier, our analysis at this stage focuses on the measure itself, rather than on elements relating to the manner in which it is being applied,

[1253] Brazil's answer to panel questions No. 12 and 91.
[1254] Brazil's answer to European Communities question No. 8.
[1255] Brazil's first written submission, para. 82.
[1256] European Communities' answer to panel question No. 87.
[1257] Exhibit BRA-102.
[1258] Brazil's first written submission, para. 82.
[1259] Brazil's answer to European Communities question No. 8.
[1260] Brazil's answer to European Communities question No. 9.
[1261] Brazil's second written submission, para. 120. Second oral statement, para. 79. See expert Report of Plinio M. Nastari, M.Sc., Ph.D., July 2006, at para. 39 ("Nastari Report") (Exhibit BRA-146). European Communities, second oral statement, para. 36.
[1262] European Communities' first written submission, para. 127.
[1263] Brazil also argues that the fact that "local retreaders are desperately seeking to circumvent the import ban through court injunctions demonstrates ... that the ban is necessary to induce local retreaders to collect waste tyres accumulated in Brazil for retreading, rather than importing used tyres". Brazil's answer to panel question 19.
[1264] Brazil's answer to Panel question 118.

which will be relevant in the context of our analysis under the chapeau of Article XX.[1265] We will therefore reserve our examination of this element for that later stage.

7.141 Finally, it appears to the Panel that the Brazilian retreading industry has the production capacity to retread domestic used tyres at the end of their life. This conclusion can be drawn from the ABR report which shows that the production of the domestic retreading industry in 2005 was 10.8 million retreaded passenger car tyres and 7.8 million truck and bus tyres.[1266] This means that in total 18.6 million retreaded tyres were produced domestically in 2005. Brazil indicates also that, in 2005, 33.4 million new tyres (all types included) were sold in Brazil (either domestically produced or imported).[1267]

7.142 In light of the above, the **Panel** is of the view that Brazil has established that it has the production capacity to retread domestic used tyres, that domestic used tyres are suitable for retreading and are being retreaded. Therefore, the Panel concludes that the import ban is capable of contributing to the reduction of the overall amount of waste tyres generated in Brazil. Having determined this first aspect of the contribution, the Panel now turns to a consideration of whether such a reduction will, in turn, lead to a reduction of the risks to human life or health that Brazil seeks to address.

> Contribution of the import ban to the reduction of the risks to human, animal and plant life and health

7.143 **Brazil** argues that it has demonstrated that the import ban contributes in a significant way to the reduction of the health and environmental risks that flow from waste tyre accumulation, transportation, and disposal.[1268] For Brazil, by reducing the volumes of waste tyres, and consequently the amount of tyres that will be stockpiled or illegally dumped, the ban also reduces mosquito breeding grounds[1269] and the health risks caused by tyre fires and toxic leaching.[1270] For Brazil, the more waste tyres there are, the higher these risks.[1271] Brazil points out that in addition to collecting tyres, Brazil's campaign against dengue targets other key containers, educates the public about dengue prevention, carries out mosquito surveillance, monitors mosquito resistance to insecticides, and offers guidance on treatment of dengue patients.[1272] Brazil also argues that the level of risk from commercial vehicle retreaded tyres is higher than that from passenger car retreaded tyres because commercial vehicle retreads are substantially heavier and, thus, produce more waste.[1273]

7.144 The **European Communities** argues that, even if Brazil had established that its ban makes a contribution to the reduction of waste tyres, it has failed to demonstrate that this leads to a reduction of the risks to human life or health.[1274] In the European Communities' view, the problems arising from waste tyres are not attributable to imports of retreaded tyres but to the 100 million waste tyres scattered around the country, and the health problems continue since the ban was enacted.[1275]

[1265] See para. 7.107 above.

[1266] Exhibit BRA-157, para. 2. The ABR report also indicates that "[t]here are 1257 tyre reforming companies operating with truck/bus tyres; 120 in the field of passenger car tyres; 100 in the field of agriculture/earthmoving tyres; 100 in the field of motorcycle tyres. That totals 1577 tyre reforming companies". Exhibit BRA-157, para. 1.

[1267] Brazil's answer to panel question No. 99 by the Panel.

[1268] Brazil's second written submission, para. 109.

[1269] Brazil's second written submission, para. 123.

[1270] Brazil's second written submission, para. 132.

[1271] Brazil's second oral statement, para. 78.

[1272] Brazil's answer to panel question No. 89.

[1273] Brazil's answer to panel questions Nos. 5, 100-102.

[1274] European Communities, first oral statement, para. 42.

[1275] European Communities,' second written submission, para. 55.

7.145 In the **Panel**'s view, it cannot be reasonably expected that the specific measure under consideration would entirely eliminate the risk to human health or life arising from the accumulation of waste tyres in Brazil, or even that its impact on the actual reduction of the incidence of the diseases at issue would manifest itself very rapidly after the enactment of the measure, especially when a number of factors beyond the specific product targeted by the measure (retreaded tyres) also contribute to the realization of the hazard.

7.146 The question here is whether a measure that contributes to the reduction of the amount of waste tyres in Brazil will contribute to the reduction of the risks arising from such accumulation. In this respect, the Panel considers it significant that the very essence of the problem is the actual accumulation of waste in and of itself. To the extent that this accumulation has been demonstrated to be associated with the occurrence of the risks at issue, including the providing of fertile breeding grounds for the vectors of these diseases, a reduction in this accumulation, even if it does not eliminate it, can reasonably be expected to constitute a step towards the reduction of the occurrence of the diseases and the tyre fires. The Panel also notes that the measure at issue is intended to operate in conjunction with a number of other measures taken by Brazil domestically to reduce the risks arising from the accumulation of waste tyres (such as tyre collection) as well as measures targeting mosquito-borne diseases, including measures intended to address key containers other than waste tyres that may act as breeding grounds for mosquito-borne diseases.[1276]

7.147 In this context, the Panel finds it reasonable to consider that a measure that contributes to the reduction of the amount of waste tyres in Brazil also will contribute to the reduction of the risks to human, animal and plant life and health arising from the accumulation of waste tyres in Brazil.

Conclusion

7.148 In light of the above, the Panel concludes that the prohibition on the importation of retreaded tyres is capable of making a contribution to the objective pursued by Brazil, in that it can lead to a reduction in the overall number of waste tyres generated in Brazil, which in turn can reduce the potential for exposure to the specific risks to human, animal, plant life and health that Brazil seeks to address.

Availability of alternative measures

Approach by the Panel

7.149 Having reviewed the relevant factors identified by the Appellate Body, the Panel will now undertake a comparison between the challenged measure and possible alternatives. In this connection, the Panel recalls the Appellate Body's finding that a measure cannot be considered "necessary" within the meaning of Article XX if a WTO-consistent alternative measure, or less WTO-inconsistent measure, is "reasonably available" that would achieve the same end.[1277]

[1276] See Brazil's response to Question No. 89 of the Panel; Brazil's second written submission, para. 126.

[1277] Appellate Body Report on *Korea – Various Measures on Beef*, paras. 165-166 and Appellate Body Report on *EC – Asbestos*, paras. 170-172. The Appellate Body, in addressing the "necessity" of the measures respectively under Articles XX(b) and XX(d) concerned in both cases, found that the standard set forth by the GATT panel in *US – Section 337 of the Tariff Act of 1930* was correct. The panel in *US – Section 337 of the Tariff Act of 1930* stated:

> "In was clear to the Panel that a contracting party cannot justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent

7.150 As stated by the Appellate Body in *Dominican Republic – Import and Sale of Cigarettes,* the weighing and balancing process of the factors that we have considered above should inform the determination of whether a WTO-consistent alternative measure, or a less WTO-inconsistent measure, which the Member concerned could reasonably be expected to employ, is available.[1278]

7.151 In this instance, we have determined above that the objective of protecting human health and life is both vital and important in the highest degree and the objective of protection of animal and plant life and health can also be considered important. We have also observed that the challenged measure, a complete import ban, is particularly restrictive of trade, but also that it is capable of contributing to the objective pursued, in that it can lead to a reduction in the overall number of waste tyres generated in Brazil, which in turn can reduce the potential for exposure to the specific risks to human, animal, plant life and health that Brazil seeks to address.

7.152 We must therefore now consider whether any alternative measure, less inconsistent with GATT 1994, that is, less trade-restrictive than a complete import ban, would have been reasonably available to Brazil to achieve the same objective, taking into account Brazil's chosen level of protection.[1279] The challenged measure could not be considered to be necessary if such an alternative measure was available.

7.153 The **European Communities** submits that the onus is upon Brazil to prove that there are no reasonably available alternatives to the import ban on retreaded tyres.[1280] According to the European Communities, once the complaining party identifies the universe of alternative measures, it is the responding party that has the burden of proof to show that the alternative measures identified by the complaining party are not reasonably available.[1281]

7.154 **Brazil** argues that the complaining party, not the respondent, bears the burden of demonstrating that a less trade-restrictive measure is reasonably available and that only if the complaining party raises a WTO-consistent alternative measure that is reasonably available, the burden of proof would shift to the responding party.[1282]

7.155 The **Panel** recalls that the Appellate Body in *US – Gambling* found that the respondent only needs to make a prima facie case of the necessity of a measure and does not need to identify less WTO-inconsistent measures. The Appellate Body stated that:

> "[i]t is for a responding party to make a prima facie case that its measure is 'necessary' by putting forward evidence and arguments that enable a panel to assess the challenged measure in the light of the relevant factors to be 'weighed and

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with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions." (Panel report on *US – Section 337 of the Tariff Act of 1930*, BISD 36S/345, para. 5.10.)

[1278] Appellate Body Report on *Dominican Republic – Import and Sale of Cigarettes*, para. 70. Brazil also agrees to this approach. See Brazil's first written submission, paras. 112-113.

[1279] In this respect, we recall the Appellate Body's statement in *EC – Asbestos* that, given the value pursued in that case – the preservation of human life and health through elimination, or reduction, of the health risks posed by asbestos fibres – was both vital and important in the highest degree, the remaining question was whether there was an alternative measure that would achieve the same end and that is less restrictive of trade than a prohibition (the measure in that case) (Appellate Body Report on *EC – Asbestos*, para. 172*).*

[1280] European Communities' first written submission, para. 110.

[1281] European Communities' second written submission, paras. 69-71, citing Appellate Body Report on *US – Gambling*, paras. 309-311.

[1282] Brazil's first written submission, paras. 116-117, citing Appellate Body Report on *US – Gambling*, at paras. 311, 320; Brazil's second written submission, para. 39.

> balanced' in a given case. The responding party may, in so doing, point out why alternative measures would not achieve the same objectives as the challenged measure, but it is under no obligation to do so in order to establish, in the first instance, that its measure is 'necessary'"[1283]

7.156 The Appellate Body then found that once the complaining party comes forward with a WTO-consistent alternative measure, the respondent has to demonstrate why the measure at issue is necessary in light of the alternative measure raised by the complainant or why the proposed alternative is not "reasonably available":

> "If, however, the complaining party raises a WTO-consistent alternative measure that, in its view, the responding party should have taken, the responding party will be required to demonstrate why its challenged measure nevertheless remains 'necessary' in the light of that alternative or, in other words, why the proposed alternative is not, in fact, 'reasonably available'. If a responding party demonstrates that the alternative is not 'reasonably available', in the light of the interests or values being pursued and the party's desired level of protection, it follows that the challenged measure must be 'necessary' ..."[1284]

7.157 Following the same approach, we will first examine whether the European Communities has identified a measure, other than the import ban, that is compatible, or less incompatible, with the WTO Agreement and at the same time, in its view, was reasonably available to Brazil to achieve its policy objective. If the Panel finds that the European Communities has done so, we will then examine whether, in light of the alternative measures identified by the European Communities, Brazil has demonstrated why the import ban nevertheless remains necessary (i.e. why these alternative measures are not, in fact, reasonably available). We understand this assessment to involve in particular a consideration of the relative trade-restrictiveness of the proposed alternatives compared to that of the measure at issue, taking into account also the importance of the objective pursued and the ability of the proposed alternative measure to achieve this objective.

7.158 As to the elements that may guide our assessment as to whether such alternative measure is reasonably available, we find useful the following statement of the Appellate Body in *US – Gambling*:

> "An alternative measure may be found not to be 'reasonably available', however, where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties. Moreover, a 'reasonably available' alternative measure must be a measure that would preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued...".[1285]

[1283] Appellate Body Report on *US – Gambling*, para. 310.

[1284] Appellate Body Report on *US – Gambling*, para. 311.

[1285] Appellate Body Report on *US – Gambling*, para. 308. We also note that in *Korea – Various Measures on Beef*, the Appellate Body endorsed the approach taken by the panel in that case:

> "Having found that possible alternative enforcement measures, consistent with the *WTO Agreement,* existed in other related product areas, the Panel went on to state that:
> '... it is for Korea to demonstrate that such an alternative measure is not reasonably available or is unreasonably burdensome, financially or technically, taking into account a variety of factors including the domestic costs of such alternative measure, to ensure that consumers are not misled as to the origin of beef'" (original footnote omitted)

Alternative measures identified by the European Communities

7.159 The European Communities has identified various measures as alternatives to Brazil's import prohibition. More specifically, the European Communities has presented these measures in two categories – alternative measures to reduce the number of waste tyres accumulating in Brazil and those to improve the management of waste tyres in Brazil.

7.160 First, the European Communities suggests that Brazil has not done "all it could" to reduce the accumulation of waste tyres in Brazil because there exist various other measures that Brazil could reasonably have been expected to employ to achieve the same objective. The European Communities argues that Brazil should have taken the following domestic measures: measures to encourage or ensure the retreading of domestic passenger cars, including, for example, measures such as education campaigns or the use of government procurement to require the installation of retreaded tyres on government vehicles; measures to improve the low suitability of Brazilian passenger car tyres for retreading[1286]; measures that would reduce the use of cars in Brazil, for example through the promotion of public transport in urban areas[1287]; as for tyres that have already been retreaded, any policy aiming at a longer safe use of retreaded tyres, such as better vehicles maintenance, including technical inspection, and educational campaigns on better driving habits[1288]; and measures to prevent the constant and growing flow of used tyres into Brazil.[1289]

7.161 Second, as alternative measures to improve the management of waste tyres, the European Communities first argues that Brazil already has a measure in its legislation that can achieve its policy objective, namely the collecting and disposal system such as that which has already been set up by CONAMA Resolution 258/1999, as amended in 2002. Similarly, the European Communities argues that Brazil should have adopted at the federal level voluntary programmes such as "Paraná Rodando Limpo" and other equivalent programmes implemented in some other States in Brazil. Finally, according to the European Communities, main disposal methods such as controlled landfilling, stockpiling, energy recovery and material recycling constitute alternative measures to the import ban.

Reasonable availability of alternative measures to Brazil

7.162 As noted above, the European Communities has identified the alternative measures consistent with the WTO Agreement that in its view would achieve Brazil's policy objective. We will now proceed to examine whether Brazil has demonstrated that these measures are not reasonably available to it.

7.163 Thus, bearing in mind the guidance provided by the Appellate Body, we will consider in turn the two different sets of measures suggested by the European Communities as alternatives to the import ban – first, measures to reduce the number of waste tyres and secondly, measures to improve the management of waste tyres.

Measures to reduce the number of waste tyres

7.164 The **European Communities** argues that Brazil does not seem to have taken measures to encourage domestic retreading or improve the retreadability of tyres, such as those listed in paragraph 7.160 above.

[1286] European Communities' first oral statement, paras. 58-61.
[1287] European Communities' answer to Panel question No. 38.
[1288] European Communities' answer to Panel question No. 38.
[1289] European Communities' first oral statement, paras. 62-68.

7.165 Regarding the alternative measures suggested by the European Communities to prevent the generation of waste, **Brazil** first responds that it actively promotes retreading of the tyres and has already implemented a number of measures that encourage non-generation and is in the process of implementing others.[1290] Brazil further submits that government procurement is not necessary in Brazil since Brazil already has a high demand for retreaded tyres.[1291] Furthermore, according to Brazil, in developing countries such as Brazil, the promotion of public transport is hardly necessary since most of the population do not own cars and already use public transportation.

7.166 In any event, Brazil submits that none of these measures can replace the import ban because they do not allow Brazil to achieve its goal of preventing tyre waste to the maximum extent possible. Brazil asserts that the non-generation solutions proposed by the European Communities could be alternatives only if Brazil sought to reduce waste tyre volumes by a particular amount and that these suggested measures are not alternatives within the meaning of Article XX(b), but rather additional measures, because without the import ban, some tyre waste that could have been prevented would not, in fact, be prevented.[1292]

7.167 The **Panel** first notes that the measures suggested by the European Communities to encourage domestic retreading or to improve the retreadability of domestic used tyres are less trade-restrictive than the import ban, in that they operate on the domestic market for imported and domestic tyres alike and do not involve any *a priori* import restrictions. Furthermore, they could contribute to the reduction in the number of waste tyres generated by domestic used tyres in Brazil by maximizing their overall lifespan.

7.168 However, as pointed out by Brazil, the promotion of domestic retreading and enhanced retreadability of locally used tyres in Brazil would not lead to the reduction in the number of waste tyres additionally generated by "imported short-lifespan retreaded tyres".

7.169 We also observe that Brazil has already implemented or is in the process of implementing such domestic measures.[1293] Indeed, the positive impact of both measures – i.e. the ban on imported short-lifespan retreaded tyres and domestic measures on domestic used tyres – could be cumulative rather than substitutable. We thus do not agree with the European Communities that the institution of domestic measures to encourage timely domestic retreading and to improve the retreadiblity of domestic used tyres would achieve the same outcome as the import ban on retreaded tyres.

7.170 Finally, the European Communities also argues that Brazil has not taken measures to prevent the constant and growing flow of *used tyres* into Brazil due to the imports through court injunctions.[1294]

7.171 In this respect, we note that by law, imports of used tyres *are* already prohibited, so that if the "alternative measure" proposed by the European Communities is the prohibition of used tyres, it could be said that Brazil actually already imposes that measure. Indeed, as noted above, this prohibition actually supports the effectiveness of the measure at issue.[1295] Further, this will be an issue relevant in our consideration of "whether the import ban is being applied in a manner consistent with its objective under the chapeau".

[1290] Brazil's second written submission, para. 104.
[1291] Brazil's second written submission, para. 104.
[1292] Brazil's answer to Panel question No. 122.
[1293] See paragraphs 7.137-7.138 above for such examples.
[1294] European Communities' first oral statement, paras. 62-68.
[1295] See paragraph 7.139.

7.172 Therefore, in the **Panel's** view, Brazil has successfully demonstrated that the alternative measures identified by the European Communities to avoid the generation of waste do not constitute alternatives that could apply *as a substitute for* the import ban on retreaded tyres to achieve its goal of preventing the generation of waste tyres to the maximum extent possible. Rather, they would appear to be complementary measures that Brazil in fact already applies, at least in part.

Measures to improve the management of waste tyres

7.173 We will now examine the waste tyre management measures identified by the European Communities to determine whether Brazil has demonstrated that these measures do not constitute reasonably available alternative measures to the import ban.

Resolution CONAMA 258/1999 and "Paraná Rodando Limpo"

7.174 First, the **European Communities** submits that the Brazilian legislation itself contains one alternative to the import ban: the system for the final disposal of tyres adopted by Resolution CONAMA 258/1999 which makes it mandatory for domestic producers of new tyres and tyre importers to provide for the safe disposal of waste tyres ("unusable tyres" in the terminology of the Resolution) in specified proportions. The European Communities also suggests that a second alternative measure could exist in a programme put in place in the State of Paraná[1296]; it is a voluntary multi-sector programme called "Paraná Rodando Limpo" ("Paraná Rolling Clean"), in which more than 10 million old tyres have so far been disposed of, thus eliminating the waste tyre problem in that State.[1297] The European Communities also indicates that equivalent programmes are now being implemented in Pernambuco and Paraíba and suggests that Brazil could apply such a programme to the whole Union.[1298] The European Communities claims that such a disposal scheme is an alternative measure to the import ban and that the scheme, if enforced correctly, would eliminate the eventual health hazards created by waste tyres.[1299] According to the European Communities, schemes like these are even more effective than an import ban, since they cover all waste tyres; this would also correspond to the modern waste management policies adopted around the world.

7.175 **Brazil** argues, however, that collection schemes such as Resolution CONAMA 258/1999 and "Paraná Rodando Limpo" are only one component of Brazil's comprehensive waste management programme, which complements – but cannot substitute for – the import ban.[1300] This is because the Resolution, which is a measure dealing with the final disposal of waste tyres, by itself, does not achieve the desired "level" of protection sought by the import ban – i.e. non-generation of unnecessary additional tyre waste. Moreover, according to Brazil, even when the collection and disposal methods conform to the environmental legislation in force, in accordance with Resolution CONAMA 258/1999 and "Paraná Rodando Limpo", they pose health and environmental risks themselves, which are the very risks that Brazil seeks to prevent in the first place. Therefore, Brazil submits that its import ban is necessary because no lesser measure could contribute so effectively to the policy objective of protecting human life or health and the environment through the avoidance of the additional and unnecessary generation of waste tyres.

7.176 The **Panel** notes that, as Brazil explains, Resolution CONAMA 258/1999 imposes an obligation on importers of retreaded tyres to collect and ensure the "environmentally appropriate final disposal of four unusable tyres in Brazil" for every three retreaded tyres imported.[1301] We agree with

[1296] European Communities' first written submission, para. 113. See Exhibit EC-49.
[1297] European Communities' first written submission, para. 113.
[1298] European Communities' first written submission, para. 113.
[1299] European Communities' first written submission, para. 112.
[1300] Brazil's first written submission, para. 119.
[1301] Brazil's first written submission, para. 118.

the European Communities that the obligation to collect four waste tyres for every three retreaded tyres imported would seem to contribute to reducing the accumulation of waste tyres and consequently to reducing the types of the risks identified earlier in relation to the accumulation of waste tyres. Also, it is clearly less trade-restrictive than the import ban. Thus, it would seem, at least initially, that the Resolution could constitute an alternative measure to the import ban.

7.177 At the same time, however, we recall that Brazil's chosen level of protection is the reduction of the risks associated with waste tyre accumulation to the maximum extent possible and that Brazil purports to achieve this goal by reducing the "generation" of tyre waste as much as possible. Thus, insofar as the level of protection pursued by Brazil involves the "non-generation" of waste tyres in the first place, the Resolution would not seem able to achieve the same level of protection as the import ban. Furthermore, we also note Brazil's concern that collection schemes such as the Resolution do not even address, let alone eliminate, the very disposal risks that Brazil seeks to avoid.[1302] We consider the Appellate Body's observation in *EC – Asbestos* useful in this respect: "France could not reasonably be expected to employ any alternative measure if that measure would involve a continuation of the very risk that the measure seeks to halt."[1303]

7.178 In sum, the **Panel** is of the view that Brazil has demonstrated that collection and disposal schemes such as Resolution CONAMA 258/1999 as amended by Resolution CONAMA 301/2002 and Paraná Rodando Limpo have already been implemented in Brazil and that the overall objective of these schemes is, as recognized by the European Communities, ensuring environmentally appropriate collection and final disposal of waste tyres.[1304] The Panel is also of the view that, for the reasons expressed in the previous paragraphs, these schemes are not reasonably available to Brazil as an *alternative* to the import ban in light of the level of protection Brazil pursues in relation to the health

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Article 3 of the Resolution, as amended by the Resolution of 2002, provides:

> "The time periods and quantities for collection and environmentally appropriate final disposal of unusable tyres resulting from use on automotive vehicles and bicycles covered by this Regulation are as follows:
> I – as of 1 January 2002: for every four new tyres produced in Brazil or imported new or reconditioned tyres, including those on imported vehicles, manufacturers and importers must ensure final disposal of one unusable tyre;
> II – as of 1 January 2003: for every two new tyres produced in Brazil or imported new or reconditioned tyres, including those on imported vehicles, manufacturers and importers must ensure final disposal of one unusable tyre;
> III – as of 1 January 2004:
> a) for every one new tyre produced in Brazil or imported new tyre, including those on imported vehicles, manufacturers and importers must ensure final disposal of one unusable tyre;
> b) for every four imported reconditioned tyres, of any type, importers must ensure final disposal of five unusable tyres;
> IV – as of 1 January 2005:
> a) for every four new tyres produced in Brazil or imported tyres, including those on imported vehicles, manufacturers and importers must ensure final disposal of five unusable tyres;
> b) for every three imported reconditioned tyres, of any type, importers must ensure final disposal of four unusable tyres."

[1302] For the discussion on the risks from the disposal of waste tyres, see the section on disposal methods below, paragraphs 7.179-7.208.

[1303] Appellate Body Report on *EC – Asbestos*, para. 174.

[1304] European Communities' first written submission, para. 110, 112, 113, 137; European Communities' second written, para. 109.

risks concerned and since such disposal schemes do not address the risks associated with the disposal of waste tyres.

Disposal methods[1305]

7.179 The **European Communities** has identified several disposal methods that, in its view, are reasonably available alternatives to the import ban on retreaded tyres. These methods are controlled landfilling and stockpiling; incineration of waste tyres in cement kilns and similar facilities; and material recycling.[1306]

7.180 **Brazil** submits that every known disposal method capable of dealing with the existing volumes of waste tyres generated in Brazil, which amount to over 40 million waste tyres every year, carries with it serious risks and adverse effects to human health and the environment.[1307] Although Brazil recognizes that landfilling, stockpiling and tyre incineration may handle existing volumes of waste tyres[1308], it claims that these waste management methods present significant health and environmental risks.[1309] In relation to material recycling alternatives, Brazil argues that even if generally these are considered safer than stockpiling and incineration, such methods can only dispose of a small fraction of the waste tyres currently generated in Brazil.[1310] Thus, Brazil argues that the European Communities cannot expect Brazil to rely solely on disposal if the risks associated with disposal are the very risks that Brazil seeks to eliminate.

7.181 The **Panel** will now examine the specific disposal methods suggested by the European Communities as alternative measures.

7.182 Concerning landfilling, Brazil argues that it is not safe and among the least preferable of the waste tyre management options.[1311] Brazil submits that landfilling of waste tyres damages the structure of landfills[1312] and can leach harmful contaminants into the environment.[1313] Brazil also refers to the EC-commissioned report on implementation of the Landfill Directive, which lists a number of problems associated with the landfilling of tyres, including, *inter alia*, potential risks of combustion and fires.[1314] The European Communities does not disagree that landfilling[1315], in

[1305] The Panel notes that the parties do not define the term "disposal" and disagree on whether a certain method is a "disposal" method for waste tyres, which is beyond the scope of the Panel's review in this case. As such, the Panel's reference to the term "disposal" in this Report is only in general sense and not by any means a judgment on whether a specific method dealing with waste tyres qualifies as a disposal method for waste tyres.

[1306] European Communities' second written submission, paras. 106, 107, 113 and 133.

[1307] Brazil's first written submission, paras. 4, 17, 21; Brazil's first oral statement, para. 80; Brazil's second written submission, paras. 41-42.

[1308] Brazil's first written submission, para. 4; Brazil's first oral statement, para. 2; Brazil's second written submission, paras. 42, 73-77.

[1309] Brazil's first written submission, paras. 3, 4, 18, 43, 44; Brazil's first oral statement, para. 28; Brazil's answer to panel question No. 35..

[1310] Brazil's second written submission, para. 94.

[1311] Brazil's first written submission, paras. 18, 20, 39-41.

[1312] "Landfill" is explained as "a disposal site for the deposit of waste onto or into land, including internal waste disposal (i.e. landfill where a producer of waste carries out its own waste disposal at the place of production) and excluding facilities where waste is unloaded in order to permit its preparation for further transport for recovery, treatment or disposal elsewhere, and temporary (i.e. less than one year) deposit of waste prior to recovery, treatment or disposal" (Basel Convention Technical Guidelines on the Identification and Management of Used Tyres, p. 16 (1999) (Exhibit BRA-40)).

[1313] Brazil's first written submission, paras. 4, 39.

[1314] Brazil's first written submission, para. 39, citing Golder Europe EEIG, "Report on Implementation of the Landfill Directive in the 15 Member States of the European Union" (2005) (Exhibit BRA-41). More specifically, the report lists the following as the problems associated with landfilling waste tyres: (i) Tyres in large volumes can cause instability by rising to the surface of the site...; (ii) older landfill sites where large

particular randomly stacking tyres, poses a risk of tyre fires.[1316] However, the European Communities argues that "controlled" landfilling, by which the European Communities seems to mean landfilling of only shredded tyres, poses no environmental risk.[1317]

7.183 An examination of the evidence before the Panel suggests that the problems related to the landfilling of waste tyres include, *inter alia*, instability of sites that will affect future land reclamation, long-term leaching of toxic substances, and the risk of tyre fires and mosquito-borne diseases.[1318] For example, the OECD Environmental Directorate explains that waste tyres disposed of in landfills pose increased environmental and public health risks related to possible leakage and the danger of

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quantities of tyres had been disposed of in an uncontrolled manner experienced wash-through of soil and fine particles leading to inward collapse and surface failures; (iii) rubber materials contain proportions of organic chemicals and little is known about the long-term leaching effects of these materials; (iv) tyres in landfills have also been associated with combustion and fires; and (v) during degradation the steel reinforcement within some tyres may cause damage to the geo-membrane liners.

[1315] The European Communities describes "landfilling" as different from stockpiling in that landfilling consists in discarding large amounts of waste tyres directly on or into the ground (European Communities' second written submission, para. 104, citing Exhibits BRA-1, 10, 18, 25).

[1316] European Communities' second written submission, paras. 104, 105. The European Communities itself submits that "landfilling has been normally done by tossing waste into piles, a method that, ... 'requires little effort or handling by a site operator but also requires the most storage space' and where 'randomly stacked tires are a greater fire risk... '" (European Communities' second written submission, para. 104, citing "the Tires Pile Fires report by Environmental Engineering & Contracting Inc." (Exhibit BRA-29)).

[1317] European Communities' second written submission, paras. 107-110.

[1318] Evidence on the health risks linked to the landfilling of waste tyres include the following: "If disposed of in large volumes tyres in landfill sites can lead to fires and instability by rising to the surface. This affects long-term settlement and may cause problems for future use and land reclamation. Tyres buried in landfill sites are a fire hazard, and there have been a number of fires involving tyres at landfill sites... Little is known about the long-term leaching of organic chemicals from tyres in landfill sites" (British Environment Agency, "Tyres in the Environment" (1998) (Exhibit BRA-1)); "[I]t must be acknowledged that there is limited experience with long-term impacts… Tyres in landfills are also associated with fire risks... Tyres reportedly destabilise a landfill and may impact on the useability of the landfill area for future use." (Commonwealth Department of Environment (Australia), "A national Approach to Waste Tyres," p. 29 of Part I (2001) (Exhibit BRA-8)); "Even those that were dumped in sanitary landfills created environmental problems. Sometimes landfilled tires work their way back to the surface, causing expensive damage to liners and liquid collection systems and compromising their ability to keep landfill contaminants from mixing with local groundwater and surface water" (Ohio Department of Natural Resources, Recycling Tires: Problems with wasting scrap tires: Fire (2005) (Exhibit BRA-38)); "When disposed of in landfill sites, a number of potential occurrences are perceived to lead to possible problems as follows: Tyres in large volumes can cause instability by rising to the surface of the site (generally on sites where there is insufficient capping and restoration cover materials, affecting its long term settlement and therefore posing problems for future use and land reclamation) … Rubber materials contain proportions of organic chemicals and little is known about the long-term leaching effects of these materials" (Golder Europe EEIG, Report on Implementation of the Landfill Directive in the 15 Member States of the European Union (2005) (Exhibit BRA-41)); and "A fourth environmental risk, which is not part of common practice, but merely can be considered a calamity, is the incidence of tyre fires. Tyres do not ignite by themselves, but may occur in landfills where whole tyres are disposed in large quantities in combination with an ignition source. A tyre fire is very difficult to extinguish, results in incomplete combustion of the tyres and subsequently an uncontrolled releases of toxic fumes… When disposed of in landfills, scrap tyres occupy a large space and remain intact for decades posing increased environmental and public health risks related to possible leakage and the danger of uncontrolled burning. Furthermore, when whole tyres are buried in a landfill they trap air and have tendency to migrate to the top of a closed landfill breaking the landfill cap and causing costly damages to the landfill cover that increases the instability of sites. Also, used tyres easily trap rainwater and therefore create a favourable environment for insects, which increases the risk for mosquito-borne diseases" (PRé Consultants, "Life Cycle Assessment of an Average European Car Tyre" (2001) (Exhibit BRA-45)).

uncontrolled burning of tyres and create a favourable environment for insects, which increases the risk of mosquito-borne diseases.[1319]

7.184 In this regard, we note the European Communities' argument that landfilling of shredded tyres, namely controlled landfilling according to the European Communities, does not pose environmental risks (i.e. potential leaching of harmful organic chemicals and heavy metals).[1320] The European Communities, however, does not specifically dispute the alleged health risks that Brazil argues are posed by general landfills of waste tyres. Furthermore, the evidence on the health and environmental risks posed by landfills of waste tyres does not make a clear distinction between "uncontrolled" and the so-called "controlled" landfills. Therefore, in light of the evidence submitted by the parties, it is not possible to conclude that controlled landfills do not pose risks similar to those linked to other types of waste tyre landfills. Also, as noted earlier[1321], in reality, tyres do accumulate in various forms, including landfills of whole tyres, and any related risks should be assessed on the basis of such reality.

7.185 In addition, evidence suggests that while landfilling has traditionally been the most common method for disposal of waste tyres, mainly due to low investment and running costs[1322], landfilling of waste tyres in many countries has substantially declined in the past decade and seems likely to continue decreasing.[1323] We also note that the European Commission itself also accepted a directive that bans the disposal in landfills of whole tyres by 2003 and shredded tyres by 2006 in response to the health and environmental risks identified in previous paragraphs in relation to landfilling of waste tyres.[1324]

7.186 The **Panel** is thus of the view that Brazil has provided sufficient evidence to demonstrate that the landfilling of waste tyres may pose the very risks Brazil seeks to reduce through the import ban and thus cannot constitute a reasonably available alternative to the import ban.

7.187 Regarding stockpiling, Brazil argues that stockpiling is not a disposal method and can only be used for temporary storage until effective disposal is available as it poses health risks related to mosquito-borne diseases as well as toxic emissions from tyre fires.[1325] On the other hand, the

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[1319] OECD Environmental Directorate, "Improving Recycling Market" p. 127 (2005) (Exhibit BRA-58).

[1320] European Communities' second written submission, para. 109.

[1321] See paragraphs 7.65-7.67 above.

[1322] OECD Working Group on Waste Prevention and Recycling, "Improving Recycling Markets (Excerpts)," p. 127 (Exhibit EC-16) and Technical Working Group of the Basel Convention, "Technical Guidelines on the Identification and Management of Used Tyres," p.12 (Exhibit EC-18).

[1323] Exhibits EC-18 and 84; Exhibit BRA-38, p. 1.

[1324] The Council Directive 1999/31/EC of 26 April 1999 (Exhibit BRA-42) states:

"Article 1: ... the aim of this Directive is, by way of stringent operational and technical requirements on the waste and landfills, to provide for measures, procedures and guidance to prevent or reduce as far as possible negative effects on the environment, in particular the pollution of surface water, groundwater, soil and air, and on the global environment, including the greenhouse effect, as well as any resulting risk to human health, from landfilling of waste, during the whole life-cycle of the landfill: Article 5 (Waste and treatment not acceptable in landfills): ... 3. Member States shall take measures in order that the following wastes are not accepted in a landfill: ... (d) *whole used tyres* from two years from the date laid down in Article 18(1), ... and *shredded used tyres* five years from the date laid down in Article 18(1)..." (emphasis added)

See also Golder Europe EEIG, "Report on Implementation of the Landfill Directive in the 15 Member States of the European Union" (2005) (Exhibit BRA-41).

[1325] Brazil's first written submission, paras. 3, 4, 42; Brazil's second written submission, paras. 61, 63-70, 76. See also Exhibit BRA-40 (Basel Convention Technical Guidelines on the Identification and Management of Used Tyres (1999)) stating: "[s]tockpiling facilities require investments in transport, handling and fire prevention. Stockpiling with proper control can be used only for temporary storage before an end-of-life tyre is forwarded to a recovery operation." In addition to the evidence above, Brazil also refers to, *inter*

European Communities contends that Brazil's argument relating to the types of risk identified by Brazil in relation to stockpiling is only a description of the hazards arising from improperly managed installations and that "controlled stockpiling" through implementing site design requirements and guidelines for the prevention of waste tyres as provided in the Basel Convention Technical Guidelines reduces those risks.[1326]

7.188 As Brazil observes, stockpiling of waste tyres is the practice whereby waste tyres are concentrated in central locations.[1327] In other words, stockpiling as such does not "dispose of" waste tyres in the sense that the material itself (i.e. waste tyres) still physically exists in a stockpiled form.[1328] In this connection, we recall our finding above that the accumulation of waste tyres in general poses health risks relating to mosquito-borne diseases as well as tyre fires. The Panel also recalls that the evidence shows that even the so-called "controlled stockpiling" that is to say stockpiles designed to prevent the risk of fires and pests may still pose considerable risks to human health and the environment.[1329] We found that these risks exist, although to differing degrees, in relation to accumulated waste tyres in general, be they illegally dumped waste tyres or waste tyres stockpiled in designated sites.[1330]

7.189 Thus, in our view, Brazil has provided sufficient evidence to prove that stockpiled waste tyres pose similar types of risks such as mosquito-borne diseases and tyre fires to those posed by the accumulation of waste tyres in general and thus cannot constitute an alternative to the import ban: the risk may be lower for controlled, in particular if well-managed, stockpiled waste tyres, but that does not eliminate such risks.[1331]

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alia, the following evidence with respect to the risks of stockpiling (Brazil's second written submission, paras. 64 and 68): "[e]n France métropolitaine, *Aedes albopictus* avait été identifié sur plusieurs sites ce stockage de pneus uses entre 1999 et 2004" (Institut de Recherche pour le Développement, *Le Tour du Monde d'un Moustique*, Sciences Au Sud, No. 34 (2006) (Exhibit BRA-134)); "Tyre dumps attract vermin and the standing water from rain collected in the inner rim of the tyre provides an excellent breeding ground for mosquitoes... in the UK the major hazard of tyre dumps to public health relates to the toxic plumes of smoke released if they are set alight..." (Health Protection Agency (UK), *Chemical Hazard and Poisons Report* (2003) (Exhibit BRA-10)); and "The EU has millions of used tyres that have been illegally dumped or stockpiled. These historic stockpiles can, in some cases, pose a potential threat to human health (fire risk, haven for rodents or other pests such as mosquitoes...)..." (European Tyre & Rubber Manufacturers' Association, *End-of-Life Tyres* (2006) (Exhibit European Communities-84)).

[1326] European Communities' first oral statement, para. 75, citing Exhibits EC-18 and BRA-40 and also referring to Exhibit BRA-29; European Communities' second written submission, paras. 104, 106.

[1327] Brazil's second oral statement, para. 30. The Panel also notes the following in this respect: "Stockpiles were created as a means of disposing of tires outside the normal landfill destination for most solid waste... In some locations, many tires went to landfills, and some states still allow the practice, at least for shredded or cut tires. Stockpiles were an alternate disposal option..." (John Serumgard, "Internalization of Scrap Tire Management Costs: A Review of the North American Experience," p.6 (1998) (Exhibit BRA-125)).

[1328] See also "Fact Sheet – Best Management Practices for Automotive Recyclers: Waste Tyres" by Massachusetts Department of Environmental Protection (2006) (Exhibit BRA-137). It states, "Stockpiles of waste tires can cause safety and health problems... Stockpiling is not a disposal option and speculative accumulation of tires is more likely to result in costs than profits."

[1329] See paragraph 7.68 above.

[1330] We recall in particular the terms of the Basel Convention Technical Guidelines on the Identification and Management of Used Tyres (1999), stating: "[s]tockpiling facilities require investments in transport, handling and fire prevention. Stockpiling with proper control can be used only for temporary storage before an end-of-life tyre is forwarded to a recovery operation."(Exhibit BRA-40).

[1331] For instance, according to the study Tire Pile Fires: Prevention, Response, Remediation (2002) issued by the California Environmental Protection Agency (US), Integrated Management Board, "[a]ll tire and rubber storage facilities should be considered high-risk storage facilities" (Exhibit BRA-29). Pointing to the same direction, the Commonwealth Department of Environment of Australia concludes: "[i]mpacts due to the

7.190 In connection with waste tyre incineration, Brazil submits that disposing waste tyres in cement kilns and similar facilities produces harmful emissions including dioxins, furans and lead that cause cancer, affect the immune system, and lead to reproductive and other health problems.[1332] Brazil argues that since these harmful emissions can only be reduced, but not eliminated, even in properly operated, state-of-the-art cement kilns, it is necessary to reduce, as much as possible, the volume of tyres that must be incinerated.[1333] On the other hand, the European Communities argues that incineration of waste tyres is safe since the risks Brazil alleges in relation to incineration of waste tyres are not significant, as operational conditions, technical requirements and the emission limit values for plants incinerating waste guarantee a high level of environmental and human health protection.[1334] Thus, the parties seem to agree to the extent that harmful emissions such as dioxins and furans produced by the incineration of waste tyres cannot be entirely eliminated although the degree of emissions may vary depending on emission standards and the technologies used to control emissions.

7.191 Bearing these considerations in mind, the evidence before the Panel suggests that incineration[1335] of waste tyres, in particular incineration in cement kilns, is a common practice in many countries including Brazil[1336] and that strict emission standards and technical regulations can significantly reduce toxic chemicals that are emitted from the combustion of waste tyres. For example, the Basel Convention Technical Guidelines state that waste tyres represent an alternative supplementary non-fossil fuel and the addition of waste tyres is environmentally safe and does not produce additional emissions of sulphur oxides and nitrogen oxides into the atmosphere when appropriate emission control devices are properly installed and maintained.[1337] Also, the British Environment Agency reports that the trial burns in most cases have shown either no change in the concentration of pollutants or a decrease when burning tyres.[1338]

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uncontrolled disposal of tyres to land are similar to those for stockpiles" ("A National Approach to Waste Tyres" (Exhibit BRA-8)).

[1332] Brazil's first written submission, paras. 18, 20, 21, 43-47; Brazil's first oral statement, paras. 30-31; Brazil's second written submission, paras. 72, 76, 77, 78-93.

[1333] Brazil's second written submission, para. 78; Brazil's answer to panel question No. 97.

[1334] European Communities' second written submission, paras. 114-119; European Communities' second oral statement, para. 84; European Communities' answer to panel question No. 48, citing Exhibits EC-84-87.

[1335] The Panel notes that incineration of waste tyres referred to by the parties in the context of discussing various disposal methods in this case mainly concerns incinerating waste tyres with other conventional fuels in cement kilns and in other similar facilities as a means of energy recovery, namely as "Tyre Derived Fuel (TDF)", rather than mere combustion of waste tyres without any energy recovery. Thus, unless specified otherwise, the Panel's reference to incineration of waste tyres in this Report means incineration in cement kilns and in similar facilities. A discussion paper prepared by Atech Group for Australian Department of Environment lists cement kilns, other co-firing applications (paper mills, power plants), direct combustion (for electricity or steam) and pyrolysis as the four main options for energy recovery using tyres ("A National Approach to Waste Tyres" (2001) (Exhibit BRA-8)).

[1336] See, for example, the following: "Tyres are already used in cement kilns in many countries" (Figure 4.7, Exhibit BRA-1); "Energy recovery is growing as a reprocessing option due to the ability to deal with large quantities of tyres..." (A.B. Hird et al., "Tyre Waste and Resource Management : A Mass Balance Approach," p. 1 (2002) (Exhibit BRA-56)); "Tire-Derived Fuel Market: Oldest and largest market for scrap tires..." (John Sheerin, "Markets & Trends in the US Scrap Tire Industry," p. 8 (2004) (Exhibit BRA-63)); "Since 1985, TDF has been the largest single market segment for scrap tires in the United States..." (John Serumgard, "Internalization of Scrap Tire Management Costs: A Review of the North American Experience," p.7 (1998) (Exhibit BRA-125)).

[1337] Basel Convention Technical Guidelines on the Identification and Management of Used Tyres (1999) (Exhibit BRA-40).

[1338] British Environment Agency, "Tyres in the Environment" (1998) (Exhibit BRA-1). Additional evidence includes the following: "While uncontrolled fires cause substantial air and ground pollution, the

7.192 At the same time, the Panel is presented with evidence suggesting that the question still remains whether toxic chemicals emitted by incineration of waste tyres, regardless of the level of emission, may potentially pose health risks to humans.[1339] In particular, we note that emission levels can vary largely depending on the operating conditions of, and the emission control technology used by, the facilities:

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incineration of whole tires or tire chips in a controlled furnace is environmentally safe. On average, the BTU value of scrap tires or TDF exceeds that of coals, while the sulphur content is in the same order of magnitude or even lower..." (Kurt Reschner, "Scrap Tyre Recycling: A Summary of Prevalent Scrap Tire Recycling Methods" (2006) (Exhibit BRA-5)); "Air emissions data from the use of tires as fuel [well-designed combustors] are discussed... with the exception of zinc emissions, potential emissions from TDF are not expected to be very much different than from other conventional fossil fuels, as long as combustion occurs in a well-designed, well-operated, and well-maintained combustion device... In general, the results indicate that properly designed existing solid fuel combustors can supplement their normal fuels ... with 10 to 20 per cent TDF and still satisfy environmental compliance emission limits... it is possible to have emissions much lower than produced by existing solid-fuel-fired boilers (on a heat input basis), when properly designed and the facility is controlled" (Environmental Protection Agency (US), "Air Emissions from Scrap Tire Combustion" (1997) (Exhibit BRA-26));"burning tyres in cement kilns often has a net environment benefit when compared to conventional fuels, which are usually coal and petroleum coke. The emissions of nitrogen oxides (a major pollutant from cement kilns) have been shown to be lower when using tyres..." (Used Tyre Working Group (UK), "Sixth Report of the Used Tyre Working Group" (2003) (Exhibit BRA-55)); and "The fact that tire fuel-using facilities have been permitted in at least 34 states and several Canadian provinces illustrates that tires can meet these requirements... The driving forces behind the current and anticipated use of TDF are: improved emissions; increased production; and decreased fuel costs..." (John Serumgard, "Internalization of Scrap Tire Management Costs: A Review of the North American Experience," pp.8-9 (1998) (Exhibit BRA-125)).

[1339] For example, the Panel notes the following: "Stable operating conditions and a high incineration efficiency cannot be guaranteed during co-incineration of waste ... emissions of toxic organics such as polyhalogenated dioxins and furans, benzene and polycyclic aromatics cannot be effectively controlled. In contrast to what is stated in the EIA, compliance with the EU directive 94/67 on waste incineration is highly questionable..." (Okopol Institute fur Okologie and Politik GmbH, Expertise on the Environmental Risk Associated with the Co-incineration of Wastes in the Cement Kiln "Four E" of CBR Usine de Lixhe, Belgium (undated circa 1998) (Exhibit BRA-46)); "For tire-burning in cement kilns, the risk calculations have typically shown increase in risk that is still below the levels that local air pollution control districts consider "significant." However, opponents have not been convinced by determinations that risk is not significant, and point to important sources of uncertainty, some of which are acknowledged by kiln operators and risk assessors..." (Seymour Schwartz et al., "Domestic Markets for California's Used and Waste Tires, Attachment A: Environmental and Health Consequences from Using Tires as Fuel: Health Risk Assessment" (1998) (Exhibit BRA-48)); "Virtually nothing is known about the dose-response functions for important categories of health effects, particularly disruptions to the hormone systems of humans, which could produce life long damage in developing infants. Also, virtually nothing is known about the health effects caused by combinations of toxic chemicals that are emitted when burning tires... Without such scientific knowledge, and because some toxic pollutants increase from burning tires, there is no scientific basis for the Board to conclude that burning waste tires in cement kilns is safe..." (Letter from Seymour I. Schwartz, Professor of Environmental Science and Policy at University of California Integrated Waste Management Board (21 January 1998) (Exhibit BRA-49)); "However, burning the tyres produces emissions that have to be carefully controlled to ensure they do not enter the environment. Gases therefore filtered and cleaned ... so that the final emissions are within limits set by the Environment Agency (EA)" (The Environment Council, "The Stakeholders' Guide to Sustainable Waste Management Tyres," p. 4 (Exhibit BRA-57)); "Although there have been recent positive developments in recycling, compliance with the European Communities Directives on land-filling and waste combustion emissions will require considerable investment in new retreating and recycling facilities for used tyres. ... The overall objective of the EU waste strategy is to prevent waste generation. ... Retreating and recycling of tyres should be encouraged and increased, in preference to combustion and energy recovery... and if no other outlet is possible the tyre should be used for energy recovery... Use in wet cement kilns is not an optimal environmental solution; moreover this outlet will be limited by the stricter emission standards imposed from 2008 by the Directive on waste incineration ..." (European Environment Agency, "Waste from Road Vehicles" (2001) (Exhibit BRA-108)).

> "Emissions can include dioxins and furans, which are carcinogenic, as well as oxides of nitrogen and sulphur... Studies on the use of tyres in cement kilns have generally concluded that the impacts are either positive or neutral compared to the combustion of other fuels. However this needs to be considered on a case-by-case basis as it is dependent on good operating practice as well as the particular characteristics of the tyres used and the kiln..."[1340]; and
>
> "Very little data exist for devices that are not well-designed and use scrap tires for fuel... Air emissions from these types of devices are likely between that of open burning and a combustor. However, there is serious concern that the emissions are much more similar to those of an open tire fire than a combustor... "[1341]

We are also presented with evidence that casts doubt on the credibility of trial burns in cement kilns.[1342]

7.193 The above evidence demonstrates that toxic emissions from the incineration of tyres cannot be eliminated, although emission levels may vary depending on the level of technology used to control emissions in TDF-driven[1343] facilities. The evidence suggests that the most up-to-date technology that can control toxic emissions to minimum levels is not necessarily readily available, mostly for financial reasons.[1344] For example, the Panel notes the following observations:

> "The high temperatures within the kilns enable the tyres to be combusted 'cleanly', reducing solid waste. ... If tyres are allowed to burn in an uncontrolled manner large amounts of air pollution can be generated in the form of black smoke and sulphur dioxide. Costs of controlling these emissions are large and, consequently, investment costs for cement kilns/incinerators which can burn tyres are ten times more than those burning liquid fuel ..."[1345]; and
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> "For a waste recovery system to be widely adopted it must be economically viable to use waste rather than virgin energy sources. At present, use of tyre waste in cement kilns is economical but if emission limits are tightened, the cost of installing

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[1340] Prepared by Atech Group for Commonwealth Department of Environment (Australia), "A National Approach to Waste Tyres" (2001) (Exhibit BRA-8).

[1341] Environmental Protection Agency (US), "Air Emission from Scrap Tire Combustion" (1997) (Exhibit BRA-26).

[1342] Brazil's second written submission, para. 82 For example, the West Virginia Environmental Council reports that "Tire test burn results vary a lot, some pollutants go up in some tests, the same pollutants go down in others. ... Test burns are generally considered a poor indicator of operation on a daily basis: during trial burns when regulatory authorization is at stake and government officials are present, variables such as waste fee, temperature, oxygen flow, and pollution control device efficiency are carefully maintained to optimize performance. On a day to day basis, there are upset conditions that result in considerably higher emissions. How well a facility maintains its pollution control equipment, operator error, fuel feed conditions, etc. all affect emissions..." (West Virginia Environmental Council, "Green Issues: Tire Burning Fact Sheet," (1998) (Exhibit BRA-52)).

[1343] See footnote 1335 above.

[1344] Commonwealth Department of Environment (Australia), "A National Approach to Waste Tyres" (2001) (Exhibit BRA-8); Environmental Protection Agency (US), "Air Emissions from Scrap Tire Combustion" (1997) (Exhibit BRA-26); A. B. Hird et al., "Tyre Waste and Resource Management: A Mass Balance Approach" (2002) (Exhibit BRA-56); "The Environment Council, The Stakeholders' Guide to Sustainable Waste Management, Tyres" (Exhibit BRA-57).

[1345] A.B. Hird et al., "Tyre Waste and Resource Management: A Mass Balance Approach," p. 18 (2002) (Exhibit BRA-56).

> purification equipment may outweigh the cost saving of using tyre waste as a fuel...".[1346]

Further, there are still doubts as to the exact level of toxic emissions, in particular since the emission results of the trial burns may not accurately reflect actual emission levels.[1347]

7.194 We thus find that Brazil has provided sufficient evidence to demonstrate that health risks exist in relation to the incineration of waste tyres, even if such risks can be significantly reduced through strict emission standards.

7.195 In sum, the **Panel** finds that Brazil has demonstrated that the currently available disposal methods capable of handling the existing volumes of waste tyres, namely landfilling, stockpiling and tyre incineration, even if performed under controlled conditions, pose risks to human health and cannot constitute an alternative to the import ban.

7.196 Lastly, the European Communities claims that material recycling is one of the best waste management practices and therefore, another reasonably available alternative to the import ban. In the European Communities' view, material recycling of rubber includes the use of waste tyres in civil engineering projects, in other construction activities such as rubber asphalting, and in the production of a wide variety of rubber goods.[1348] The European Communities submits that material recycling methods do not pose substantial risks to human or animal health or the environment, and that they are able to dispose of substantial amounts of waste tyres.[1349]

7.197 Brazil submits that it is "practically impossible to recycle a tyre" due to its physical characteristics that make it a highly stable and rigid product. According to Brazil, the existing

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[1346] The Environment Council, "The Stakeholders' Guide to Sustainable Waste Management, Tyres" (Exhibit BRA-57).

[1347] For instance, Brazil has submitted evidence stating: "the test data [of a scale-down simulation performed by the US Environment Protection Agency] is not an accurate measure of the actual day-to-day emissions of a given plant. As reported by Greenpeace, 'Trial burns are generally considered a poor indicator of operation on a daily basis: during trial burns when regulatory authorization is at stake and government officials are at the site, variables such as wastefeed, temperature, oxygen flow, and pollution control device efficiency are carefully maintained to optimize performance. On a day-to-day basis, emissions may be considerably higher'... The aforementioned EPA test was not even performed on an actual operating plan but rather on a scaled-down simulator. Such devices are obviously bound to be more stable than large industrial incinerators that are used on a daily basis over a period of years. Importantly, the EPA simulator isn't even designed to represent the type of incinerators typically used in paper mills, which often use Tire Derived Fuel" (Energy Justice Network, "What is 'Tire Derived Fuel' and Why Is It Dangerous" (Exhibit BRA-50)).

[1348] European Communities' first written submission, para. 112. The EC did not provide the Panel with an exhaustive list of activities that should be considered as material recycling. However, the EC seems to include within this category the following activities: civil engineering projects such as reusing discarded tyres to create artificial reefs, boat bumpers, slope stabilisers, irrigation channels and erosion layers on dams; the use of shredded and ground tyres as a base material in asphalt paving and road construction; and the use of rubber granulates in the production of new tyres, adhesives, wire and pipe insulation, brake linings, conveyor belts, carpet padding and hose pipes (European Communities' first oral statement, paras. 81-82).

[1349] European Communities' second written submission, paras. 133 and 139. The EC claims on the basis of the document titled Panorama dos Residuos Sólidos no Brasil that in 2004 "17.65 per cent of waste tyres in Brazil were rolled into sheeting" and "19.65 per cent were transformed into goods and raw material" (Exhibit EC-114). The European Communities suggests that these figures demonstrate the considerable disposal potential of material recycling already used in Brazil. Additionally, according to the evidence submitted by the EC, the ground rubber applications market in certain countries is able to consume nearly 10 per cent of the scrap tires generated (European Communities' second written submission, para. 135). The European Communities also submits that in countries such as Australia the market for civil engineering is of the order of 200,000 tyres per year and that ground rubber applications market in the US "consumed over 28 million tires in 2003, or nearly 10 per cent of the scrap tires generated" (Exhibit EC-113).

methods of material recovery are not able to produce high-quality rubber that may be reused in the production of new tyres.[1350] Brazil also argues that material recycling of tyres should not be considered as recycling "in its true sense" since the material is not reused in new tyres.[1351]

7.198 Brazil acknowledges nevertheless that waste tyre recycling is desirable and should be encouraged because the activities usually denominated as material recycling are generally safer than other disposal methods such as stockpiling and incineration and extract the greatest environmental benefit from the waste tyres, next to retreading.[1352] Brazil also submits that it actively promotes the development of new recycling applications for waste tyres and the improvement of the safety aspects and market acceptance of the existing ones.[1353] However, according to Brazil, material recycling of tyres cannot be an alternative to the import ban because, on the one hand, it poses certain risks to human health and the environment, and, on the other hand, this process can absorb only a fraction of the waste tyres annually generated in Brazil due to its frequent economical and technical unfeasibility.[1354]

7.199 The Panel will now examine whether various material recycling methods identified by the European Communities can constitute an alternative to the import ban.

7.200 In relation to *civil engineering*, we note that the evidence before us shows that there is a wide variety of engineering applications for waste tyres involving different levels of material transformation and recycling. These applications include the use of whole and shredded waste tyres to protect the margins of ravines in urban areas[1355]; to build drainage layers for leakage management in landfills, or coastal or riverbank protection projects such as artificial reefs, erosion barriers, sea-walls, off-coast breakwaters and sea base.[1356]

7.201 The majority of the evidence supports the view that civil engineering applications of waste tyres are expected to become more widespread in the future.[1357] However, the evidence before us also

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[1350] Brazil's first written submission, para. 52. In support of this assertion, Brazil quotes from a report by California Environmental Protection Agency (US):

> "Generally, the use of recycled tire material in new tires is challenged by the fact that unlike paper, metals, plastics and glass, it is not currently possible to obtain materials from tires that have properties adequately similar to the original materials use in manufacturing tires. Tire rubber materials are highly engineered, with specific qualities... designed to optimize wet and dry traction, long life, low rolling resistance, comfortable ride responsive handling and performance characteristics, at an affordable cost. Unfortunately, the products currently available from recycled tires do not provide performance" ("Integrated Waste Management Board, Increasing the Recycled Content in New Tyres," (Exhibit BRA-59)).

[1351] Brazil's second written submissions, para. 94.

[1352] Brazil's second written submissions, para. 94; Brazil's second oral statement, paras. 47-49.

[1353] Brazil's second written submissions, para. 95; Brazil's second written submissions, para. 97.

[1354] Brazil's second oral statement, para. 48; Brazil's second written submissions, para. 94; Brazil First written submission, para. 123. In support of this argument Brazil presents the Panel with several studies that recognizes that the amount of post-consumer recycled material obtainable from a used tyre is "necessarily ... very limited" (Brazil's first written submission, para. 53) and that "material recycling uses remain limited and unable to absorb the existing volumes of wastes tyres" (Exhibit BRA-108).

[1355] Antonio J. Andrietta, "Pneus e Meio Ambiente: Um Grande Problema Requer Uma Grande Solção" (2002) (Exhibit BRA-6).

[1356] Technical Working Group of the Basel Convention, "Technical Guidelines on the Identification and Management of Used Tyres" (Exhibit EC-18); UK Environment Agency, "Tyres Report" (Exhibit EC-15).

[1357] For instance the Panel notes the following statements: "[c]ivil engineering applications of scrap tires are expected to become more widespread as more an more applications can be proven to be technically and economically viable," (Kurt Reschner, *Scrap Tyre Recycling: A Summary of Prevalent Scrap Tire Recycling Methods* (Exhibit BRA-5, p. 4)); "[t]he use of scrap tires in civil engineering applications, with its major problems apparently behind us, should increase significantly" (John Serumgard, Internalization of Scrap Tire

shows that the current demand for these applications is fairly limited partly due to their high cost and that for this reason they are only capable of disposing of a small number of waste tyres.[1358]

7.202 Moreover, it is not clear whether some of these engineering applications are sufficiently safe. The evidence suggests that the use of waste tyres in civil engineering projects may produce wire exposure, tyre fires, or leakages of toxic chemicals such as zinc and polycyclic aromatic hydrocarbons into the surrounding environment that may pose a risk to humans, cattle and aquatic life, including fish and microscopic plants.[1359]

7.203 Regarding rubber asphalt, Brazil submits evidence indicating that roads incorporating granulate rubber have the potential to catch fire under certain conditions or to release dangerous fumes generating occupational hazards.[1360] In response, the European Communities points out that a

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Management Costs: A Review of the North American Experience, in Proceedings of the Second Joint Workshop of the Secretariat of the United Nations Conference on Trade and Development (UNCTAD) and the International Rubber Study Group on Rubber and the Environment (1998) (Exhibit BRA-125)); "[o]nly a small number of applications have been developed to use recycled rubber, but many more will emerge as the costs of environmental compliance escalate" Human Resources and Social Development Canada, Rubber Industry (circa 1999) (Exhibit BRA-131).

[1358] For instance the Panel notes the following pieces of evidence: "This market [referring to civil engineering applications] is for the moment confined to single projects and therefore fairly small scale. It is an application which is under-utilised and could represent a significant growth area for end-of-life tyres." (2006 Report by the European Tyre & Rubber Manufacturers' Association (Exhibit EC-84)); "Without significant expansion of existing markets for waste tires (such as rubberized asphalt concrete, playground mats and other surfacing, civil engineering applications, tire-derived fuel, and the development of new technologies that use waste tires), tire stockpiles and the environmental threat they pose, will continue to grow" (California Environmental Protection Agency (US), Integrated Waste Management Board, *Five-Year Plan for the Waste Tire Recycling Management Program* (2003) (Exhibit BRA-36)); "Shredded tyres have a pretty limited application ... There are only so many playground surfaces that need soft pads, landfills that need drainage material, and roads that need resurfacing – some of the variety of reused tire. Burning tires as an energy source is also problematic" (Kathleen Cannon, *Where Mosquitoes And Tires Breed*, New York Times, 8 July 2001 (Exhibit BRA-130, p. 2)).

[1359] "When used on silage clamps tyres last between 10 and 15 years, after which they begin to degrade. Degradation manifests itself in the breakdown of the rubber compound, resulting in the rubber crumbling and exposure of the reinforcement wires. The wire is a direct danger to livestock, and the crumb gets into the silage and, in larger pieces, can also pose a risk to cattle" (UK Environment Agency, Tyres Report (Exhibit EC-15, p. 21)); "As a fill material, rubber has the advantage that it is lightweight which can reduce the cost of some civil structures particularly on slopes. The occurrence of fires in a number of such applications in the US has prompted concern over this application. Investigation of the fires suggests that while the tyres ultimately provided the fuel they were unlikely to be the source of ignition." (Commonwealth Department of Environment (Australia), A National Approach to Waste Tyres (2001) (Exhibit BRA-8, p. 70, Part I)); "HA oils are not chemically bound to the rubber. They tend to leach from the mixture and migrate into the surrounding environment. Studies recently undertaken at the Zoological Institute at Gothenburg University showed that fish exposed to tyre pieces in running water activate their very specific defence against polycyclic aromatic compounds... A new study from the Institute of Applied Environmental Research at Stockholm University found a high acute toxicity to water-dwelling organism in the waters around Stockholm. A strong effect has been pointed out for non-migratory fish in the Stockholm area, where the toxicity is due mostly to PCAs. A significant proportion of these polyaromatics can originate from tyre wear." (Projekt Grön Kemi, HA Oil in Tyres (Exhibit BRA-44, pp. 1-2)).

[1360] For instance: "[w]ith the exception of one site (California 1), results from the area air samples and PBZ [personal breathing-zone] samples indicated exposures to a variety of analyses were greater on the CRM [crumb-rubber modified] paving days. The confidence intervals generally show that exposures can be considerably higher on CRM paving days and that some of these differences were statistically significant... Also, in general, the reported number of symptoms was greater on the CRM paving days, including four paving workers who had a pattern of PEFR [peak expiratory flow rate] variability suggesting work-related bronchoreactivity only during CRM paving days. Furthermore, benzothiazole, found predominately only during CRM paving, may induce metabolic pathways that may not otherwise be active in these workers, thus exposing

study submitted by Brazil and prepared by the National Institute of Occupational Safety and Health concludes that "no definitive results were obtained indicating that rubber asphalt exposures are more hazardous than conventional asphalt exposures." Moreover, the European Communities argues that Brazil has recognized that rubber asphalt, rubber products and appliances are among the disposal methods usually approved by Brazilian environmental authorities[1361] and that according to a recent press article, two companies are actually applying rubber asphalt in the Brazilian states of São Paulo and Minas Gerais.[1362]

7.204 Brazil replies to these arguments by recognizing that it authorizes rubber-surfacing activities in Brazil and that it actually "funds research on rubber asphalt and has hosted an international summit on the subject."[1363] However, Brazil submits that due to the disadvantageous cost-benefit relationship, the demand for this product is very limited.[1364] Based on a study by the British Environment Agency, Brazil argues that roads incorporating granulate rubber last about twice as long as conventional roads, "but they cost about twice as much to produce."[1365]

7.205 The Panel is of the view that whereas the evidence is inconclusive on whether rubber asphalt exposures are more hazardous than conventional asphalt exposures[1366], the information provided by the parties consistently shows that the use of rubber asphalt results in higher costs. Consequently, the demand for this technology is limited and its waste disposal capacity is reduced.[1367]

7.206 We also note that the evidence suggests that the *use of rubber granulates to produce many different products* such as adhesives, wire and pipe insulation, brake linings, conveyor belts, carpet

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them to potential new hazards" (National Institute for Occupational Safety and Health, Crumb-Rubber Modified Asphalt Paving: Occupational Exposures and Acute Health Effects (2001) (Exhibit BRA-64)); "There are also reports that such roads have the potential to catch fire under certain conditions, for example the hot temperatures found in the USA, and have a slippery surface. Dangerous fumes may also be generated when the road surface is removed" UK Environment Agency, (Tyres Report (Exhibit EC-15)); "Unlike all other results, the 'Material recycling in football fields' is however clearly the worst scenario when looking at cooper, zinc, iron, mercury and PAH. These leaching emissions are much larger in the football field than in the landfill and the noise banks. The reason is that in the football field, the amount of water that drains through the tyre granulate layer is much larger per tons of tyre granulate than the amount of water per tons of tyre cuts in the landfill and the noise banks" (Study by IVL Swedish Environmental Research Institute Ltd (Exhibit EC-87)).

[1361] European Communities' second written submission, para. 137.

[1362] European Communities' second written submission, para. 137.

[1363] Brazil's second written submission, para. 97.

[1364] Brazil's first oral statement. To illustrate the limited disposal capacity of rubber asphalt, Brazil points out that road surfacing helps the EC to dispose of "slightly more than one quarter of one percent of its waste tyres" and that in the US it helps to dispose of less than two percent of waste tyres (Brazil's first written submission, para. 55 citing Serge Palard, BLIC: European Association of the Rubber Industry, Rubber Recycling Activities in Europe: Trends and Challenges (2004) (Exhibit BRA-60).

[1365] Brazil's first written submission, para. 56.

[1366] The study by the National Institute for Occupational Safety and Health, Crumb-Rubber Modified Asphalt Paving: Occupational Exposures and Acute Health Effects (2001) concludes (Exhibit BRA-64): "no definitive results were obtained indicating that CRM [crumb-rubber modified] exposures are more hazardous than CONV [conventional] exposures".

[1367] For instance the report of the OECD Working Group on Waste Prevention and Recycling, Improving Recycling Markets (Excerpts) states that: "In view of its environmental performance, grinding is an energy-intensive process and has relatively high dust emissions. The economic and environmental advantage of grinding is that it generates recyclable rubber and useful by-products such as steel and textile, which can also be recycled. The most common application of granulate is in rubberised asphalt. Although this seems to be a promising outlet for recycled rubber because rubberised asphalt lasts longer than conventional asphalt, its relatively high cost prevents its widespread application" (Exhibit EC-16).

padding, hose pipes, sporting goods, wheels of roller blades, rubber boots and suitcases may dispose of only a limited amount of waste tyres.[1368]

7.207 Finally, as regards *devulcanization*, which according to Brazil is the only true recycling method with respect to tyres, Brazil claims that it is cost-prohibitive, results in pollution, and produces poor-quality rubber with limited demand and applications.[1369] Therefore, according to Brazil, tyre rubber devulcanization is not a feasible alternative for the disposal of huge volumes of tyre wastes.[1370] Although we do not find evidence showing that devulcanization or other forms of chemical or thermal transformation such as pyrolisis pose substantial health or environmental risks, most of the evidence indicates, as submitted by Brazil, that under current market conditions, the economic viability of these options has yet to be demonstrated.[1371]

7.208 For these reasons and based on the evidence before it, the **Panel** finds that it is not clear that material recycling applications are entirely safe. Furthermore, even if these various material recycling methods were completely harmless, Brazil has demonstrated that they would not be able to dispose of a quantity of waste tyres sufficient to achieve Brazil's desired level of protection due to their prohibitive costs and thus cannot constitute a reasonably available alternative to the import ban.[1372]

Conclusion on the necessity of the measure

7.209 As stated above, the **Panel**'s assessment of the necessity of the measure under Article XX(b) will be the result of a "weighing and balancing" process, taking into account the factors considered

[1368] On this issue we note the following pieces of evidence: "[o]f the other markets for scrap tires, indications are that export, cut, stamped and punched products, agricultural and other uses will not increase to any great extent over the next several years" (John Serumgard, Internalization of Scrap Tire Management Costs: A Review of the North American Experience, in Proceedings of the Second Joint Workshop of the Secretariat of the United Nations Conference on Trade and Development (UNCTAD) and the International Rubber Study Group on Rubber and the Environment (1998) (Exhibit BRA-125)); "Environmental concerns over the proper disposal of scrap tires represent a continuing challenge to the industry. While tire producers have received most of the attention thus far, all rubber product manufacturers will ultimately face the problems of dealing with waste and discarded material. Rubber products are more difficult to recycle than plastics because they cannot be reprocessed by the simple application of heat and pressure. Recycling processes are based on mechanical desegregation of the article, separation, recovery of the rubber component and incorporation of the resultant "crumb" rubber into another manufacturing process. ... Only a small number of applications have been developed to use recycled rubber, but many more will emerge as the costs of environmental compliance escalate. Some existing, limited uses of recycled rubber include rubberised asphalt, athletic flooring, and rubber mats and carpet underlay" (Human Resources and Social Development Canada, Rubber Industry (circa 1999) (Exhibit BRA-131)).

[1369] Brazil's first written submission, para. 52.

[1370] Brazil's first oral statement, para. 34.

[1371] For instance: Tyres Report "[t]echnology also exists to use microwaves to break down tyres into oil, steel and carbon black, but this has not had much impact on the market as yet" (UK Environment Agency (Exhibit EC-15)); "The pyro-oil may be used as fuel or mixed in equal proportion with diesel oil. After refining, the 'pyro-carbon' may be used as a semi-reinforcing filler or as an active carbon. Even if recent technological advances have improved product quality, it is still unclear whether there is a market demand for this product" (Technical Working Group of the Basel Convention, Technical Guidelines on the Identification and Management of Used Tyres (Exhibit EC-18)); "[i]t is also likely that the thermal distillation (pyrolisis) of scrap tires will not be a technology which will have an impact on the market for scrap tires" (John Serumgard, Internalization of Scrap Tire Management Costs: A Review of the North American Experience, in Proceedings of the Second Joint Workshop of the Secretariat of the United Nations Conference on Trade and Development (UNCTAD) and the International Rubber Study Group on Rubber and the Environment (1998) (Exhibit BRA-125, p. 15)).

[1372] Brazil's first oral statement, para. 54.

above and the availability of a less trade-restrictive alternative measure, to determine whether the measure at issue is "necessary" within the meaning of Article XX(b).[1373]

7.210 We first recall that we have found the protection of human, animal, and plant life and health against risks arising from the accumulation of waste tyres to be an important objective. Specifically, we have found that the objective of protecting human life and health against life-threatening diseases, such as dengue fever and malaria, is both vital and important in the highest degree.[1374] This factor must be taken into account in assessing the challenged measure. At the same time, we agree with the European Communities that the importance of human life and health in and of itself is not sufficient to establish that a measure is necessary for the purposes of Article XX(b).[1375] Rather, we are required to assess whether the challenged measures, i.e. the specific measures chosen by Brazil in order to address this important objective, is necessary. In making this assessment, we must consider in particular the trade-restrictiveness of the challenged measure and its contribution to the achievement of the objective, in light of the availability to Brazil of any alternative measures.

7.211 In this instance, we have found that the challenged measure, being an import ban, was by design as trade-restrictive as can be in respect of the products that it covers, i.e. retreaded tyres. We note that the European Communities argued that this, in itself, made it "impossible to consider the challenged measure as "necessary"".[1376] We do not exclude, however, that there may be circumstances in which a highly restrictive measure is necessary, if no other less trade-restrictive alternative is reasonably available to the Member concerned to achieve its objective.[1377]

7.212 The Panel recalls the Appellate Body's statement that a "necessary" measure is located significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to".[1378] As we have determined above, an import ban on retreaded tyres has the potential to reduce the amount of waste tyres generated on Brazil's territory and, hence, can contribute to the realization of the stated objective, i.e. the protection of human, animal and plant life and health from the risks posed by the accumulation of waste tyres. Moreover, our examination of the alternatives identified by the European Communities suggests that no alternative measure is reasonably available that could avoid the generation of the specific risks arising from imported retreaded tyres. Alternatives that would involve management or disposal of the tyres once imported do exist, but raise their own concerns, either because they lead to the type of risks that Brazil seeks to avoid in the first place (unsafe stockpiling and emissions from incineration) or because they would not meet the level of protection sought by Brazil. The safest methods (material recycling) are useful but insufficient on their own to absorb the entire amount of waste from end-of-life tyres.

7.213 In "weighing and balancing" these elements, the Panel is mindful of the specific circumstances of this case. First, based on the elements presented by the parties, it appears to us that *non-generation* measures, i.e. measures that avoid the generation of waste tyres in the first place, are a pertinent way of addressing the risks arising from the accumulation of waste tyres. Secondly, it is clear from the submissions of both parties that in addressing such risks, including through the management of waste tyres, a combination of measures may be appropriate, so that the question of a specific measure's justification does not necessarily present itself in terms of simple alternatives or the replacement of one specific measure by another, as it is possible that different measures may address different aspects of the same risk and complement each other towards addressing this risk.

[1373] Appellate Body Report on *US – Gambling*, para. 307.
[1374] See paragraphs 7.108-7.112 above.
[1375] European Communities' second written submission para. 13.
[1376] European Communities' first written submission paras. 114-115.
[1377] Indeed, the European Communities itself successfully defended an import ban on importation under Article XX, in the *EC – Asbestos* case.
[1378] Appellate Body Report on *Korea - Various Measures on Beef*, para. 161.

7.214 In this instance, the chosen measure only addresses a specific component of the overall risk arising from the accumulation of waste tyres in Brazil, namely the importation of tyres that have already exhausted part of their useful life by the time they enter Brazil, and it is applied by Brazil in combination with other measures addressing other aspects of the overall risk. The European Communities has suggested a number of alternative ways to address the challenges arising from the management and disposal of waste tyres. None of these methods, by hypothesis, involve avoiding the entry of the imported retreaded tyres into Brazil in the first place. Rather, they would aim to address the management and disposal of such tyres, as part of Brazil's overall management and disposal strategy for waste tyres in general. Our examination of these alternatives suggests that none of these, either individually or collectively, would be such that the risks arising from waste tyres in Brazil would be safely eliminated, as is intended under the current import ban. In fact, it appears that Brazil already implements some of the alternative measures identified by the European Communities in order to address the challenges arising from the management of waste tyres. The imposition of an import ban on retreaded tyres thus appears to be consistent with other efforts by Brazil to control the risks arising from the accumulation and disposal of waste tyres.

7.215 In light of these elements and of our analysis of the different factors above, the **Panel** concludes that Brazil has demonstrated that the alternative measures identified by the European Communities do not constitute reasonably available alternatives to the import ban on retreaded tyres that would achieve Brazil's objective of reducing the accumulation of waste tyres on its territory and find that Brazil's import ban on retreaded tyres can be considered "necessary" within the meaning of Article XX(b) and is thus provisionally justified under Article XX(b).

7.216 We wish to stress that we reach this conclusion on the basis, *inter alia*, of a consideration of the import ban on retreaded tyres as designed, and in light of the considerations reflected in paragraphs 7.125-7.142 in relation to the circumstances in which such an import ban would apply. We make no determination, at this stage of our analysis, as to how this measure actually is applied by Brazil. This question will be considered hereafter in the context of our examination of whether the challenged measure is applied consistently with the requirements of the chapeau of Article XX.

(b) Is the measure applied consistently with the requirements of the chapeau of Article XX?

7.217 The **European Communities** submits that the import ban does not satisfy the requirements of the chapeau of Article XX.[1379] **Brazil** responds that the import ban is applied in a reasonable, consistent and predictable manner and that it constitutes neither a means of "arbitrary or unjustifiable discrimination" between countries where the same conditions prevail nor a disguised restriction on international trade.[1380]

(i) General considerations

7.218 **Brazil** argues that Members of the WTO have the right under Article XX to adopt and enforce measures which constitute general exceptions to the provisions of the GATT, provided that those measures are applied in good faith.[1381] Brazil claims that the manner in which Brazil applies the import ban on retreaded tyres constitutes neither a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, nor a disguised restriction on international trade.

7.219 The **European Communities** submits that in *US – Gasoline*, the Appellate Body stated that "the purpose and object of the introductory clauses of Article XX is generally the prevention of abuse

[1379] European Communities' first written submission, para. 142.
[1380] Brazil's first written submission, para. 130.
[1381] Brazil's first written submission, quoting the Appellate Body Report on *US – Shrimp*, at para. 158.

of the exceptions of [Article XX]",[1382] and in *US – Shrimp* the Appellate Body added that the "chapeau" is: (i) a balancing principle to mediate between the right of a Member to invoke an Article XX derogation and its obligation to respect the right of other Members[1383]; (ii) a qualification making the Article XX exemptions limited and conditional[1384]; and (iii) an expression of the principle of good faith in international law.[1385] The European Communities claims that the import ban on retreaded tyres adopted by Brazil does not fulfil any of these requirements.[1386]

7.220 The **Panel** first observes that, as the Appellate Body noted in *US – Gasoline*, "[t]he chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied".[1387] Therefore, pursuant to the chapeau of Article XX, we will need to address whether, although the measure itself falls within the terms of Article XX(b), the *application* by Brazil of its import ban on retreaded tyres is such as to constitute "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail" or "a disguised restriction on international trade".

7.221 In proceeding with our analysis, we also have in mind the guidance provided in earlier panel and Appellate Body rulings with respect to the chapeau of Article XX of GATT 1994. In particular, we note the Appellate Body's indication that "the fundamental theme – when interpreting the chapeau – is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX";[1388] and that the task of interpreting this introductory paragraph is essentially the "delicate one of locating and marking out a line of equilibrium "between the rights of the Member invoking the exception and those of other WTO Members. This line of equilibrium is not fixed and unchanging and moves "as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ."[1389]

7.222 We also recall that, as clarified by the Appellate Body, the burden of demonstrating that a measure provisionally justified under one or more of the exceptions set out in the individual paragraphs of Article XX does not, in its application, constitute abuse of such exception under the chapeau, rests on the party invoking the exception. In this case, therefore, Brazil bears the burden of demonstrating that its import ban on retreaded tyres is not applied in a manner that would constitute "arbitrary or unjustifiable" discrimination or a "disguised restriction on international trade".[1390]

7.223 As set out by the Appellate Body, in *US – Shrimp* and *US – Shrimp (Article 21.5)*, three types of situations regarding the *application* of measures provisionally justified under a specific paragraph of Article XX might lead to an inconsistency with the chapeau of Article XX;[1391]

(a) arbitrary discrimination between countries where the same conditions prevail;

(b) unjustifiable discrimination between countries where the same conditions prevail; and

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[1382] European Communities' first written submission, para. 144.
[1383] European Communities' first written submission, para. 144, quoting the Appellate Body Report on *US – Shrimp*, para. 156.
[1384] European Communities' first written submission, para. 144, quoting the Appellate Body Report on *US – Shrimp*, para. 157.
[1385] European Communities' first written submission, para. 144, quoting the Appellate Body Report on *US – Shrimp*, para. 158.
[1386] European Communities' first written submission, para. 145.
[1387] Appellate Body Report on *US – Gasoline*, p. 21.
[1388] Appellate Body Report on *US – Gasoline*, p. 25.
[1389] Appellate Body Report on *US – Shrimp*, para. 159.
[1390] Appellate Body Report on *US – Gasoline*, pp. 22-23.
[1391] Appellate Body Report on *US – Shrimp*, para. 150 and Appellate Body Report on *US – Shrimp (Article 21.5 – Malaysia)*, para. 118.

(c) a disguised restriction on international trade.

7.224 The existence of one of these situations would lead to the measure not being justified under Article XX.[1392]

7.225 The first two elements ("arbitrary" and "unjustifiable" discrimination), both of which relate to the existence of discrimination, will be considered together[1393] in light of the close relationship between them. The existence of a "disguised restriction on international trade" is then considered separately.

(ii) Arbitrary or unjustifiable discrimination

7.226 As clarified by the Appellate Body in previous rulings, a measure should be considered to be applied in a manner which constitutes a means of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail", if three conditions are met:

(a) First, the application of the measure results in *discrimination*;

(b) Second, the discrimination is *arbitrary* or *unjustifiable* in character;

(c) Third, this discrimination occurs *between countries where the same conditions prevail*.[1394]

7.227 We will therefore first consider whether Brazil's application of its import ban on retreaded tyres results in discrimination. If that is the case, then we will need to consider whether such discrimination is "arbitrary or unjustifiable" and, if so, whether it occurs between countries where the same conditions prevail.

Is the import ban on retreaded tyres applied in a manner that results in discrimination?

7.228 **Brazil** recalls the Appellate Body's explanation that the standard of discrimination contemplated in the chapeau of Article XX is different from the standard of discrimination in the treatment of products under other substantive obligations of the GATT.[1395]

7.229 The **Panel** agrees that, as clarified by the Appellate Body, the "nature and quality" of the discrimination referred to in the chapeau of Article XX is different from the discrimination in the treatment of products that might already have been found to be inconsistent with one of the substantive obligations of the GATT 1994. In this instance, the initial violation identified in relation to this measure is a prohibition or restriction on importation within the meaning of Article XI. This type of measure (an import ban in this instance), does not necessarily *ipso facto* result in discrimination, as an inconsistency with Articles I or III would. Thus, any discrimination alleged to exist in the application of the measure would arise, in this case, *in addition to* the restriction that is inherently present in the measure by its very nature.

7.230 **Brazil** claims that the manner in which it applies this measure is reasonable and in strict observance of the express terms of Portaria SECEX 14/2004.[1396]

[1392] Appellate Body Report on *US – Shrimp*, para. 184.

[1393] This approach has been followed in various previous cases. See the Appellate Body Report on *US – Gasoline*, the Appellate Body Report on *US – Shrimp (Article 21.5 – Malaysia)*, the Appellate Body Report on *US – Gambling*, and the Panel Report on *US – Gambling*, the Panel Report on *EC – Tariff Preferences* and the Panel Report on *EC – Asbestos*.

[1394] Appellate Body Report on *US-Shrimp*, para. 150.

[1395] Brazil's first written submission, para. 133.

7.231 The **European Communities,** however, identifies different sources of discrimination arising from Brazil's application of its import ban on retreaded tyres. First, it argues that discrimination arises from the fact that the ban does not apply to retreaded tyres imported into Brazil from other MERCOSUR countries, even though they produce the same environmental externalities.[1397] Secondly, the European Communities argues that the fact that the import ban on *used* tyres has been "suspended" by Brazilian courts has allowed Brazilian manufacturers of retreaded tyres to use imported casings, which in the opinion of the European Communities also constitutes discrimination against retreaded tyres imported from the European Communities.[1398] Finally, in relation to new tyres, the European Communities claims that there is discrimination because Brazil has not adopted any measure to ensure that new tyres consumed in its territory are retreaded when they become used tyres[1399] and because Brazil does not restrict the importation and sale of non-retreadable tyres.[1400]

7.232 It is worth highlighting in this context that the European Communities has also clearly indicated that it is *not* alleging that the non-application of the ban to retreaded tyres made from *domestic* used tyres constitutes arbitrary or unjustifiable discrimination.[1401]

7.233 We will consider in turn the different elements of discrimination identified by the European Communities in the application of Brazil's import ban on retreaded tyres.

> Does discrimination arise from the exemption of imports of remoulded tyres originating in MERCOSUR countries from the import ban on retreaded tyres (the "MERCOSUR exemption")?

7.234 Turning first to the difference in treatment between MERCOSUR and non-MERCOSUR countries, the **Panel** notes that discrimination is alleged to exist in favour of countries benefiting from the MERCOSUR exemption. It is useful to recall in this respect that the Appellate Body has clarified that "discrimination" within the meaning of the chapeau could occur between different exporting Members, as well as between exporting Members and the importing Member concerned."[1402]

7.235 In this instance, Brazil does not deny that the exemption of imports of remoulded tyres originating in MERCOSUR countries gives rise to discrimination between those imports and those of the European Communities (and other WTO Members).[1403] Indeed, the exemption, by its very nature, allows imports originating from other MERCOSUR countries to enter Brazil while the same products are not authorized for importation, if they originate in other WTO Members. The exemption therefore gives rise to discrimination, between MERCOSUR countries and other WTO Members.

7.236 The MERCOSUR exemption is contained in Portaria SECEX 14/2004, which is also the very instrument that provides the legal basis for the import ban. We recall that in our consideration of the provisional justification of the import ban under paragraph (b), we focused our analysis on the import ban itself, i.e. on the measure that had been found to be inconsistent with Article XI.1 of GATT 1994

[1396] Brazil's first written submission, para. 134.
[1397] European Communities' first written submission, para. 147.
[1398] European Communities' first written submission, para. 147.
[1399] European Communities' first written submission, para. 149.
[1400] European Communities' second oral statement, para. 92.
[1401] European Communities' first oral statement, para. 94.
[1402] Appellate Body Report on *US – Gasoline*, p. 24; *see also* the Appellate Body Report on *US – Shrimp*, para. 150.
[1403] Brazil's first written submission, para. 136 and European Communities' first written submission, para. 147.

in the first place. At this stage of our analysis, however, we are required to focus on the *manner* in which the measure is *applied*.[1404]

7.237 The fact that the MERCOSUR exemption is foreseen in the very legal instrument containing the import ban itself does not, in our view, prevent us from taking it into consideration in the context of our examination, under the chapeau, of the manner in which the measure is applied. In its ruling in *US – Shrimp*, the Appellate Body clarified that "the application of a measure may be characterized as amounting to an abuse or misuse of an exception of Article XX not only *when the detailed operating provisions of the measure prescribe* the arbitrary or unjustifiable activity, but also where a measure, otherwise fair and just on its face, is actually applied in an arbitrary or unjustifiable manner"(emphasis added)[1405]. This clearly supports the view that an unjustifiable discrimination can arise from elements actually prescribed in the measure itself. This was in fact the case in *US-Gasoline*, where the Appellate Body examined the contents of the statutory baselines for different suppliers in the context of the chapeau, rather than under paragraph (g).[1406]

7.238 The **Panel** finds therefore that the MERCOSUR exemption can be considered to form part of the manner in which the import ban imposed by Brazil on retreaded tyres – the measure provisionally justified under Article XX(b) – is applied and that it gives rise to discrimination within the meaning of the chapeau of Article XX, between MERCOSUR and non-MERCOSUR countries.

> Does discrimination arise from the importation of used tyres through court injunctions?

7.239 The **European Communities** also alleges that discrimination arises from the fact that the import ban imposed by Brazil on *used* tyres (also contained in Portaria SECEX 14/2004) has been, in the words of the European Communities, "suspended" through the grant of court injunctions allowing such imports in spite of the ban.

7.240 **Brazil** considers that the import ban on used tyres is not "suspended" and is both in force and enforced.[1407] Brazil has recognized, however, that "limited quantities" of used tyres are being imported under court injunctions. Brazil has also clarified, in response to questions by the Panel, that these court injunctions have been granted as a result of challenges to the legality and constitutionality of the ban enacted through Portaria SECEX 14/2004 and that the Federal Supreme Court has already rejected three of the four arguments typically raised in these proceedings. Brazil also indicated that it anticipates that the same court will soon reject also the fourth argument, namely that the ban "interferes with the constitutional principle of free enterprise because it restricts access to supplies of raw material necessary for domestic retreaders to carry on their business".[1408]

7.241 The **Panel** first observes that it is undisputed that court injunctions have been granted, which have enabled the importation of used tyres, from the European Communities and elsewhere, and that at least some of these injunctions are presently in place. The European Communities argues that this discriminates in favour of domestic retreaded tyres made from imported used tyres, which generate the same waste as that arising from imported retreads.[1409]

7.242 It has not been suggested that there is any significant difference between retreaded tyres made in Brazil from imported casings and imported retreaded tyres. Further, Brazil has not disputed that

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[1404] Appellate Body Report on *US – Gasoline*, p.22.
[1405] Appellate Body Report on *US – Shrimp*, para. 160.
[1406] Appellate Body Report on *US – Gasoline*, p. 23.
[1407] Brazil's second written submission, para. 151.
[1408] See Brazil's answer to panel question No. 14.
[1409] European Communities' first oral statement para. 94.

retreaded tyres made from imported used tyres would produce the same environmental externalities and waste management issues as imported retreads.

7.243 In light of these elements, the **Panel** finds that to the extent that it enables retreaded tyres to be produced in Brazil from imported casings while retreaded tyres using the same casings cannot be imported, permitting imports of used tyres through court injunctions results in discrimination in favour of tyres retreaded in Brazil using imported casings, to the detriment of imported retreaded tyres.

> Does discrimination arise from the absence of comparable measures in relation to new tyres?

7.244 Finally, the European Communities has argued that in relation to new tyres, there is discrimination because Brazil has not adopted any measure to ensure that new tyres consumed in its territory are retreaded when they become used tyres[1410] and because Brazil does not restrict the importation and sale of non-retreadable new tyres.[1411] We consider these two aspects in turn.

Retreading of new tyres consumed in Brazil

7.245 The **European Communities** argues that discrimination exists since Brazil effectively imposes on other WTO Members a requirement that imported tyres have the capacity of being retreaded once in order to be allowed into Brazil, while its domestic industry does not need to ensure that the tyres it produces will be retreaded.

7.246 **Brazil** replies that it actively promotes retreading of the tyres it consumes[1412] and has implemented a number of measures to realize the full promise of retreading.[1413] Brazil argues that the ban on used and retreaded tyre imports forces domestic retreaders to use casings collected at home, even if it raises production costs.[1414] CONAMA Resolution 258/1999 exempts domestic retreaders from disposal obligations, as long as they process tyres consumed within the country's territory.[1415] Finally, Brazil continues to promote better tyre care to increase the collected tyres' suitability for retreading (e.g. the 1997 National Code of Traffic).[1416]

7.247 The **Panel** notes that, even assuming, as the European Communities argues, that the "capacity of being retreaded once" were a requirement effectively placed by Brazil on imported tyres, this would not be equivalent to ensuring that tyres produced domestically "*will* be retreaded" (emphasis added). Rather, the "equivalent" requirement for domestic tyres would be that they have the *capacity to be* retreaded in Brazil. We recall in this respect our earlier conclusion that Brazil has established that it has the production capacity to retread domestic used tyres and that domestic used tyres are suitable for retreading and are being retreaded.[1417] Thus the **Panel** concludes that Brazil has established that, prima facie, the tyres produced domestically have the capacity to be retreaded in Brazil, and that the European Communities has failed to demonstrate that these tyres are not suitable for retreading.

[1410] European Communities' first written submission, para. 149.
[1411] European Communities' second oral statement, para. 92.
[1412] Brazil's first written submission, para. 79.
[1413] Brazil's first written submission, para. 81.
[1414] Brazil's first written submission, para. 81.
[1415] Brazil's first written submission, para. 81.
[1416] Brazil's first written submission, para. 82.
[1417] See paragraphs 7.135-7.142above.

Retreadability of new tyres sold in Brazil

7.248 The **European Communities** argues that not all new tyres are, by virtue of the way in which they are constructed, necessarily suitable for being retreaded after their first use. The European Communities argues that the fact that Brazil restricts the importation of retreaded tyres, whereas it does not take similar measures against low-quality new tyres is further evidence that the ban constitutes arbitrary and unjustifiable discrimination against imported retreaded tyres.[1418] The European Communities also submits that new tyres that are not retreaded produce the same public health and environmental externalities as imported retreaded tyres.[1419]

7.249 **Brazil** has responded that new tyres sold in Brazil (whether manufactured domestically or imported) are high-quality tyres that comply with strict technical and performance standards that are based on international standards.[1420] Brazil contends that tyres manufactured in accordance with these standards have the potential to be retreaded and new tyres sold in Brazil are not "cheap low quality new tyres" with no potential for future retreading.[1421]

7.250 In light of the elements before it, the **Panel** concludes that Brazil has established that, prima facie, the new tyres it allows onto the market are of retreadable quality meeting relevant international standards, and that the European Communities has failed to demonstrate that new tyres sold on the Brazilian market (whether produced in or imported into Brazil) are low-quality tyres not suitable for retreading, such that this would constitute discrimination against imported retreaded tyres.[1422]

Conclusion

7.251 The **Panel** has determined above that discrimination arises in the application of the measure at issue from two sources: discrimination arising from the exemption from the measure at issue of imports of remoulded tyres originating in MERCOSUR and discrimination arising from the importation of used tyres under court injunctions. In light of the above determinations, we need to consider further whether such discrimination is "arbitrary or unjustifiable" within the meaning of the chapeau of Article XX and arises between countries where the same conditions prevail. As stated by the Panel in *EC – Asbestos*, "if the application of the measure is found to be discriminatory, it still remains to be seen whether it is *arbitrary* and/or *unjustifiable* between countries where the same conditions prevail".[1423]

Is the discrimination in the application of the measure "arbitrary" and/or "unjustifiable"?

7.252 We have determined above that two elements result in discrimination in the application of the measure: the MERCOSUR exemption and the allowance, through court injunctions, of imports of used tyres. We will therefore consider in turn whether either source of discrimination is "arbitrary" or "unjustifiable". Before turning to this assessment, we first consider the meaning of these terms.

Approach of the Panel

7.253 In the view of the **European Communities**, the terms "arbitrary" and "unjustifiable" both qualify decisions or conducts that are not reasonable. The European Communities submits that the term "arbitrary" has its "centre of gravity" in the lack of consistency and predictability in the application of the measure, while the term "unjustifiable" refers more to the lack of motivation and

[1418] European Communities' answer to panel question No. 11.
[1419] European Communities' first written submission, para. 149.
[1420] Brazil's answer to the panel question Nos. 12 and 91.
[1421] Brazil's answer to panel question No. 12.
[1422] Exhibit BRA-95.
[1423] Panel Report on *EC – Asbestos*, para. 8.226.

capacity to convince.[1424] Moreover, the European Communities submits that what is arbitrary and unjustifiable discrimination must be established in relation to the objectives of the measure at issue, in the present case, the protection of human life and health.[1425]

7.254 According to **Brazil**, the term "arbitrary" is defined as "dependent on will or pleasure", "discretionary", "based on mere opinion or preference", "capricious, unpredictable, inconsistent", "unrestrained in the exercise of will or authority", "despotic, tyrannical."[1426] Brazil also submits that the word "unjustifiable" denotes that which cannot be "legally or morally justified", or shown to be "just, reasonable, or correct", or "defensible."[1427] Based on these definitions, Brazil submits that the only question that the Panel must examine is whether Brazil's measures are applied reasonably and in good faith.[1428]

7.255 As required by Article 3.2 of the DSU, the **Panel** must interpret these terms in accordance with the customary rules of interpretation of public international law. As noted earlier, these customary rules are reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT).

7.256 In accordance with Article 31.1 of that convention, we must consider "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". We therefore consider the ordinary meaning of the terms "arbitrary" and "unjustifiable", read in their context and in light of the object and purpose of the treaty.

7.257 We first observe that definitions of "arbitrary", as set out in *The Shorter Oxford English Dictionary*, provide some guidance as to the ordinary meaning of the term:

> "***arbitrary*** **1** Dependent on will or pleasure; **2** Based on mere opinion or preference as opp. to the real nature of things; capricious, unpredictable, inconsistent; 3 Unrestrained in the exercise of will or authority; despotic, tyrannical."[1429]

7.258 In *US – Shrimp (Article 21.5 – Malaysia)*, the Panel similarly considered "the ordinary meaning of the word 'arbitrary', i.e. 'capricious, unpredictable, inconsistent'".[1430] In the same case, the Appellate Body highlighted two factors that it found, in that case, to be relevant to an assessment of whether the measure was arbitrary within the meaning of the chapeau of Article XX, namely "rigidity and inflexibility" of the application of the measure; and the fact that the measure is imposed without inquiring into its appropriateness for the conditions prevailing in the exporting countries.[1431]

7.259 As to the term "unjustifiable", definitions set out in *The Shorter Oxford English Dictionary*, provide some guidance on its ordinary meaning:

> "***unjustifiable*** Not justifiable, indefensible."[1432]

[1424] European Communities' first written submission, para. 152.
[1425] European Communities' first oral statement, para. 92; European Communities' second written submission, para. 152.
[1426] Brazil's first written submission, para. 135.
[1427] Brazil's first written submission, para. 135.
[1428] Brazil's first oral statement, para. 62.
[1429] *The Shorter Oxford English Dictionary*, Vol. I, p. 109.
[1430] Panel Report on *US – Shrimp (Article 21.5 – Malaysia)*, para. 5.124.
[1431] Appellate Body Report on *US – Shrimp*, para. 177.
[1432] *The Shorter Oxford English Dictionary*, Vol. II, p. 3450.

"***justifiable*** **2** Able to be legally or morally justified; able to be shown to be just, reasonable, or correct; defensible."[1433]

7.260 Read in the context of the chapeau of Article XX, these definitions suggest, overall, the need to be able to "defend" or convincingly explain the rationale for any discrimination in the application of the measure.

7.261 In its ruling on *US – Gasoline*, the Appellate Body found that discrimination that could have been "foreseen" and that was not "merely inadvertent or unavoidable" would be unjustifiable.[1434] Two specific elements for the justification of discrimination can also be identified in the Panel and Appellate Body reports in *US – Shrimp* and *US – Shrimp (Article 21.5 - Malaysia)*: first, a serious effort to negotiate with the objective of concluding bilateral and multilateral agreements for the achievement of a certain policy goal, and secondly, the flexibility of the measure. These examples provide useful illustrations on what might render discrimination "unjustifiable" within the meaning of the chapeau of Article XX.

7.262 We do not assume, however, that exactly the same elements will necessarily be determinative in every situation, in assessing whether discrimination in a given case is "arbitrary" or "unjustifiable". We recall in this regard the Appellate Body's observation, in its ruling in *US – Shrimp*, that the "location of the line of equilibrium [between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions], as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ".[1435]

7.263 Against this background, the Panel will assess whether the discrimination resulting from the manner Brazil has applied its import ban on retreaded tyres may be described as "arbitrary" and "unjustifiable" within the meaning of the chapeau of Article XX.

> Is the discrimination arising from the MERCOSUR exemption "arbitrary" or "unjustifiable"?

7.264 The **European Communities** submits that the discrimination between retreaded tyres imported from MERCOSUR member States and those imported from non-MERCOSUR countries is unreasonable, and therefore arbitrary, because all retreaded tyres, irrespective of their country of origin, produce the same environmental externalities.[1436] The European Communities also considers that the same reasons make the discrimination "unjustifiable". The European Communities further argues that retreaded tyres coming from its territory and those coming from other MERCOSUR countries differ in no way and that in fact, the latter are largely produced with casings imported from the European Communities and other non-MERCOSUR countries.[1437]

7.265 **Brazil** recalls that the exception of remoulded tyres coming from other MERCOSUR countries was introduced through Portaria SECEX 2/2002, after Uruguay prevailed in the proceedings against Brazil under the MERCOSUR dispute settlement system.[1438] Therefore, Brazil claims that its

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[1433] *The Shorter Oxford English Dictionary*, Vol. I, p. 1474.
[1434] Appellate Body Report on *US – Gasoline*, p. 27.
[1435] Appellate Body Report on *US – Shrimp*, para. 159.
[1436] European Communities' first written submission, para. 154
[1437] European Communities' second written submission, para. 151.
[1438] Brazil's first written submission, para. 138. Brazil identifies the following provisions as those requiring compliance with the MERCOSUR arbitral tribunal's decision: Brazil was thus required, under the Treaty of Asuncion and its Protocols of Brasilia and Ouro Preto, the Brazilian implementing legislation, the Decision CMC No. 22/00 and the arbitral award of the MERCOSUR tribunal, to exempt the MERCOSUR countries from the import ban (see Brazil's first written submission, para. 137).

decision to exempt the MERCOSUR countries from the ban was thus made in compliance with its international law obligations[1439] and that far from being either arbitrary or unjustifiable, it is an expression of Brazil's adherence to the rule of law.[1440]

7.266 Brazil further argues that the very language of the regulation that the European Communities challenges explicitly provides for the MERCOSUR exception. According to Brazil, assuming that the exemption is permitted under Articles XXIV and XX(d), "there is nothing arbitrary about applying the WTO-consistent law as it is written."[1441]

7.267 The **European Communities** further submits that the existence of an international agreement to which Brazil is a party or the fact that the application of the import ban is mandated by law cannot justify the introduction of unjustifiable and arbitrary discrimination; otherwise, the European Communities submits, it would be very easy for any WTO Member to circumvent the requirements of the chapeau of Article XX by simply concluding agreements with other WTO Members or by providing for a discriminatory application in the law itself".[1442]

7.268 Finally, the European Communities claims that the discrimination in the present case is all the more unreasonable because Brazil is at least partially responsible for the obligation it now invokes.[1443] According to the European Communities, Brazil consciously chose not to defend itself against Uruguay on grounds related to human health and safety, whereas it is now invoking this defence against the European Communities. In the view of the European Communities, this behaviour by itself constitutes arbitrary and unjustifiable discrimination between countries where the same conditions prevail.[1444]

7.269 In response, **Brazil** explained that the dispositive question in the case against Uruguay was whether or not Portaria 8/00 was a new import restriction, in violation of the Decision CMC 22/2000. Brazil claims that its attorneys believed that they needed only to show that the import ban had been in effect since 1991, and that the 2000 regulation merely clarified the scope of that prohibition.[1445]

7.270 The **Panel** first notes that there has been no suggestion that remoulded tyres imported from MERCOSUR countries would differ in any significant way from their European counterparts.[1446] The health impact of both types of tyres can thus be expected to be comparable. Indeed, Brazil does not seek to justify the discrimination on the basis of any difference in the impact of the products in relation to the achievement of its policy objective of reducing the accumulation of waste tyres. Rather, Brazil argues that the MERCOSUR exemption is neither arbitrary nor unjustifiable because it finds its origin in Brazil's obligation to implement a ruling of a MERCOSUR tribunal, which required it to allow MERCOSUR imports of remolded tyres. Brazil also argues that "Brazil's different

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[1439] Brazil's first written submission, para. 137.

[1440] Brazil's first written submission, para. 137. Brazil clarifies that it implemented the MERCOSUR ruling in the most narrow way possible. It exempted from the import ban only remolded tyres (a subcategory of retreaded tyres) from MERCOSUR countries, because the MERCOSUR case referred only to that category of retreaded tyres.

[1441] Brazil's first oral statement, para. 64.

[1442] European Communities' second written submission, paras. 154, 157-58. The European Communities also claims that Brazil's argument would also run against the spirit of Article 34 of the Vienna Convention on the Law of Treaties, which precludes a treaty, in this case the Treaty of Asuncion, from affecting the rights and obligations of a third State without its consent, European Communities' first oral statement, para. 93.

[1443] European Communities' second oral statement, para. 96.

[1444] European Communities' second written submission, para. 165.

[1445] Brazil's answer to the European Communities' question No. 18.

[1446] As noted in footnote 1041 above, remoulded tyres are one of three types of retreaded tyres.

treatment of its MERCOSUR partners is explicitly authorized under Article XXIV of GATT 1994 and, therefore, cannot be arbitrary and unjustifiable".[1447]

7.271 The key factual circumstances that ultimately led to the exemption of remoulded tyres originating in other MERCOSUR countries are undisputed. Both parties agree that the import ban, as it was originally designed in Portaria 8/2000, applied to all retreaded tyres regardless of their country of origin, and that it was only after a dispute settlement tribunal established under MERCOSUR found Brazil's restrictions on the importation of a certain type of retreaded tyres (remoulded tyres) to be in violation of its obligations under MERCOSUR that Brazil exempted that particular kind of retreaded tyres from the application of the import ban. This ruling arose in the context of a challenge initiated by Uruguay against Brazil's import ban on remoulded tyres, on the grounds that it constituted a new restriction on trade prohibited under the MERCOSUR agreements. We also note that MERCOSUR rulings are *res judicata* for the parties involved and that the European Communities does not dispute that Brazil had an obligation, under MERCOSUR, to implement the ruling.

7.272 The exception of remoulded tyres originating in MERCOSUR therefore does not seem to be motivated by capricious or unpredictable reasons. It was adopted further to a ruling within the framework of MERCOSUR, which has binding legal effects for Brazil, as a party to MERCOSUR.

7.273 We also note that this ruling was adopted specifically in the context of an agreement intended to liberalize trade among its members. This type of agreement inherently provides for preferential treatment in favour of its members, thus leading to discrimination between those members and other countries. To the extent that the existence of some discrimination in favour of other members of a customs union is an inherent part of its operation, the possibility that such discrimination might arise between members of MERCOSUR and other WTO Members as a result of the implementation of the MERCOSUR Agreement is not, in our view, *a priori* unreasonable.

7.274 We note that this type of agreement is expressly recognized in Article XXIV, which provides a framework for WTO Members to discriminate in favour of their partners in customs unions or free trade areas, subject to certain conditions. In making this observation, we make no determination as to whether MERCOSUR meets the requirements of Article XXIV in respect of customs unions.[1448]

7.275 The European Communities submits, however, that Brazil is at least partially responsible for the obligation it now invokes.[1449] According to the European Communities, Brazil consciously chose not to defend itself against Uruguay on grounds related to human health and safety under Article 50(d) of the Montevideo Treaty, whereas it is now invoking this defence against the European Communities. Brazil has acknowledged that it did not invoke the relevant exceptions in the Montevideo treaty before the MERCOSUR tribunal, but has explained that, in light of the legal issues

[1447] Brazil's second oral statement, para. 107.

[1448] In this part of our analysis, we do not consider whether the exemption is in conformity with Article XXIV, as a measure taken within a customs union complying with the requirements of Article XXIV. At this stage, we merely observe that the fact that the MERCOSUR exemption was enacted in the context of an agreement that establishes further liberalization among its partners provides support for the proposition that there is a rational basis for it. We recall that Brazil has also specifically argued that its "different treatment of MERCOSUR partners cannot be considered arbitrary or unjustifiable under Article XX, if it is explicitly authorized under Article XXIV". However, we do not consider that the fact that the measure may be *authorized* under Article XXIV dispenses Brazil from complying with the requirements of Article XX, including the requirements of the chapeau. In particular, we note that Article XXIV:8(a)(i) provides members of a customs union sufficient flexibility to eliminate or not eliminate restrictive regulations of commerce as necessary in relation to measures taken under, *inter alia*, Article XX.

[1449] European Communities' second oral statement, para. 96.

raised by the case, it had seemed, at the time, that defences based on other grounds were more appropriate.[1450]

7.276 We do not consider that we are in a position to assess in detail the choice of arguments by Brazil in the MERCOSUR proceedings or to second-guess the outcome of the case in light of Brazil's litigation strategy in those proceedings. Nor would it be appropriate for us to engage in such an exercise. We need only consider the details of those proceedings to the extent necessary to determine the consistency of the MERCOSUR exemption with the requirements of the chapeau of Article XX, and specifically, at this stage of our analysis, whether as a result the import ban on retreaded tyres is being applied as a means of "arbitrary" or "unjustifiable" discrimination. In this respect, we note that, although the litigation strategy chosen by Brazil during the MERCOSUR proceedings failed to persuade the MERCOSUR tribunal, it does not, in itself, seem unreasonable or absurd. Brazil has explained that it chose to defend its measures in consideration of the specific legal claims raised against it in the proceedings. Furthermore, while the particular litigation strategy followed in that instance by Brazil turned out to be unsuccessful, it is not clear that a different strategy would necessarily have led to a different outcome.[1451]

7.277 The European Communities also argues that the MERCOSUR Arbitral Tribunal simply decided that Portaria 8/00 was incompatible with Brazil's obligations under MERCOSUR and did not require it to discriminate between MERCOSUR and other WTO Members.[1452] Brazil, for its part, argued that it was required under the Treaty of Asunción and its Protocols of Brasilia and Ouro Preto, the Brazilian implementing legislation, the Decision CMC 22/00 and the arbitral award of the MERCOSUR Tribunal, to exempt MERCOSUR countries from the import ban.[1453]

7.278 Here again, we consider Brazil's obligations under the ruling by the MERCOSUR tribunal only to the extent necessary to determine whether the application by Brazil of the MERCOSUR exemption is "arbitrary" or "unjustifiable" within the meaning of the chapeau of Article XX. We note that the text of the decision itself only indicates that Brazil is required to adapt its internal legislation in light of the inconsistency found by the arbitral body. The decision did not expressly provide for a particular course of action to implement the ruling.

7.279 Brazil has argued that the exemption of MERCOSUR imports was effectively the only course of action available to it for the implementation of the ruling.[1454] We also note Brazil's indication that eliminating the import ban altogether was not a reasonable option for the implementation of the ruling, "because it would have forced Brazil to abandon its policy objective and its level of protection, which is to reduce unnecessary generation of tyre waste to the maximum extent possible".[1455] We note further Brazil's indication that it implemented the exemption in the most narrow way possible, taking

[1450] Brazil has explained that it argued before the tribunal that it was entitled to maintain the ban against all imports of retreaded tyres, regardless of the country of origin, including on imports from MERCOSUR countries, because the ban was merely a continuation of an existing measure. Brazil also explains that the tribunal did not agree with Brazil's arguments and decided instead that the application of the import ban to MERCOSUR countries pursuant to Portaria No. 8/00 was contrary to Decision CMC No. 22 of 29 June 2000, which prohibits the adoption of new trade restrictive measures by MERCOSUR countries *inter se* (Brazil's first written submission, para. 137).

[1451] In a similar case between Argentina and Uruguay, the tribunal also reached the conclusion that the restriction was unjustified, despite the invocation of the relevant exception by Argentina in those proceedings.

[1452] European Communities' first written submission, para. 72.

[1453] Brazil's first written submission, para. 137.

[1454] See Brazil's answer to panel question No. 73 ("Apart from non-compliance, the only alternative available to Brazil was to exempt MERCOSUR member states from the import ban").

[1455] Brazil's response to Panel question No. 73.

into account all of its international law obligations, and limited the exemption to the exact product that had been the object of the MERCOSUR ruling, namely remoulded tyres.[1456]

7.280 Whether or not this was the only course of action for Brazil to follow, it does not appear to us to be a capricious or unpredictable action, in light of Brazil's obligation to comply with the MERCOSUR ruling.

7.281 In light of the above, the discrimination resulting from the MERCOSUR exemption cannot, in our view, be said to be "capricious" or "random". To that extent, the measure at issue is not being applied in a manner that would constitute *arbitrary* discrimination.

7.282 The European Communities argues that what constitutes an arbitrary or unjustifiable discrimination must be established in relation to the objectives of the measure at issue, in the present case, the protection of human life and health,[1457] and that to rule otherwise would mean that WTO Members could discriminate in the application of measures simply by concluding international agreements providing for discriminatory application of such measures. The European Communities also argues that this is also contrary to Article XXIV:8(a), which specifically excludes measures taken under Article XX from the need to liberalize "substantially all trade" within a customs union or free trade area.[1458]

7.283 However, in observing that the MERCOSUR ruling provided a reasonable basis for Brazil to enact an exemption from the import ban in favour of remoulded tyres originating in MERCOSUR, we are not suggesting that the invocation of any international agreement would be sufficient under any circumstances, in order to justify the existence of discrimination in the application of a measure under the chapeau of Article XX. Rather, we have considered the specific circumstances of the case, including the nature of the international agreement and of the ruling on the basis of which Brazil has acted, and concluded that in the circumstances, this provided a reasonable basis for Brazil to enact an exemption from the import ban in favour of its MERCOSUR partners.

7.284 We also do not consider that it is contrary to the terms of Article XXIV:8(a) for us to take into account, in our assessment of the measure under Article XX, the fact that the MERCOSUR exemption was adopted as a result of Brazil's obligations under MERCOSUR. As noted by the Appellate Body, Article XXIV:8(a) provides "some flexibility" to the members of the members of a customs union to maintain certain restrictive regulations of commerce.[1459] In this instance, Brazil has not maintained the import ban *vis-à-vis* its MERCOSUR partners, and this has resulted in discrimination towards other WTO Members. Our task under the terms of the chapeau of Article XX is to consider whether this discrimination is arbitrary or unjustifiable. This is a distinct assessment from that which might arise under Article XXIV:8(a) as to whether restrictive regulations of commerce have been eliminated on "substantially all the trade" in a manner consistent with the terms of that provision.

[1456] Brazil's second written submission para. 149.

[1457] See European Communities' first oral statement, para. 91.

[1458] See European Communities' first oral statement, paras. 92 and 93. The European Communities also argues in the same paragraph that this would "run against the spirit of" Article 34 of the Vienna Convention on the Law of Treaties, which precludes a treaty from affecting the rights and obligations of a third state without its consent. We note that the European Communities does not suggest that it would actually be contrary to the *terms* of that provision, which provides that "[a] treaty does not create obligations or rights for a third State without its consent". Indeed, in taking account, in the context of our assessment of the consistency of Brazil's measure under Article XX, the fact that Brazil is a member of MERCOSUR and has incurred obligations under that agreement, we do not believe that we are affecting the rights or obligations of the European Communities under the WTO Agreement, and more specifically under Article XX. Nor does this amount, in our view, to a situation in which the MERCOSUR agreement would have created rights or obligations for the European Communities without its consent.

[1459] See Appellate Body Report on *Turkey – Textiles*, para. 48.

7.285 However, the fact that we give due consideration to the existence of Brazil's commitments under MERCOSUR in our assessment does not imply that the exemption must necessarily be justified. Rather, we must now examine the manner in which the import ban is applied, taking into account the existence of an exemption for MERCOSUR members, in order to determine whether the discrimination arising from the MERCOSUR exemption is arbitrary or unjustifiable.

7.286 The MERCOSUR exemption entails that certain imports of retreaded tyres may take place. We also note that Brazil has confirmed that under the MERCOSUR exemption, it is quite possible for retreaders from MERCOSUR countries benefiting from the exemption to source casings from abroad (for example from the European Communities), retread them locally, and then export the retreaded tyre to Brazil under the MERCOSUR exemption.[1460] This means that casings from non-MERCOSUR countries, as well as casings originally used in MERCOSUR, may be retreaded in a MERCOSUR country and exported to Brazil as originating in MERCOSUR. This further increases the potential for imports of retreaded tyres to enter into Brazil through the MERCOSUR exemption.

7.287 If such imports were to take place in such amounts that the achievement of the objective of the measure at issue would be significantly undermined, the application of the import ban in conjunction with the MERCOSUR exemption would constitute a means of unjustifiable discrimination. The more imports enter Brazilian territory through the exemption, the more Brazil's declared policy objective of reducing the unnecessary accumulation of waste tyres to the greatest extent possible will be undermined, thereby affecting the justification for the maintenance of the import ban *vis-à-vis* non-MERCOSUR WTO Members. This is a matter of preserving the "line of equilibrium" between Brazil's right to invoke Article XX and the rights of other WTO Members under the Agreement.

7.288 As of the time of the Panel's examination, however, volumes of imports of retreaded tyres under the exemption appear not to have been significant. The European Communities has indicated that such imports had increased tenfold since 2002, from 200 to 2,000 tons per year by 2004.[1461] That figure remains much lower than the 14,000 tons per year imported from the European Communities alone prior to the imposition of the import ban.[1462] Even if all the retreaded tyres imported from MERCOSUR countries were made from used tyres of EC origin, the import ban would still have resulted in eighty six percent of the previous imports from the European Communities not taking place, for the year 2004. Thus, the measure's ability to fulfil its objective does not appear to have been significantly undermined by the occurrence of imports from other sources, even in the presence of an exemption for MERCOSUR imports.

7.289 The **Panel** finds, therefore, that, as of the time of the Panel's ruling, the operation of the MERCOSUR exemption has not resulted in the measure being applied in a manner that would constitute arbitrary or unjustifiable discrimination.

> Is the discrimination arising from the importation of used tyres through court injunctions "arbitrary" or "unjustifiable"?

7.290 The **European Communities** submits that the import ban is also applied in an arbitrary and unjustifiable manner because, due to the injunctions granted to importers of used tyres, retreaded tyres continue to be produced in Brazil using imported carcasses.[1463] According to the European

[1460] *See* Brazil's answer to panel question No. 72 ("it is possible for tyres used in the EC to be remolded in a Mercosul country and then exported to Brazil because Brazil has no control over remolded tyre production in other Mercosul members").
[1461] European Communities' first written submission, para. 83.
[1462] European Communities' first written submission, para. 80.
[1463] European Communities' second written submission, para. 169.

Communities the discrimination is not reasonable, and therefore it is arbitrary, because all retreaded tyres, made from used tyres not originating in Brazil produce the same environmental externalities in Brazil irrespective of the country where they are produced.[1464] It also argues that the same reasons could be referred to in order to find the discrimination "unjustifiable".

7.291 **Brazil** clarifies that the import ban on used tyres has not been suspended in any way and that the government of Brazil has consistently opposed in court the injunctions granted to used tyre importers.[1465] Brazil agrees that the used tyres imported into Brazil on the basis of the preliminary injunctions have the same environmental externalities in its territory irrespective of the country where they are produced. However, Brazil adds that this is precisely the reason why it has consistently opposed them.[1466]

7.292 The **Panel** first notes that the importation of used tyres into Brazil is prohibited, under the terms of Article 40 of Portaria SECEX 14/2004. There is no disagreement between the parties that used tyres have been imported into Brazil in recent years only as a result of injunctions granted by Brazilian courts in specific cases.[1467] Furthermore, Brazil has provided evidence that it has judicially challenged such injunctions, with a certain degree of success. Therefore, the fact that Brazilian retreaders are still able to use imported casings to manufacture their products does not seem to be the result of a capricious or unpredictable action of Brazil. Rather, it was the result of successful court challenges to the import ban and finds its basis in the customs authorities' need to give effect to judicial orders authorizing the introduction into Brazil of products, the importation of which would otherwise be legally impossible.

7.293 Brazil has provided the Panel with information concerning the arguments submitted by the used tyres importers when requesting the preliminary injunctions[1468] and the Brazilian authorities' challenges to such injunctions. As in the context of our earlier examination of the MERCOSUR ruling that led to the MERCOSUR exemption, our consideration of these elements is limited to what is necessary in order for us to determine whether the measure is being applied in a such manner as to result in arbitrary or unjustifiable discrimination within the terms of the chapeau of Article XX. Here again, we consider that nothing in the evidence before us suggests that the decisions of the Brazilian courts granting these injunctions were capricious or unpredictable. Moreover, the decision of the Brazilian administrative authorities to comply with the preliminary injunctions does not seem irrational or unpredictable either.

7.294 In light of the above, the discrimination resulting from the importation of used tyres into Brazil resulting from the injunctions granted to domestic tyre retreaders cannot, in our view, be said to be the result of "capricious" or "random" action. To this extent, the measure at issue is not being applied in a manner that would constitute *arbitrary* discrimination.

7.295 Nonetheless, the existence of such discrimination leads to a situation in which the very casings that Brazil seeks to prevent from entering Brazilian territory, i.e. used tyres that have been first used in other (non-MERCOSUR) countries, are in fact entering Brazil through the court injunctions. As noted earlier, the measure's capacity to contribute to the objective of reducing the number of waste tyres accumulating in Brazil is premised on imports of used tyres being prohibited, so that "second-life" tyres do not enter Brazilian territory, be it as used tyres or as retreaded tyres.

[1464] European Communities' first written submission, para. 155. The European Communities claims that in fact, retreading in Brazil should be more problematic, since Brazil also has to deal with some degree of industrial losses which inevitably occur, European Communities' second written submission, para. 169.

[1465] Brazil's first written submission, para. 76; Brazil's second written submission, paras. 152 and 153.

[1466] Brazil's second written submission, para. 153.

[1467] See the European Communities' answer to panel question Nol. 22 and Brazil's answers to panel question Nos. 13 and 98.

[1468] Brazil's answer to panel question No. 14.

The granting of injunctions allowing used tyres to be imported, however, runs directly counter to this premise, as it effectively allows the very used tyres that are prevented from entering into Brazil *after* retreading to be imported *before* retreading.

7.296 This has the direct potential to undermine the objective of the prohibition on importation of retreaded tyres. Indeed, to the extent that some of these used tyres are not retreaded and end up as waste in Brazil without being used further at all, the adverse impact of these imports is greater than the importation of the same casings after retreading would be.[1469] If these imports were to take place in volumes so as to significantly undermine the achievement of Brazil's declared objective of avoiding the unnecessary generation of waste tyres to the greatest extent possible, this would lead to the measure being applied in a manner that would constitute a means of unjustifiable discrimination.

7.297 Indeed, the volumes of imports of used tyres that have actually taken place under the court injunctions confirm that the objective of the import ban on retreaded tyres, i.e. prevent the entry of short-life tyres into Brazil, has been significantly undermined.

7.298 Brazil describes the amount of imports of used tyres into Brazil as "limited quantities"[1470] and claims that with the exception of 2004 and 2005, imports of used tyres through preliminary injunctions have not been "particularly high".[1471] It has not been able, however, in the course of the proceedings, to clarify exactly how many injunctions remain in place and what volumes of imports they represent.[1472] One of the exhibits submitted by Brazil identifies 24 companies benefiting from one or more injunctions authorizing them to import used tyres, as of 15 September 2006.[1473]

7.299 The European Communities presents the following figures for imports of used tyres into Brazil, citing as source the Brazilian development Ministry's database:[1474]

2000	2001	2002	2003	2004	2005
1,407,618	2,396,898	2,659,704	4,240,474	7,564,360	10,478,466

7.300 Brazil has not disputed these figures. The European Communities also provides figures showing volumes of imports of used and retreaded tyres from the European Communities, as follows:

[1469] See Brazil's answer to panel question No. 16: "in 2005, Brazilian retreaders imported almost 11 million casings, of which only 6 million were retreaded or stocked for later use by the importers" and that "the remaining casings were either illegally sold or disposed of." (Exhibit BRA-94, however suggests a figure of 1 million imported used tyres a year are rejected as industrial losses). See also Brazil's answer to question 93 by the Panel ("at least nine percent [1 million] of the used tyres imported as raw material for retreading are sold to the general public as part-worn (used) tyres" although such sales are illegal in Brazil). Brazil also adds, based on Exhibit BRA-69, that domestic retreaders have been fined for reselling imported used tyres as part-worns. The EC suggests that the figures are much smaller (EC comment to Question 93).

[1470] Brazil's second written submission, paras. 151-152.

[1471] Brazil's answer to panel question No. 18, para. 65.

[1472] In response to a question from the Panel as to how many injunctions are currently in force and what volumes of imports this represents, Brazil replied that to obtain the information required by the Panel, the Brazilian Government would need to consult Brazil's five Appeals Courts (Brazil's answer to question 18 by the Panel). Brazil stated later in the proceedings that in 2006, until July, out of sixteen preliminary injunctions filed requesting authorizations to import used tyres, thirteen had been denied *ad portas*, while the remaining three have been appealed and will be adjudicated by the High Courts (Regional Federal Tribunals) (Brazil's second written submission, para.137).

[1473] Exhibit BRA-168.

[1474] European Communities' answer to panel question No. 118. Brazil has also indicated that according to the industry data, 27 million used tyres were imported between 2001 and 2005 (Brazil's answers to panel questions Nos. 20 and 41, Brazil's second written submission, para. 135). Brazil states that a total of 272,017 units of retreaded tyres were imported in 2002-2003 (Brazil's answer to panel question No. 117).

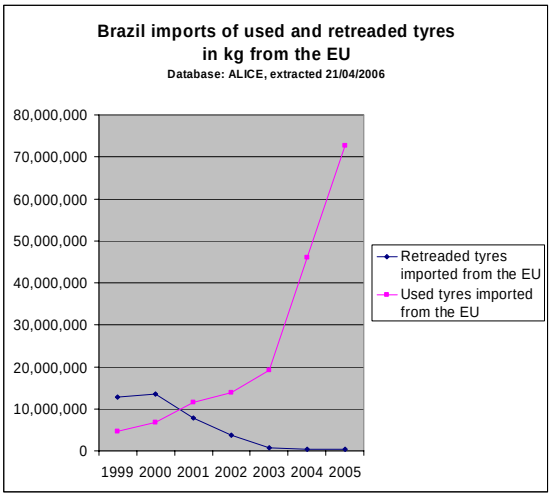


Table showing the evolution of Brazil's imports of used and retreaded tyres from the EU. [Source: Brazilian trade data base Alice, http://aliceweb.desenvolvimento.gov.br/][1475]

7.301 The European Communities further states that in 2005, Brazil imported, largely for the purposes of domestic retreading, 10.5 million used tyres (out of which 8.4 million came from the European Communities)[1476], while the total number of retreaded tyres imported annually to Brazil, from all sources, was 2-3 million prior to the import ban.[1477]

7.302 These figures suggest that imports of used tyres have taken place in significant amounts. More specifically, the figures before us, as cited above, show that in 2005 (the last year for which we have complete figures, and also the last full year prior to establishment of this Panel), Brazil imported approximately 10.5 million used tyres, compared to 1.4 million in 2000, the year in which the ban on imports of used and retreaded tyres was first enacted in, at the time, Portaria 8/00. This means that imports of used tyres to Brazil have not only continued, but increased, by 2005, to reach levels (i.e. 10.5 million) representing approximately three times the amount of retreaded *plus* used tyres (2 million[1478] plus 1.4 million) that were annually imported in the year 2000.

7.303 The result of the court injunctions is therefore that used tyres of foreign origin from which retreaded tyres are made are in fact allowed to enter Brazil, with at best the same adverse impact or, at worse, a more negative impact on the objective Brazil asserts than the importation of retreaded tyres themselves would have, directly defeating the objective of the import ban itself. Such imports have taken place in significant amounts.

7.304 We take note of the Brazilian government's efforts, within the Brazilian domestic legal system, to prevent the grant, or seek reversal, of court injunctions for the importation of used tyres. We also take note of the initiative taken in the course of these proceedings to resolve the matter in a definitive manner through the initiation of proceedings at the federal level.[1479] However, we also note

[1475] European Communities' first written submission, para. 84.

[1476] European Communities' first oral statement, para. 39. Brazil does not contest the validity of this figure, i.e. 10.5 million used tyres imported in 2005 (Brazil's answer to panel questions No. 26). In response to panel question No. 16, Brazil states that in 2005, Brazilian retreaders imported "*almost 11 million* casings".

[1477] European Communities' answer to panel question No. 118.

[1478] The European Communities has provided that the amount of Brazil's retreaded tyre imports in 2000 is between 2 and 3.3 million (European Communities' answer to panel question No. 118). For the purpose of our analysis, we have referred to the more conservative figure, 2 million.

[1479] See Brazil's comments on question 118 of the Panel.

that, while it hopes to succeed in halting the flow of imports of used tyres arising from such injunctions, the Government has not been able, so far, to ensure that no such imports occur. It is also not in a position to guarantee that such imports will cease in the near future.

7.305 While the Panel appreciates the practical difficulties that may be associated with the prevention of such imports within Brazil's domestic legal system, it is of the view that it remains incumbent upon Brazil to ensure that it applies its measure in a manner that is consistent with the requirements of Article XX. The fact that the imports arise from court rulings does not exonerate Brazil from its obligation to comply with the requirements of Article XX. Rather, as noted by the Appellate Body in *US – Shrimp*, a Member of the WTO "bears responsibility for acts of all its department of government, including its judiciary".[1480]

7.306 The **Panel** finds, therefore, that, since used tyre imports have been taking place under the court injunctions in such amounts that the achievement of Brazil's declared objective is being significantly undermined, the measure at issue is being applied in a manner that constitutes a means of unjustifiable discrimination.

Does the discrimination occur between countries where the same conditions prevail?

7.307 Having determined that the measure is being applied in a manner that constitutes a means of unjustifiable discrimination, the **Panel** must now consider whether such discrimination occurs between countries where the same conditions prevail.

7.308 We first recall that the discrimination at issue, which arises from the importation through court injunctions of used tyres, favours tyres retreaded in Brazil using imported casings, to the detriment of imported retreaded tyres made from the same casings. The discrimination thus arises between Brazil and other WTO Members, including the European Communities.

7.309 The European Communities has argued that "it is manifest that a casing originating in the Euopean Communities is not more problematic from a waste management point of view just because it is retreaded in the Euopean Communities rather than in Brazil".[1481] In this respect, we recall our earlier observation that it has not been suggested by either party that there was any significant difference between retreaded tyres made in Brazil from imported casings and imported retreaded tyres.[1482] We also note that Brazil has not identified any difference between the conditions prevailing in Brazil and in other WTO Members, that would be pertinent in the context of considering whether the discrimination between retreaded tyres made in Brazil from imported casings and imported retreaded tyres occurs between countries where the same conditions prevail. In light of these elements, we conclude that this discrimination occurs between countries where the same conditions prevail.

[1480] See the Appellate Body Report on *US – Shrimp,* para. 173 and the references cited in the footnote 177 to that paragraph. See also Article 4 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (2001), which provides that "The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State". The Panel also notes in this context the provisions of Article XVI:4 of the WTO Agreement, requiring that : "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed agreements", and the terms of Article XXV:12 of GATT 1994, which foresees that "Each Member shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories".

[1481] European Communities' second written submission, para. 169.

[1482] See paragraph 7.242 above.

7.310 Consequently, the **Panel** also concludes that since used tyre imports have been taking place under the court injunctions in such amounts that the achievement of Brazil's declared objective is being significantly undermined, the measure at issue is being applied in a manner that constitutes a means of unjustifiable discrimination where the same conditions prevail.

(iii) Is the measure applied in a manner that constitutes a disguised restriction on international trade?

7.311 The application of a measure "in a manner that would constitute … a disguised restriction on international trade" is the third situation envisaged by the chapeau of Article XX, which would lead a measure otherwise provisionally justified under one of the paragraphs of Article XX to be in violation of that provision.

7.312 In this instance, **Brazil** considers that though the import ban imposes restrictions on international trade, these restrictions are not "disguised" because there is nothing disguised, deceptive or concealed about the ban's application.[1483]

7.313 The **European Communities**, however, argues that the import ban on retreaded tyres constitutes a disguised restriction on international trade, to the benefit of new tyre manufacturers located in Brazil, and to the benefit of Brazilian and other MERCOSUR retreaders.

7.314 **The Panel** first turns to the notion of "disguised restriction on international trade" within the meaning of the chapeau of Article XX, before considering whether, in this instance, the import ban imposed by Brazil on retreaded tyres is applied in a manner that constitutes such disguised restriction.

Approach by the Panel

7.315 Under the very terms of the provision, three elements would need to exist for a violation to arise under this part of the chapeau:

(a) first, this assessment, like those considered above in relation to other aspects of the chapeau, relates to the manner in which the measure is *applied*;

(b) secondly, the measure is applied in a manner that would constitute a *restriction on international trade*; and

(c) thirdly, a violation arises if this restriction on international trade is *disguised*.

7.316 As far as the first element is concerned, we note that the observations made above in the context of the chapeau in general remain pertinent in this context. As expressed by the Appellate Body, the chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied.[1484]

7.317 With respect to the second element, namely the existence of a "restriction on international trade", we agree with Brazil that, just as the standard of "arbitrary or unjustifiable discrimination" under the chapeau of Article XX differs from that applied to the determination of the type of discrimination that leads to a violation of Articles I or III, the standard of "disguised restriction" under the chapeau also differs from the standard of "prohibition or restriction" referred to in Article XI.1.[1485] In this instance, the existence of a restriction on international trade is inherent in the very notion of

[1483] Brazil's first written submission, para. 146.
[1484] Appellate Body Report on *US – Gasoline*, p. 23 (original footnote omitted).
[1485] See Brazil's first written submission, para. 144.

import ban, and this restriction is the basis on which the measure has initially been found to be inconsistent with Article XI.1. What we are required to examine in this part of our analysis is whether the import ban, which by its very nature involves a restriction on international trade, is *applied in a manner* that constitutes a *disguised* restriction on international trade. This assessment goes beyond a consideration of the existence of the type of restriction inherent in an import ban as such.

7.318 As to what constitutes such a "disguised restriction" within the meaning of the chapeau, the Appellate Body has clarified that:

> "'Arbitrary discrimination', 'unjustifiable discrimination' and 'disguised restriction' on international trade may ... be read side-by-side; they impart meaning to one another. It is clear to us that 'disguised restriction' includes disguised *discrimination* in international trade. It is equally clear that *concealed* or *unannounced* restriction or discrimination in international trade does *not* exhaust the meaning of 'disguised restriction'."[1486]

7.319 From the above, we understand that a restriction need not be formally "hidden" or "dissimulated" in order to constitute a disguised restriction on international trade within the meaning of the chapeau. We also note that the existence of a restriction on international trade could be derived from "the kinds of considerations" that are otherwise also relevant under other parts of the chapeau. We therefore do not exclude that the elements we have considered earlier in determining whether the application of the import ban amounts to "arbitrary or unjustifiable discrimination", may also be pertinent in determining the existence of a "disguised restriction" on international trade in the application of the import ban.

7.320 More generally, we observe that these terms, as interpreted by the Appellate Body, do not suggest that a single test might uniformly apply in all cases to determine the existence of a "disguised restriction on international trade". Rather, the Appellate Body's understanding of the terms suggests that the existence of a "disguised restriction on international trade" might be derived from a variety of situations where a restriction on international trade, arising in the application of a measure provisionally justified under a specific paragraph of Article XX, would lead to that exception being abused or illegitimately used.

7.321 As to the elements that might indicate the existence of such disguised restriction on international trade in a given case, both parties highlighted, in response to a question by the Panel, the Appellate Body's observation that the chapeau is "but one expression of the principle of good faith".[1487] The European Communities suggests that "all aspects of the relevant measure have to be considered in order to prevent the abuse of the exceptions under Article XX".[1488] Brazil agrees with the European Communities that both the intent and the effect of a measure can play a valuable role in the analysis of a measure under the chapeau, and notes that their relative value will depend on the nature of the specific measure at issue and that the specific facts of the case should determine factors that are most relevant to the "disguised restriction" analysis under the chapeau.[1489] Brazil considers that there is no "ready formula to help determine whether a measure is applied in a manner which would constitute a disguised restriction on international trade".[1490]

[1486] Appellate Body Report on *US – Gasoline*, p. 25.
[1487] See responses to Panel Question No. 127.
[1488] European Communities' answer to panel question No. 127.
[1489] Brazil's answer to panel question No. 127.
[1490] Brazil's answer to panel question No. 127.

7.322 Bearing in mind our earlier observations and the Appellate Body's ruling as cited above, we agree that no single element will necessarily be determinative in each and every case, and that a range of factors may be relevant to our determination.

7.323 With these considerations in mind, we turn to an examination of the application of the measure at issue in this case.

Assessment by the Panel

7.324 The **European Communities** argues that "the import ban of retreaded tyres was not adopted in 2000 with the intention of protecting the public health or the environment. On the contrary, its *disguised purpose* as well as its *effect* was to protect the Brazilian industry through a restriction of international trade in violation of the objectives of the WTO Agreements" (emphases added).[1491]

7.325 **Brazil** considers, however, that there is nothing deceptive or concealed about the application of the ban[1492], and that Brazil protects neither its domestic new tyres manufacturers nor domestic and MERCOSUR retreaders. Brazil further submits that it has imposed collection and disposal obligations on new tyre importers and manufacturers that demonstrate that there is no protectionist intent behind the import ban.[1493]

7.326 The **Panel** first recalls its earlier observation that a restriction need not be formally concealed in order to constitute a disguised restriction on international trade within the meaning of the chapeau of Article XX. In this instance, Portaria SECEX 14/2004, which constitutes the current legal basis for the ban (as well as SECEX 8/2000, the initial instrument in which an express prohibition on the importation of retreaded tyres was imposed) has been published. It is therefore not "concealed" in any formal sense. However, this is not in itself determinative of whether it might nonetheless be applied in a manner that would constitute a disguised restriction on international trade.

7.327 As described earlier in the justification of the measure under Article XX(b), **Brazil** has explained that the object of the measure was to reduce as much as possible the further accumulation of waste tyres in Brazil, and we have found such a policy to fall within the terms of Article XX(b).

7.328 The **European Communities** argues, however, that the import ban on retreaded tyres "has, as main objective, to protect the Brazilian tyre industry from the competition of the foreign industry, by restricting international trade".[1494] The European Communities argues that the protective application of the ban is apparent from the fact that it emanates from the Ministry responsible for Development, Industry and Foreign Trade by means of the measures challenged in this case, which, none of them, make any link to the legislation adopted by the Ministry in charge of the environment.[1495] It also refers to various statements made in the course of a domestic proceeding "against the lifting of the retread import ban for MERCOSUR", and to a draft decree introduced by three Brazilian senators to abrogate Portaria SECEX No.8/2000. The European Communities concludes that "the structure of the Brazilian legislation and the statements described above prove that the import ban of retreaded tyres was not adopted in 2000 with the intention of protecting the public health or the environment".[1496]

7.329 **Brazil** responds that regardless of any statement that may have been made by a trade official before the Brazilian National Congress, and wrongly used by the European Communities in these

[1491] European Communities' first written submission para. 167.
[1492] Brazil's first written submission, para. 146.
[1493] Brazil's second written submission, para. 155.
[1494] European Communities' first written submission, para. 160.
[1495] European Communities' first written submission, para. 162.
[1496] European Communities' first written submission, paras. 164-167.

proceedings, what is relevant in this case is that Brazil clearly demonstrated that there is a legitimate environmental and health rationale behind the import ban. It argues that today, there can be no question that the purpose behind the import ban is to protect public health and the environment from harms caused by waste tyre accumulation and disposal.[1497]

7.330 The **Panel** agrees that an examination of intent may be helpful in determining whether a measure is applied in a manner that constitutes a disguised restriction, in that it may reveal whether "a restriction which formally meets the requirements of Article XX(b)" "is in fact only a disguise to conceal the pursuit of trade-restrictive objectives".[1498] We are mindful, however, that, as the Appellate Body noted in *Japan – Alcoholic Beverages II*, "the aim of a measure may not be easily ascertained".

7.331 We first note that Portaria SECEX 14/2004 was adopted by the Ministry of Development, Industry and Foreign Trade, Secretariat for Foreign Trade, *inter alia* "with a view to consolidating the rules governing import operations...".[1499] It contains, in Article 40, a general prohibition on the granting of import licences for both used and retreaded tyres.[1500] The design of the measure is therefore consistent with Brazil's declared objective of reducing the further accumulation of waste tyres in its territory by avoiding the importation of short-lifespan tyres.[1501] The fact that it has been adopted by the Ministry of Development, Industry and Foreign Trade in an instrument regulating import licensing does not, in our view, imply that the specific prohibition it contains in relation to retreaded tyres could not have reflected health and environmental objectives.

7.332 In support of its argument that Brazil's import ban on retreaded tyres was not adopted with the intention of protecting the public health or the environment, the European Communities refers to a number of statements made in the course of judicial and other proceedings in Brazil. We agree that certain statements, in particular those made in an official capacity, may provide useful indications on the intent of the legislator or regulator in adopting a specific measure. We are mindful, however, that each statement should be carefully assessed in consideration of the context and capacity in which it is being made.[1502]

7.333 The European Communities points to a statement by a representative of the Ministry of Development, Industry and Foreign Trade, in a public hearing of the Consumer, Environment and Minority Protection Committee of the House of Representatives on 10 April 2002 to discuss the application of CONAMA No 258/1999, to the effect that:

> "the aim of this decision [the general ban on the importing of used goods] which dates from 1990 – precisely the time when Brazil opened up its market to imported goods – was, and I believe still is, the protection of the nation's industry."[1503]

[1497] Brazil's answer to panel question No. 129. Brazil refers to a statement by the International Court of Justice (*Namibia (Legal Consequences)*), cited by the Appellate Body in *US – Shrimp*, at paragraph 130, fn 109: "[a legal] instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation".

[1498] Panel Report on *EC – Asbestos*, para. 8.236.

[1499] See Preamble of Portaria 14/2004, Exhibit EC-29.

[1500] See Exhibit EC-29. SECEX 8/2000, also issued by the Secretariat for Foreign Trade of the Ministry of Development, industry and Foreign Trade, also contained no specific motivation for the prohibition it instituted on the granting of import licenses for retreaded and used tyres "for use as consumer goods or raw materials" (See Exhibit EC-26).

[1501] See the section on contribution above, esp. paras. 7.123-7.142.

[1502] See Panel Report on *Mexico – Taxes on Soft Drinks*, para. 8.91, and the reports cited in footnotes 293 and 294.

[1503] Exhibit EC-52.

This statement, however, relates generally to a prohibition on the importation on used goods enacted in 1990, rather than to the specific measure under consideration in this proceeding, namely the prohibition on the importation of retreaded tyres. With respect to the specific issue of used tyres, the same official explained in detail the concerns associated with their importation, including disposal concerns consistent with those that have been exposed in these proceedings by Brazil.[1504] Representatives of the Environment Ministry also detailed at the same hearing a number of concerns relating to the importation of used tyres, stressing in particular the environmental concerns and disposal challenges associated with the disposal of unserviceable tyres. This statement therefore does not, in our view, support the proposition that Brazil adopted its import ban on retreaded tyres solely with a view to protecting the industry.

7.334 The European Communities also cites a statement by the Union's Advocate General in Porto Alegre, in the context of a domestic dispute concerning the exemption of imports of retreaded tyres from MERCOSUR countries from fines otherwise applicable to the importation of retreaded tyres.[1505] In that case, the Union prevailed, thereby ensuring that the fines at issue would not apply to MERCOSUR imports.

7.335 The European Communities notes that in that lawsuit, "SECEX stated that the importation of used tyres, which is understood to comprise retreaded tyres, was harmful to the level of employment in Brazil by creating disloyal competition *vis-à-vis* domestic tyre manufacturers and by reducing the incentive to invest in the country"[1506] We first note that, again, these allegations relate to the imposition of a ban on the importation of *used* tyres, rather than on retreaded tyres.[1507] We also note that the SECEX technical note cited by the European Communities indeed identifies the protection of employment as one of the reasons for prohibiting imports of used tyres. This motivation is, however, expressed in final position, and only as an additional reason, after the identification of serious harm to the environment and public health as the primary reasons .[1508] Indeed, we note that while the prohibition on importation of used tyres may be beneficial to the new tyre industry, it is, on the contrary, opposed by the retreading industry, as illustrated by the court injunctions examined above.

7.336 With respect more specifically to the import ban on retreaded tyres, the submission of the Union's Advocate General in Porto Alegre and the related SECEX documentation appear to provide somewhat inconsistent indications. The Union's Advocate General's brief, as pointed out by the European Communities, asserts that SECEX Portaria No8/2000 "prohibits the importation of "retreaded tyres not for the defence of public health and the environment, but to protect national trade

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[1504] "[the] problem is that we are importing tyres from Europe without adding value, without providing employment on the Brazilian market, without generating an advantage from the economy but solving the environmental problems of all of these other countries while we overload our own environment with problems, because these tyres, apart from the fact that they will be remoulded and may possibly have another 20 thousand, 30 thousand or 40 thousand kilometres' life in them, will run for another five thousand kilometres and rapidly become waste in the environment." (Statement by Mr. Henrique Augusto Gabriel, Legal Adviser, representing the Minister of State for Development, Industry and Foreign Trade, Exhibit EC- 120, p 22).

[1505] In this proceeding, the Federal Prosecutor's office launched a "Public Civil Action" in Porto Alegre to seek the prohibition of importation of used or reconditioned tyres nationwide, for the protection of public health and the environment. In this dispute, the Union, as the defendant, argued that the harm to the environment was not significant, in light in particular of the small volumes of remoulded tyres imported from MERCOSUR, that CONAMA 258/1999 provides the basis for ensuring respect for environmental requirements, and emphasized Brazil's obligation to comply with the MERCOSUR ruling as the basis for the need to exempt MERCOSUR remoulded tyre imports from the fines. See Exhibit EC-52.

[1506] European Communities' first written submission, para. 164.

[1507] It is not clear that, in this note, SECEX equates used tyres and retreaded tyres, as argued by the European Communities. Indeed, in other parts of the same brief, it is clearly indicated that the issue of allowing imports of remoulded tyres from MERCOSUR is not to be confused with imports of used tyres.

[1508] See Exhibit EC-52, p. 50 of the English translation.

and industry."[1509] This statement is, however, not explained. The supporting documentation provided by SECEX and referred to by the Advocate General suggests a different motivation. It indicates under the heading "Economic aspects" that "[t]he prohibition on SECEX issuing licences in 2000 for retreaded tyres was due to the concern with possible avoidance of licensing controls on used tyres, which were indeed banned from being imported by trade and environmental legislation".[1510] Such motivation has not been alluded to by Brazil in these proceedings.

7.337 The European Communities draws further support for the view that the measure was adopted with a protectionist intent from the fact that CONAMA Resolution N°258/1999, which foresees specific disposal obligations in respect of imported retreaded tyres, was adopted in 1999 and subsequently amended,.[1511] As noted earlier, this resolution provides for the progressive implementation of a recovery programme for unusable tyres, including *inter alia*, as of January 2004, an obligation for importers to ensure final disposal of five unusable tyres for every four imported reconditioned tyres, and as of 1 January 2005, final disposal of four unusable tyres for every three reconditioned tyres imported.[1512] Similar but less onerous disposal requirements are imposed on importers of new tyres.

7.338 We understand the European Communities to be arguing essentially that the adoption of CONAMA Resolution 258/99 and its disposal scheme, which do not involve a ban on importation of retreaded tyres, reflected the environmental policy of Brazil, while the subsequent adoption of SECEX 8/2000 by the Ministry in charge of foreign trade was motivated only by protectionist intent.[1513]

7.339 We first note that at the time that CONAMA Resolution 258 was adopted, in 1999, neither Portaria 8/2000 nor Portaria SECEX 14/2004 (both expressly prohibiting the importation of retreaded tyres) had yet been enacted. It was therefore pertinent for CONAMA Resolution 258 to foresee disposal obligations in respect of such importations, on the assumption that they were not expressly banned[1514]. The preamble of CONAMA Resolution 258 highlights the environmental and public health risks associated with unusable tyres, and the need to ensure that such tyres are disposed of, as motivation for the measure. If anything, the more onerous obligations placed on importers of retreaded as opposed to new tyres in that measure suggest a measure of recognition by the environmental agency, before the enactment of Portaria 8/00 or Portaria SECEX 14/2004, that the importation of retreaded tyres presents particular disposal challenges.[1515]

[1509] See Exhibit EC-52, para. 51, p. 11 of the English version.

[1510] Exhibit EC-52, p. 29

[1511] European Communities' first written submission, para. 162.

[1512] See Resolution CONAMA 258, Articles 3: III(b) and 3:IV(b).(Exhibit EC-68).

[1513] The European Communities cites in particular the supporting documents by SECEX in the domestic lawsuit referred to above, which refer to Resolution CONAMA 258/1999 as representing "environmental law", and suggest that environmental law does not prohibit the importation of used tyres. However, the fines on importation which are the object of that dispute, and which do undisputedly relate to importation, are also described as being part of "environmental law". Even assuming that this would constitute a reliable indication of the underlying motivation of the measure, it is not clear that a valid distinction can be drawn between environmental law and foreign trade law to the effect that the measure has a protectionist intent (see p. 33, para. 100, Exhibit EC 52).

[1514] Although we note, at the same time, that this is not consistent with Brazil's indication that its previous measures on used tyres also encompassed retreaded tyres.

[1515] It is less clear how the disposal obligations in relation to retreaded tyres contained in CONAMA No 258/1999 are to be reconciled with the ban on the importation of such tyres as of the entry into force of PORTARIA 8/2000, except to the extent that they may apply to imports of retreaded tyres from MERCOSUR countries. We note the explanation provided by the representative of the Ministry of Development, Industry and Foreign Trade in the hearing of the Congressional committee referred to earlier, that if someone manages to import used tyres in spite of the ban (in particular through court injunctions), "he will not win twice" by first

7.340 The European Communities also refers to a draft decree presented by three members of parliament in order to revoke Portaria 8/2000, in which the suggestion is made that this measure (i.e. the ban on retreaded tyres) was adopted as a result of lobbying by new tyre manufacturers in Brazil fearing competition from cheaper imports, despite CONAMA's assessment that a prohibition was not necessary to ensure environmental protection.[1516] These assertions were made by individual legislators in the context of an action to revoke the legal instrument at issue. They identify an interest of the tyre industry in seeking a prohibition on imports of retreaded tyres. However, we do not consider that they provide sufficient evidence of the intention of the legislator as a whole in enacting such a prohibition for us to conclude that Brazil's intention in enacting Portaria 8/2000 or subsequently Portaria SECEX 14/2004, which is the object of the present dispute, was protectionist.

7.341 Overall, we are not persuaded that the elements presented to us conclusively demonstrate that Brazil did not adopt the prohibition on importation of retreaded tyres with the intention of protecting the public health or the environment.

7.342 We note that a representative of the federal government appears to have argued in court, in defending the implementation of the MERCOSUR exemption in respect of fines, that the environmental impact of imports of retreaded tyres from MERCOSUR would be minimal, especially considered in light of Brazil's obligation to respect its obligations under MERCOSUR. We also note that in that context, the Union's Advocate General suggested that the ban on retreaded tyres was adopted for the protection of the national industry. However, the supporting documents provided by SECEX itself in that same lawsuit do not confirm such intent, so that it is not clear on what basis this argument was made by the Advocate General. Other statements referred to by the European Communities also do not provide, in our view, a conclusive confirmation of a protectionist intent in banning the importation of retreaded tyres.

7.343 Further, the design of the measure, which bans both used and retreaded tyre imports, is consistent with Brazil's declared objective of reducing to the greatest extent possible the unnecessary accumulation of short-lifespan tyres, and by banning the import of used as well as retreaded tyres, Portaria SECEX 14/2004 in principle deprives Brazilian retreaders of the opportunity to source casings from abroad. While, under this measure, as designed, domestic retreaders would not face competition from imported retreads, they would also not benefit from the opportunity to source casings from abroad for their own retreading activity.

7.344 The **European Communities** also argues that the trade of retreaded tyres from the European Communities (and other WTO Members) has ceased to the benefit of retreaded tyre manufacturers located in Brazil and in other MERCOSUR countries, who do not have to face competition from a product with the same characteristics. The European Communities further argues that "due to the MERCOSUR exemption and the imports in Brazil of used tyres to be retreaded, the export flow from the European Communities on tyres has been radically altered. The European Communities no longer exports retreaded tyres to Brazil. This trade has been replaced by exports of used tyres to Brazil and the other MERCOSUR countries, which are used to produce retreaded tyres ...".[1517]

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bringing the goods in and then escaping disposal obligations (see Exhibit EC-120, p. 23). Also, to the extent that this would be a source of contradiction between "environmental law" and "trade law", the same contradiction appears to exist also within the realm of "environmental law" between the disposal obligations in CONAMA No 258/1999 and the fines in relation to the importation of retreaded tyres that were the object of the dispute cited by the European Communities.

[1516] See Exhibit EC-54.

[1517] European Communities' second written submission, para. 97.

7.345 **Brazil** responds that the prohibition on used tyres has on the contrary significantly increased production costs for Brazilian retreaders, as they are deprived of cheap raw material for the domestic retreading industry.[1518]

7.346 The **Panel** first notes that the fact that the European Communities no longer exports retreaded tyres to Brazil is, in itself, inherent in the existence of an import ban. This fact alone, which is an inevitable consequence of the very existence of the measure provisionally justified under Article XX(b), could not be, in this instance, the sole basis for a finding of "disguised restriction on international trade" within the meaning of the chapeau. More specifically however, the European Communities argues that this trade has been replaced by trade in used tyres to Brazil and other MERCOSUR countries, due to the MERCOSUR exemption and the imports of used tyres to be retreaded. The European Communities further argues that the ban protects new tyre manufacturers in Brazil, who benefit from not facing competition from imported retreads, and that the import ban is applied in a manner that amounts to a disguised restriction on international trade, to the benefit of Brazilian and other MERCOSUR retreaders. As we understand the European Communities' argument, the existence of a disguised restriction on international trade in Brazil's application of the import ban on retreaded tyres arises as a result of the same circumstances that we have considered in section (c) above, namely, the importation of used tyres through court injunctions, and the application of the MERCOSUR exemption. We thus consider both aspects in turn.

Imports of used tyres through court injunctions

7.347 The **Panel** first recalls its earlier conclusion that the import ban on retreaded tyres can contribute to the reduction of accumulation of waste tyres *inter alia* when applied in conjunction with an import ban on used tyres.[1519] As noted above, Portaria SECEX 14/2004 does indeed ban both imports of used tyres and imports of retreaded tyres. In practice, however, as also noted above, a number of injunctions have been requested and granted, in order to import used tyres despite the ban imposed on their importation. It is undisputed that, as a result, imports of used tyres have taken place under these injunctions, and both parties agree that all imports of used tyres that have occurred since the imposition of the ban have taken place under these injunctions.[1520]

7.348 We have already found above that the importation of used tyres through these court injunctions results in the measure at issue being applied in a manner that constitutes unjustifiable discrimination. The granting of court injunctions for the importation of used tyres has also in effect meant that, contrary to the intended design of the measure, domestic retreaders have been able to continue to benefit from the importation of used tyres as material for their own activity in significant amounts,[1521] while their competitors from non-MERCOSUR countries have been kept out of the Brazilian market. The restriction on international trade inherent in the banning of imports of retreaded tyres has thus operated to the benefit of domestic retreaders, while the fulfilment of the purpose for which it has been justified is being significantly undermined.

7.349 In light of the above, we find that, since imports of used tyres take place in significant amounts under court injunctions to the benefit of the domestic retreading industry, the import ban on retreaded tyres is being applied in a manner that constitutes a disguised restriction on international trade.

[1518] Brazil's first oral statement, para. 52 and Brazil's second oral statement, para. 63.

[1519] See paragraph 7.139 above.

[1520] European Communities Answer to Panel Question No 22 and Brazil's Answer to Panel Question Nos 13 and 98

[1521] See above paragraphs 7.297-7.303 on the volumes of imports of used tyres that have occurred through the injunctions.

The MERCOSUR exemption

7.350 The **European Communities** argues that the MERCOSUR exemption results in the application of the measure in a manner that constitutes a disguised restriction on international trade, as it alters trade flows in a manner that benefits, in addition to Brazilian retreaders, retreaders from other MERCOSUR countries.

7.351 The **Panel** understands the European Communities' argument in respect of the MERCOSUR exemption to entail that MERCOSUR retreaders do not have to face competition from the European Communities or other non-MERCOSUR retreaded tyres on the Brazilian market (since, under Portaria SECEX 14/2004, such imports are prohibited), while they at the same time have access to this market and can source used casings from the European Communities and elsewhere for importation into Brazil.

7.352 We agree that, to the extent that they are able to import remoulded tyres into Brazil through the MERCOSUR exemption without facing competition from any non-MERCOSUR country, retreaders from other MERCOSUR countries benefit from the application of the import ban on retreaded tyres originating in other countries. We also recall that under the MERCOSUR exemption, it is quite possible for retreaders from MERCOSUR countries benefiting from the exemption to source casings from abroad (for example from the European Communities), retread them locally, and then export the retreaded tyre to Brazil under the MERCOSUR exemption[1522]. As noted earlier, this further increases the potential for imports of retreaded tyres to enter into Brazil through the MERCOSUR exemption.

7.353 If such imports were to occur in significant amounts, they would have the potential to undermine the achievement of the stated objective of the prohibition on the importation of retreaded tyres, while protecting the retreading industry in the beneficiary countries. If this were the case, the measure would be being applied in a manner that constitutes a disguised restriction on international trade.

7.354 To date, it appears, however, that the volume of imports of remoulded tyres that has actually taken place under the MERCOSUR exemption has not been significant.[1523] In these circumstances, we find that the MERCOSUR exemption, to the extent that it results only in volumes of imports that do not significantly undermine the ability of the general import ban on retreaded tyres to fulfil its intended objective, does not result in the measure being applied in a manner that constitutes a disguised restriction on international trade.

7.355 In conclusion, the **Panel** finds that, since imports of used tyres are taking place to the benefit of the Brazilian retreading industry in such quantities as to seriously undermine the achievement of the stated objective of avoiding the further accumulation of waste tyres in Brazil, the measure at issue is being applied in a manner that constitutes a disguised restriction on international trade. We also find that the MERCOSUR exemption, although it also has the potential to similarly undermine the achievement of the stated objective of the measure, has not been shown to date to result in the measure at issue being applied in a manner that would constitute such a disguised restriction on international trade.

[1522] *See* Brazil's answer to panel question No. 72 ("it is possible for tyres used in the European Communities to be remolded in a Mercosul country and then exported to Brazil because Brazil has no control over remolded tyre production in other Mercosul members").

[1523] See paragraph 7.288 above.

(c) Overall conclusion

7.356 In conclusion, the **Panel** finds that the importation of used tyres through court injunctions results in the import ban being applied in a manner that constitutes a means of unjustifiable discrimination and a disguised restriction to trade within the meaning of the chapeau of Article XX.

7.357 In light of this conclusion, we find that the measure at issue is not justified under Article XX of GATT 1994.

B. FINES ON IMPORTATION, MARKETING, TRANSPORTATION, STORAGE, KEEPING OR WAREHOUSING OF RETREADED TYRES

7.358 The **European Communities** claims that the fines imposed under Presidential Decree 3.919 of 14 September 2001 ("Presidential Decree 3.919") are import restrictions inconsistent with Article XI:1, *or alternatively*, a measure affecting internal sale inconsistent with Article III:4 of the GATT 1994 to the extent that some aspects of the measure are found not to constitute a prohibited import restriction within the meaning of Article XI:1.[1524]

7.359 **Brazil** describes these measures as anti-circumvention fines that support the import ban.[1525] Brazil states that it does not contest that the fines embodied in Presidential Decree 3.919 are prima facie inconsistent with Article XI:1. However, Brazil does not acknowledge any inconsistency of the fines with Article III:4.[1526] Brazil however argues that the measure is justified under paragraphs (b) and (d) of Article XX.

1. Preliminary issue: fines as an enforcement measure

7.360 Presidential Decree 3.919 provides:

> "Art. 1. The following article is added to Decree no 3.179 of September 21, 1999[1527]:
>
> > "Article 47-A. Importing used or retreaded tyres:
> >
> > Fine of R$ 400.00 (four hundred reais) per unit.

[1524] In its request for a panel, the European Communities refers to the following:

> "Brazil's imposition, by virtue of Presidential Decree No. 3919 of 14 September 2001, of a fine of 400 BRL per unit on the importation, as well as the marketing, transportation, storage, keeping or keeping in deposit or warehouses of imported, but not of domestic retreaded tyres".

In its first submission, the European Communities slightly modifies the description of the contents of the measure and refers to it as "the importation, selling, transporting, storing, keeping or warehousing of used or reconditioned tyres imported under such conditions" (European Communities' first written submission, para. 60).

[1525] Brazil's first written submission, para. 157.

[1526] Brazil's answer to panel question No. 33.

[1527] Presidential Decree 3.179 dated 21 September 1999 is a regulation addressing the sanctions against an environmental administrative violation. See Article 1 of Presidential Decree 3.179 (Exhibit BRA-73).Article 47-A, which is added, through Presidential Decree 3.919, to Presidential Decree 3.179 comes under Section III (entitled "Sanctions Applicable to Pollution and Other Environmental Violations") of Presidential Decree 3.179. Brazil has confirmed that Presidential Decree 3.179, as amended by Presidential Decrees No. 3.919 and 4.592, is currently legally in force (Brazil's answer to panel question No. 111).

> Sole paragraph: The same penalty shall apply to whosoever trades, transports, stores, keeps or maintains in a depot a used or retreaded tyre imported under such conditions." (NR)
>
> Article 2. This Decree herein enters into force on the date of its publication."[1528]

7.361 In respect of its claim on the fines, the **European Communities** distinguishes two aspects of the measure: (1) a fine of R$ 400 per unit on the *importation* of retreaded tyres ("fine on importation"); and (2) a fine of R$ 400 per unit on the *marketing, transportation, storage, keeping or warehousing* ("fine on marketing") of such imported retreaded tyres. Nonetheless, the European Communities describes both fines as ancillary to the import ban, which they complement and reinforce, so that they both violate Article XI:1 of the GATT 1994 as "a punitive measure intended to sanction a violation of the import ban imposed by Brazil.[1529] At the same time, the European Communities argues *alternatively* that to the extent the fine on marketing is not found to be an import restriction inconsistent with Article XI:1, it should be found to be a measure affecting internal sale in a manner inconsistent with Article III:4.

7.362 **Brazil** describes the fines as a whole as an anti-circumvention measure that safeguards the integrity of the import ban by penalizing traders that circumvent import controls through fines and argues that the fines are thus a measure to enforce the import ban.[1530] Further, in response to a Panel question on the implication on the fines of the Panel's possible finding of an inconsistency of the import prohibition with the GATT 1994, Brazil responds that if the fines can be considered as ancillary to the import prohibition, the fines would, then, likewise be inconsistent with the GATT 1994.[1531] To Brazil, the anti-circumvention fines are an ancillary enforcement measure that must stand or fall with the ban.[1532]

7.363 Brazil further submits that it does not acknowledge any inconsistency of the fine on marketing with Article III:4 to the extent that the European Communities claims that the fine on marketing alternatively violates Article III:4.[1533] According to Brazil, because the fines are ancillary to the import ban, they are, therefore, a prima facie violation of Article XI:1, not Article III:4.

7.364 In response, the European Communities submits that since both parties agree that there is a prima facie incompatibility with Article XI:1, the Panel need not address the question whether there is also a violation of Article III:4.[1534]

7.365 In sum, the parties do not dispute the nature of the fines, i.e. that the fines as a whole come in addition to and in support of the prohibition on importation as an enforcement measure. The **Panel** also considers that the fines are linked to the import prohibition to the extent that their purpose is to enforce the import ban. The only *raison d'être* of the fines is, as Brazil explains, to penalize traders that circumvent import controls through fines in the event that foreign retreaded tyres somehow enter into the Brazilian market despite the presence of the import prohibition at the border.

7.366 We are thus of the view that the fines on importation as well as on marketing should be examined as a whole rather than separately in this case. Regardless of the types of activities (i.e. "importation" or "marketing") that are subject to the fines, the fines in their entirety operate as an

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[1528] Exhibit BRA-72. Also see Exhibit EC-34. In this Report, the Panel will refer to the fines described in Presidential Decree No. 3.919 as "the fines".

[1529] European Communities' first written submission, paras. 172-174.

[1530] Brazil's first written submission, para. 157.

[1531] Brazil's answer to panel question No. 67.

[1532] Brazil's second written submission, para. 166.

[1533] Brazil's answer to panel question No. 33.

[1534] European Communities' second written submission, para. 185.

enforcement measure of the import prohibition. The Panel will thus examine the fines in their entirety as one measure.

7.367 We will now proceed to examine whether the fines are prima facie inconsistent with Article XI:1.

2. Are the fines inconsistent with Article XI of GATT 1994?

7.368 The **European Communities** claims that the fines constitute a restriction on imports incompatible with Article XI:1.[1535] The European Communities argues that the level of fines is such that "it will exceed the normal per unit value of a typical retreaded tyre" and that "it will therefore restrict any importations of such tyres into Brazil."[1536] **Brazil** has confirmed that indeed, the fines are intended to exceed the per unit value of most tyres, because they are "a punitive measure intended to sanction a violation of the import ban imposed by Brazil".[1537]

7.369 As noted above in the context of examining the European Communities' claims in relation to the import ban, Article XI:1 prohibits "prohibitions or restrictions" on the importation of any product. Thus, any measures prohibiting or restricting the importation of other Members' products will fall under the scope of Article XI:1.

7.370 The **Panel** notes in this regard that the fines do not *per se* impose a border restriction on importation, but rather act as a disincentive to importation, by penalizing it and making it prohibitively costly. The parties also agree that the fines are applied in addition to and in support of the actual prohibition on importation as an enforcement measure of the import prohibition. The issue before the Panel is therefore whether such a measure can constitute a restriction on importation within the meaning of Article XI:1.

7.371 In this regard, we recall that the scope of measures falling under "prohibitions or restrictions" under Article XI:1 has been interpreted broadly in GATT/WTO jurisprudence to date. In particular, the Panel in *India – Autos* found that "it is the nature of the measure as a restriction *in relation to importation* which is the key factor to consider in determining whether a measure may properly fall within the scope of Article XI:1," and the phrase "restrictions on importation" does not necessarily limit the scope of Article XI:1 to border measures.[1538] The same Panel found that "any form of *limitation* imposed on, or in relation to importation constitutes a restriction on importation within the meaning of Article XI:1".[1539]

7.372 We are also of the view that what is important in considering whether a measure falls within the types of measures covered by Article XI:1 is the nature of the measure. In the present case, we note that the fines as a whole, including that on marketing, have the effect of penalizing the act of "importing" retreaded tyres by subjecting retreaded tyres already imported and existing in the Brazilian internal market to the prohibitively expensive rate of fines. To that extent, we consider that the fact that the fines are not administered at the border does not alter their nature as a restriction on importation within the meaning of Article XI:1. In addition, the level of the fines – R$ 400 per unit, which significantly exceeds the average prices of domestically produced retreaded tyres for passenger cars (R$ 100-280) – is significant enough to have a restrictive effect on importation.[1540]

[1535] European Communities' first written submission, para. 170.
[1536] European Communities' first written submission, para. 172.
[1537] Brazil's answer to panel question No. 66.
[1538] Panel Report on *India – Autos*, paras. 7.254-7.263.
[1539] Panel Report on *India – Autos*, para. 7.265.
[1540] Brazil's answer to panel question No. 66.

7.373 Thus, the **Panel** finds that the fines impose limiting conditions in relation to the importation of retreaded tyres, and thus act as a restriction on the importation of retreaded tyres within the meaning of Article XI:1.

7.374 Having found that the fines as a whole are a measure falling within the scope of Article XI:1 and contrary to that provision, the Panel need not examine the European Communities' alternative claim under Article III:4 in relation to the fines on marketing.

3. Are the fines justified under Article XX of GATT 1994?

(a) Article XX(b)

7.375 **Brazil** submits that since the import ban is justified by Article XX(b), the fines, an anti-circumvention measure to enforce the import ban, is likewise justified by Article XX(b).[1541] Brazil thus argues that the arguments made by Brazil and the evidence adduced by it to establish that the import ban is justified by Article XX(b) also demonstrate that the fines are justified by Article XX(b).

7.376 The **European Communities** argues that the fines cannot be justified under Article XX(b) for the same reasons that the import ban cannot be justified under Article XX(b).[1542]

7.377 The **Panel** recalls its finding above that the fines are inconsistent with Article XI:1.[1543] In reaching this conclusion, we were mindful of the fact that the parties also agree that the fines come in addition to and in support of the prohibition on importation of retreaded tyres as an enforcement measure of this import prohibition.

7.378 Regarding Brazil's defence of the fines under Article XX(b), the parties also seem to agree that whether the fines can be justified under Article XX(b) depends on whether the import prohibition can be justified under Article XX(b).[1544]

7.379 In this regard, we have found that although the import ban falls within the scope of measures covered by paragraph (b) of Article XX, it cannot be justified under Article XX because it is applied inconsistently with the requirements under the chapeau of Article XX(b). Thus, to the extent that the fines are a measure that is applied in addition to and in support of the prohibition on importation of retreaded tyres, the fines cannot be justified under Article XX(b) for the same reasons as the import ban cannot be justified.

7.380 Therefore, the **Panel** is of the view that Brazil has not demonstrated that the fines can be justified under Article XX(b).

(b) Article XX(d)

7.381 **Brazil** argues that the fines are also justified by Article XX(d) because they are "necessary to secure compliance with" the import ban, which is justified by Article XX(b) and therefore not inconsistent with the GATT 1994.

[1541] Brazil's first written submission, para. 157; Brazil's first oral statement, para. 66; Brazil's second written submission, para. 166.

[1542] European Communities' first written submission, para. 179.

[1543] See above paragraphs 7.370-7.373.

[1544] See paragraphs 7.375-7.376 above. Brazil's first written submission, para. 157; Brazil's first oral statement, para. 66; Brazil's second written submission, para. 166. European Communities' first written submission, para. 179.

7.382 The **European Communities** submits that the fines cannot be justified under Article XX(d) since Article XX(d) applies only to measures necessary to secure compliance with laws or regulations "which are not inconsistent with the provisions of this Agreement" and the import ban is not such a law or regulation which is consistent with the GATT 1994.[1545] According to the European Communities, therefore, Article XX(d) cannot justify the fines independently of whether the fines are "necessary" to secure compliance with the import ban.

7.383 Article XX(d) provides:

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> ...
>
> (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;"

7.384 In this regard, the Appellate Body in *Korea – Various Measures on Beef* stated that for a measure, otherwise inconsistent with the GATT 1994, to be justified provisionally under paragraph (d) of Article XX, the following two elements must be shown[1546]:

> (i) the measure must be one designed to "secure compliance" with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994; and
>
> (ii) the measure must be "necessary" to secure such compliance.

The Appellate Body also stated that a Member invoking Article XX(d) as a justification bears the burden of demonstrating that these two elements are met.[1547]

7.385 Following the same approach, the **Panel** will first examine whether the fines are designed to secure compliance with a GATT-consistent law or regulation.

7.386 We recall Brazil's argument in this respect that the fines are necessary to secure compliance with the import ban, which is justified by Article XX(b), and thus not inconsistent with the GATT 1994. Brazil thus bases its argument on the assumption that the import ban is justified under Article XX(b).

7.387 As recalled above, the parties do not dispute that the fines are a measure introduced to enforce the import ban. In light of the parties' agreement and our finding above that the fines are indeed a measure the existence of which would be meaningless without the import ban, we agree with Brazil that the fines are "designed to secure compliance with the import ban".

[1545] European Communities' first oral statement, para. 105.

[1546] Appellate Body Report on *Korea – Various Measures on Beef*, para.157.

[1547] Appellate Body Report on *Korea – Various Measures on Beef*, para.157, citing Appellate Body Report on *US – Gasoline*, at 21; Appellate Body Report on *US – Wool Shirts and Blouses*, at 335-337; and Panel Report on *US – Section 337*, para. 5.27.

7.388 However, for the reasons explained in paragraphs 7.375-7.380, we found that the import ban, a measure inconsistent with Article XI:1 of the GATT 1994, could not be justified by Article XX(b). Therefore, the **Panel** is of the view that the fines cannot be justified under Article XX(d) since they do not fall within the scope of measures that are designed to secure compliance with "the laws or regulations that are *not themselves inconsistent* with some provision of the GATT 1994" (emphasis added).

7.389 Having found that Brazil has failed to demonstrate that the import ban – the domestic measure with which the fines are allegedly designed to secure compliance – is consistent with the GATT 1994 and thus has failed to show that the fines can be justified under Article XX(d), we do not consider it necessary to proceed to examine whether the fines are necessary to secure such compliance.

4. Conclusion

7.390 For the reasons above, the **Panel** finds that the fines as embodied in Presidential Decree 3.179 through Presidential Decree 3.919 are inconsistent with Article XI:1 of the GATT 1994. We also find that Brazil has not demonstrated that the fines can be justified either under Article XX(b) or under Article XX(d) of the GATT 1994.

C. STATE LAW RESTRICTIONS ON THE MARKETING OF IMPORTED RETREADED TYRES

7.391 The **European Communities** also challenges certain restrictions on the importation and marketing of retreaded tyres, imposed by the State of Rio Grande do Sul.[1548] The European Communities submits that the prohibition of the marketing of retreaded tyres produced outside of Brazil under Law 12.114 as well as an allegedly discriminatory disposal obligation under Law 12.381 are incompatible with Article III:4 of the GATT 1994.[1549]

7.392 **Brazil** does not address the consistency of these measures and states that it does not contest that the measures are prima facie in violation of Article III:4. Brazil instead focuses on the justification of the measures under Article XX(b) and claims that this state measure does not warrant an independent consideration because it does not restrict imports of retreaded tyres from the European Communities any more than the federal import ban does.[1550]

1. Preliminary issues

(a) Measures within the scope of the Panel's terms of reference

7.393 In addition to Law 12.114 of the Brazilian State of Rio Grande do Sul of 5 July ("Law 12.114") that is identified in the European Communities' panel request as the relevant state measure at issue, the **European Communities** also develops, in its first written submission, arguments in relation

[1548] In its Panel request, the European Communities identifies the following relevant measures:
> "the maintenance of measures at the level of Brazilian States which prohibit the sale of imported retreaded tyres. For instance, Law No. 12.114 of 5 July 2004 of Rio Grande do Sul which bans the commercialisation of used tyres, as which are considered *inter alia* retreaded that have been manufactured outside of Brazil from the casings of used tyres and imported into Brazil."

[1549] European Communities' first written submission, para. 181.
[1550] Brazil's first written submission, para. 186.

to a subsequent Law 12.381 of Rio Grande do Sul of 28 November 2005 ("Law 12.381"), which is not identified in its panel request.[1551]

7.394 In this regard, the Panel notes that the enactment of Law 12.381 (28 November 2005) came after the European Communities had made its request for the establishment of a panel on 18 November 2005, but prior to the Panel's actual establishment. While the European Communities generally indicated in its panel request that its request extended *inter alia* to amendments to the measures identified in the request, this specific measure was not, and could not have been, identified in the European Communities' panel request.[1552]

7.395 **Brazil** does not take issue with the articulation by the European Communities, in its first submission, of claims relating to Law 12.381, and understands the European Communities' challenge to relate to Law 12.114 (of 2004), as amended by Law 12.381.[1553]

7.396 The **Panel** considers that Law 12.381 is properly within the Panel's terms of reference. The Appellate Body has found, in past cases, that legal acts that occur subsequent to the measures identified in the panel request may still be considered to be within the panels' terms of reference, insofar as those legal acts do not change the "essence" of the main measures at issue.[1554] As explained below, Law 12.381 is directly related to Law 12.114 in that Law 12.381 maintains the original provision banning the sale of "imported used tyres"[1555], as defined in Law 12.114, while adding conditions under which the importation of some of these used tyres are exceptionally permitted. Thus, Law 12.381 cannot be considered as changing the essence of the main measure (i.e. Law 12.114), which is the general ban on the sale of "imported used tyres" as defined in Law 12.114.

[1551] According to the European Communities, Law 12.381 authorizes the importation of carcasses of used tyres and carcasses of a tyre which have been retreaded, remoulded or recapped outside Brazil, subject to the collection and destruction, in an environmentally sound manner, of *one* used tyre on Brazilian territory for each carcass to be imported or *ten* used tyres for each imported retreaded carcass. (European Communities' first written submission, paras. 61, 63)

[1552] As noted above in footnote 1548, the panel request describes the state measures as measures "which prohibit the sale of imported retreaded tyres".

[1553] Brazil's first written submission, paras. 186-189; Brazil's second written submission, paras. 195-198; Brazil's first oral statement, para. 77; Brazil's answer to panel question No. 111. Brazil argues that the state measures at issue (i.e. Law No. 12.114 as amended by Law No. 12.381) do not have legal effect but, to the extent that they have effect, they are not inconsistent with the WTO and justified under Article XX(b). In light of Brazil's position, we understand that Brazil does not contest the inclusion by the European Communities of Law No. 12.381 within the scope of the present dispute.

[1554] Appellate Body Report on *Chile – Price Band System*, paras. 136-139. The Appellate Body also endorsed the approach followed by the panel in *Argentina – Footwear*, which was to decide to examine modifications made to the safeguard measure at issue during the panel proceedings, considering that the modifications did not create a "new" safeguard measure, but were instead modifications of the legal form of the original definitive measure which was the subject of the dispute. Also, referring to the principles under DSU Articles 3.7 and 3.4 (i.e. the aim of the dispute settlement mechanism being a 'positive solution to a dispute'), the Appellate Body considered it appropriate to rule on the price band system as currently in force in Chile, that is, as amended by a later regulation, to "secure a positive solution to the dispute" and to make "sufficiently precise recommendations and rulings so as to allow for prompt compliance".

[1555] As set out below in paragraph 7.413, "an imported used tyre" under Law 12.114 is defined to include (i) the simple carcass of a used tyre from any other country; (ii) the carcass of a used tyre tha has been retreaded by top-capping, remoulding or recapping processes abroad and imported in that condition; and (iii) the carcass of a used tyre from any other country and retreaded in Brazil by any of the industrial processes in the proceeding item.

(b) State measures as a "measure"

7.397 As the European Communities' claim on the marketing restriction by the Brazilian State of Rio Grande do Sul concerns a 'state government's measure', as opposed to measures imposed at the federal level, the Panel considers it useful to briefly consider the status of such measures in the context of WTO dispute settlement.

7.398 The **European Communities** submits that as Brazil is responsible for the respect of its WTO obligations by its federal states, it must, in accordance with Article XXIV:12 of the GATT 1994 and as confirmed by paragraph 13 of the Understanding on the Interpretation of Article XXIV of the GATT 1994, take such reasonable measures as may be available to it to ensure observance of the provisions of the GATT by its state.[1556] **Brazil** does not dispute that the consistency of its state measures can be reviewed by the Panel.

7.399 The **Panel** recalls that the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* noted that the phrase "measures taken by another Member" in Article 3.3 of the DSU[1557] identifies the relevant nexus, for purposes of dispute settlement proceedings, between the "measure" and a Member", and "[i]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings."[1558]

7.400 We consider that the measures of Rio Grande do Sul, a state of the Federative Republic of Brazil, are attributable to Brazil as a WTO Member and therefore should be considered as "measures" for the purposes of Article 3.3 of the DSU.

(c) Relationship between the state measures and the federal measures

7.401 As regards Law 12.114, **Brazil** submits that the state measure does not warrant an independent consideration because it does not restrict imports of retreaded tyres from the European Communities any more than the federal import ban does.[1559] Brazil claims that to the extent the state measure conflicts with the federal measure by authorizing what the federal measure prohibits or *vice-versa*, the federal measure will prevail and trump the state measure.[1560]

7.402 Regarding Law 12.381, however, the Panel notes some evolution in Brazil's position in the course of the proceedings. Brazil first submits in its first written submission that like the fines at the federal level, Law 12.381 works as an anti-circumvention measure by establishing a disposal obligation that may seem disproportionate to the harm, but is still necessary to thwart illegal

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[1556] Article XXIV:12 provides: "Each [Member] shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories".

Further, paragraph 13 of the Understanding on the Interpretation of Art. XXIV of the GATT 1994 provides: "The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked in respect of measures affecting its observance taken by regional or local governments or authorities within the territory of a Member. ... "

[1557] Article 3.3 of the DSU provides that: "The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by *measures taken by another Member* is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members." (emphasis added)

[1558] In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body stated that they needed not consider the extent to which the acts or omissions of regional or local governments, or even the actions of private entities, could be attributed to a Member in particular circumstance (fn. 78).

[1559] Brazil's first written submission, para. 186.

[1560] Brazil's first written submission, para. 187; Brazil's second written submission, para. 195.

importation and commercialization of imported retreaded tyres.[1561] In other words, Brazil's initial position seemed to be that the disposal obligation is complementary to, rather than inconsistent with, the marketing prohibition, just as the fines are to the import prohibition.

7.403 However, in response to a question from the Panel whether the disposal obligation under Law 12.381 establishes an exception to the import prohibition set out in Law 12.114, Brazil submits that "the amendments introduced by Law 12.381, permitting imports under certain conditions, seem to *conflict* with Article 1 of Law 12.114, which prohibits imports of used tyres.[1562] It is not clear whether the amendments intended to lift the import prohibition."[1563] Brazil further states that "if importers attempted to obtain licenses to import based on State Law 12.381, the federal body responsible for granting such licences (DECEX) would deny the request, whether the federal import ban existed or not, and the likely outcome of this situation would be a declaration of the unconstitutionality of State Law 12.381 by the Federal Supreme Court."[1564]

7.404 Despite this clarification of its position on Law 12.381, Brazil's view on the state measures as a whole appears to be that the extent of the inconsistency between the substantive provisions of the state law and the federal law is irrelevant because the state measures have no legal effect, in that under Brazil's Constitution, only the Federal Government can regulate importation of products and issue import licences and state measures that purport to regulate imports have no effect.[1565] Thus, according to Brazil, the Panel need not review the European Communities' claims on the inconsistency of the states measures at issue with obligations under the GATT 1994, since the Brazilian federal measures either already encompass or trump what the state measures purport to do.

7.405 The **European Communities** argues that Law 12.114 is a measure independent of the measures adopted at the federal level in Brazil and thus warrants independent consideration.[1566] According to the European Communities, if the ban at the federal level were lifted following the present dispute, but the state law were to remain, then the state law would continue to restrict the marketing of imported retreaded tyres in Rio Grande do Sul. The European Communities submits that Brazil has not provided any evidence to support its claim that the federal measure will prevail and trump the state measure to the extent that the state measure conflicts with the federal measure.

7.406 The **Panel** is of the view that, regardless of the relationship between these states laws and the federal laws based on the jurisdictions covered by the respective law within its domestic legal system, the Brazilian government is ultimately responsible for ensuring that its constituent states respect Brazil's obligations under the WTO as explained above. In this connection, Brazil acknowledges that in order to have the state measure at issue declared null and void, a specific court ruling – i.e. a ruling by the Federal Supreme Court in an unconstitutionality action – is required.[1567] Brazil did not submit any evidence that such a ruling has been issued yet, although it provided a legal opinion issued by the Office of the Chief of Staff to the President, recommending that the Solicitor General bring a Direct Action of Unconstitutionality with respect to the state measures.[1568] Moreover, Brazil has confirmed that the state measures at issue (Law 12.114 as amended by Law 12.381) are formally in force at present.[1569]

[1561] Brazil's first written submission, para. 188. (emphasis added)
[1562] For the definition of "imported used tyres", see footnote 1555 above and paragraph 7.413 below.
[1563] Brazil's answer to panel question No. 57.
[1564] Brazil's answer to panel question No. 61.
[1565] Brazil's first written submission, para. 187, responses to panel questions No. 56, 57, 61-62, 111 and Brazil's second written submission, paras. 195, 197.
[1566] European Communities' first oral statement, paras. 107-110.
[1567] Brazil's answer to panel question No. 62.
[1568] Brazil's second written submission, para. 198 and Exhibit BRA-156.
[1569] Brazil's answer to panel question No. 111.

7.407 In light of these considerations, our understanding is that in the absence of a specific court ruling declaring them as null and void, the states measures at issue are currently legally in force in Brazil, although they may not be enforceable if they have no legal effect as claimed by Brazil due to the alleged conflicts with the federal laws.[1570] The Panel also recalls the Appellate Body's statement in *US – Upland Cotton* that "whether or not a measure is still in force is not dispositive of whether that measure is currently affecting the operation of any covered agreement."[1571]

7.408 On the basis of the foregoing, we have decided to proceed with the analysis of the claims made by the European Communities in relation to Law 12.114, as amended by Law 12.381.

2. Are the state measures inconsistent with Article III:4 of GATT 1994?

7.409 Article III:4 provides:

> "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use..."

7.410 The Panel notes that the Appellate Body has clarified that three elements must be satisfied to establish a violation of Article III:4: (1) the imported and domestic products at issue are "like products"; (2) the measure at issue is a "law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use"; and (3) the imported products are accorded "less favourable" treatment than that accorded to like domestic products.[1572]

7.411 Based on these elements as set out by the Appellate Body, we turn to a consideration of whether the state measures at issue are inconsistent with the requirements under Article III:4.

(a) Marketing prohibition

7.412 The **European Communities** argues that the marketing prohibition in Article 1 of Law 12.114 ("marketing prohibition") is inconsistent with Article III:4.[1573]

7.413 Law 12.114 provides in relevant part:

> "Art. 1. It is forbidden to sell imported used tyres in the State of Rio Grande do Sul.
>
> Sole paragraph. An imported[1574] used tyre is considered for the purposes hereof as follows:
>
> I – the simple carcass of a used tyre from any other country;
>
> II – the carcass of a used tyre that has been retreaded by top-capping, remoulding or recapping processes abroad and imported in that condition;

[1570] Brazil's answer to panel question No. 62.
[1571] Appellate Body Report on *US – Upland Cotton*, para. 262.
[1572] Appellate Body Report on *Korea – Various Measures on Beef*, para. 133.
[1573] European Communities' first written submission, paras. 182-188.
[1574] Brazil clarified that the terms "imports" and "importation" in Law 12.114 and Law 12.381 refer to the importation from other countries into Brazil and do not apply to trade among Brazilian states (Brazil's answer to panel question No. 58.)

> III – the carcass of a used tyre from any other country and retreaded in Brazil by any of the industrial processes mentioned in the preceding item. ..." [1575]

(i) Like products

7.414 Brazil clarified that Law 12.114 is intended to apply to "retreaded tyres" imported from every country.[1576] As such, for the purposes of the present analysis, the terms used in Law 12.114, in particular in its Article 1, Sole paragraph II, cover the same product scope of imported retreaded tyres as the import ban at the federal level. Law 12.114 thus prohibits the sale of "imported used tyre carcasses"; "domestic retreaded tyres made from imported used tyre carcasses" and "imported retreaded tyres", and only allows the sale of "*domestic* retreaded tyres made from *domestic used tyre carcasses*" in the market.

7.415 The European Communities submits that imported retreaded tyres are "like" domestic retreaded tyres made from domestic used tyre carcasses. The parties agree that there is no difference between imported and domestic retreaded tyres with respect to the "likeness" within the meaning of Article III:4.[1577] The **Panel** also considers that imported retreaded tyres and domestic retreaded tyres, either made with domestic used tyre carcases or with imported used tyre carcasses, are indeed "like": the same physical characteristics (produced by reconditioning used tyres through one of the three types of processes)[1578]; the same end uses (to be used for respective vehicle types, such as passenger cars, buses and trucks, and air planes)[1579]; the same tariff headings (i.e. NCM headings 4012.11.00, 4012.12.00, 4012.13.00 or 4012.19.00); and no evidence of any difference in consumers' perceptions and behaviour in respect of imported and domestic retreaded tyres.

7.416 The Panel thus concludes that imported retreaded tyres can be considered "like" domestic retreaded tyres made from domestic used tyre carcasses.

(ii) A law, regulation or requirement affecting the internal sale

7.417 The European Communities argues that the prohibition on the "marketing" of retreaded tyres is a measure affecting the internal sale of retreaded tyres, since it makes the internal sale of these products in fact impossible.

7.418 The **Panel** considers that the marketing prohibition on imported used tyres, which include imported retreaded tyres, as codified in Law 12.114 constitutes a measure affecting the internal sale of retreaded tyres, because the measure, on its face, provides that "it is forbidden to sell imported used tyres in the State". The measure, in banning the action of selling, clearly affects the sale of retreaded tyres in the territory of Rio Grande do Sul.

7.419 Therefore, we conclude that the marketing prohibition at issue affects the internal sale of retreaded tyres within the meaning of Article III:4.

[1575] Exhibit BRA-80. See also Exhibit EC-35. Brazil has clarified that Law 12.114, as amended by Law No. 12.381, is formally in force at present; that it is intended to apply to retreaded tyres imported from every country; and that the words "imports" and "importation" used in both laws refer to the importation of retreaded tyres from other countries into Brazil. (Brazil's responses to panel questions 58, 59, 111) Brazil has also clarified that these state laws seem to have been passed in reaction to the exemption of MERCOSUR countries from the national import ban. (Brazil's answers to panel questions Nos. 55 and 59).

[1576] Brazil's answer to panel question No. 58.

[1577] Brazil's answer to panel question No. 6.

[1578] See the parties answers to panel question No. 1.

[1579] See the parties' answers to panel question No. 4.

(iii) Less favourable treatment

7.420 As shown above, the marketing prohibition under Law 12.114 applies to *imported* retreaded tyres. It foresees no comparable limitation on the marketing of domestic retreaded tyres made from domestic used tyre carcasses.

7.421 The **Panel** considers, therefore, that the marketing prohibition imposed by Law 12.114 accords to imported retreaded tyres "less favourable treatment" than to domestic retreaded tyres which should be considered like products within the meaning of GATT Article III:4.

7.422 For the above reasons, we find that Law 12.114 is inconsistent with the obligations under Article III:4 of the GATT 1994 in that it provides less favourable treatment to imported retreaded tyres than to like domestic products.

(b) Disposal obligations

7.423 The **European Communities** submits that the requirement of having to dispose of *ten* used tyres (for the importation of one retreaded tyre), rather than *one* used tyre (for the production of one retreaded tyre in Brazil using an imported used tyre), under Law 12.381 is an additional discrimination and clearly constitutes less favourable treatment of imported retreaded tyres.[1580]

7.424 Law 12.381 of 28 November 2005 provides:

> "Amending Art. 1° of the Law N° 12.114 of 5 July 2004, prohibiting the sale of used tyres imported into the State and from other Sources.
>
> ...
>
> Article 1 – The sole paragraph of Article 1 of Law N° 12.114 of 5 July 2004, prohibiting the sale of used tyres imported into the State and from other sources becomes paragraph 1, and the following paragraphs 2 and 3 are added:
>
> "Article 1° ...
>
> §2° – The following shall be permitted:
>
> > I – the import of a used tyre carcass where importers can demonstrate that they will collect on Brazilian territory and destroy, in an environmentally-adequate manner, 1 (one) existing used tyre on the domestic territory for each used tyre carcass to be imported;
> >
> > II – the import of a carcass of a tyre retreaded by means of top-capping, remoulding, or recapping, outside of Brazil, where importers can demonstrate that they will collect within the domestic territory and destroy, in an environmentally-adequate manner, 10 (ten) existing used within the domestic territory for each used tyre carcass to be imported. ...
>
> §3° - tyre retreaders shall have the right to import one used tyre carcass for each used or retreaded tyre exported without having to comply with the

[1580] European Communities' first written submission, para. 187.

> environmental counterpart referred to in part I of paragraph 2 of this Article."[1581]

7.425 According to the European Communities, under the amendment (Law 12.381) now, the state of Rio Grande do Sul seems to be allowing the marketing of "*domestic* retreaded tyres made of *imported carcasses*" upon satisfying the disposal obligations.[1582]

7.426 The **Panel** recalls that the marketing prohibition under Law 12.114 applied to three types of tyres: "imported used tyre carcasses"; "domestic retreaded tyres made from imported used tyre carcasses" and "imported retreaded tyres", and so only allowing "*domestic* retreaded tyres made from *domestic used tyre carcasses*" in the market. Law 12.381, however, appears to amend this outright marketing prohibition on these three types of tyres by adding certain disposal obligations to Law 12.114, which appear to operate as an exception to the marketing prohibition under Article 1.

7.427 In response to a question from the Panel on whether Law 12.381 establishes an exception to the import prohibition set out in Law 12.114, **Brazil** submits that the amendments introduced by Law 12.381, permitting imports under certain conditions, "seem to conflict with Article 1 of Law 12.114, which prohibits import of used tyres."[1583] Brazil also states that "it is not clear whether the amendments intended to lift the import prohibition," but that "in any event, this is irrelevant because these state measures have no legal effect."

7.428 The **Panel** notes in this regard that regardless of the underlying intention behind Law 12.381 and its constitutionality due to its potential conflict with the existing federal laws prohibiting the importation of retreaded tyres, Law 12.381 explicitly provides that importing will be authorized if ten used tyres are disposed of for each imported retreaded tyre and one used tyre for each imported used tyre carcass.

7.429 In this respect, we note that the language of the amendment does not specifically permit the marketing of "domestic retreaded tyres made from imported carcasses" in the state of Rio Grande do Sul. Thus, the European Communities' argument seems to be that by permitting the importation of used tyre carcasses, the amendment effectively allows the sale of "retreaded tyres produced in Brazil using those *imported used tyre carcasses*", which are otherwise prohibited from being sold in the state of Rio Grande do Sul. We agree with the European Communities that allowing under Law 12.381 the importation of the very material (i.e. used tyre carcasses) used in the production of domestic retreaded tyres, which was originally prohibited from marketing, amounts to allowing now the marketing of domestic retreaded tyres made from such material.[1584] Thus, for the purpose of examining the European Communities' claim on Law 12.381 under Article III:4, we will consider whether the alleged discriminatory treatment exists between "imported retreaded tyres" and "domestic retreaded tyres made from imported used tyre carcasses" the marketing of which seems to be allowed as a result of the amendment to Law 12.114.

7.430 We will now proceed to examine whether this disposal obligation embodied in Law 12.381 ("disposal obligation") is inconsistent with Article III:4 of the GATT 1994 based on the three elements set out by the Appellate Body: (1) the imported and domestic products at issue are 'like products'; (2) the measure at issue is a 'law, regulation, or requirement affecting their internal sale,

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[1581] Exhibit BRA-81. See also Exhibit EC-37.
[1582] European Communities' first written submission, para. 64.
[1583] Brazil's answer to panel question No. 57.
[1584] We recall our observation above that 6 million out of almost 11 million used tyre casings imported in 2005 were retreaded or stocked for later use by the importers. (See footnote 1469 above)

offering for sale, purchase, transportation, distribution, or use'; and (3) the imported products are accorded 'less favourable' treatment than that accorded to like domestic products.[1585]

(i) Like products

7.431 As explained above, the disposal obligation under Law 12.381 makes a distinction between domestic retreaded tyres made from imported used tyre carcasses and imported retreaded tyres.

7.432 The European Communities submits that imported retreaded tyres are "like" domestic retreaded tyres made from imported used tyre carcasses. The **Panel** recalls that the parties do not dispute that imported retreaded tyres are "like" domestic retreaded tyres within the meaning of Article III:4 of the GATT 1994[1586], and the Panel also recalls its earlier conclusion[1587] that domestic retreaded tyres, regardless of the origin of used tyre carcasses used in producing them, are "like" imported retreaded tyres within the meaning of Article III:4. The Panel thus concludes that for the purposes of analysing the disposal obligation, domestic retreaded tyres made from imported used tyre carcasses are "like" imported retreaded tyres within the meaning of Article III:4.

(ii) A law, regulation or requirement affecting the internal sale

7.433 Further, the **Panel** considers the disposal obligation to be a measure affecting internal sale of retreaded tyres. This is because satisfying the disposal requirement as indicated in the amendment (i.e. disposal of ten used tyres in the case of imported retreaded tyres, in comparison to just one used tyre otherwise) is a prerequisite for the importation of used tyre carcasses and, in turn, the marketing of imported retreaded tyres made from such used tyre carcasses on the internal market. Thus, the disposal obligations directly affect the internal sale of retreaded tyres concerned in the Brazilian market.

(iii) Less favourable treatment

7.434 The amendment requires the disposal of *one* used tyre for one domestic retreaded tyre that would be made from imported used tyre carcasses, and *ten* used tyres for one imported retreaded tyre.

7.435 The **Panel** considers that the requirement imposed on imported retreaded tyres to dispose of ten used tyres is a more onerous burden than the requirement imposed on domestic retreaded tyres to dispose of just one used tyre. Therefore, the disposal requirement affords "less favourable treatment" to imported retreaded tyres within the meaning of Article III:4 of the GATT 1994.

7.436 Consequently, we find that the disposal requirement under Law 12.381 is inconsistent with Article III:4 since it accords less favourable treatment to imported retreaded tyres than to like domestic products.

(c) Conclusion

7.437 In light of the above, the **Panel** finds that Law 12.114 of Rio Grande do Sul, as amended by Law 12.381, is inconsistent with Brazil's obligations under Article III:4 of the GATT 1994.

[1585] *Korea – Various Measures on Beef*, Appellate Body Report on para. 133.
[1586] Brazil's answer to panel question No. 6.
[1587] See paragraph 7.415 above.

3. Are the state measures justified under Article XX(b) of GATT 1994?

7.438 **Brazil** submits that the state measures – i.e. Law 12.114 as amended by Law 12.381 – are justified by Article XX(b) for the same reasons that the import ban is justified by Article XX(b) and does not warrant an independent consideration because it does not restrict imports of retreaded tyres any more than the federal import ban does.[1588]

7.439 The **European Communities** argues that for the same reasons that the import ban cannot be justified under Article XX(b), the state measures cannot be justified by Article XX(b).[1589] The European Communities sees no objective basis for the allegedly discriminatory treatment accorded by the disposal obligations under the state measures concerned as to imported and domestic retreaded tyres. The European Communities submits that such discrimination is manifestly arbitrary and seems to be inspired by the motive to protect the domestic industry.

7.440 First, with respect to the marketing prohibition imposed by Law 12.114, although the parties disagree, as noted above, on the legal effect of this state measure in relation to the import ban imposed at the federal level, they do not seem to dispute that the marketing prohibition is similar to the import ban to the extent that it effectively prohibits the sale of imported retreaded tyres in the Brazilian market.[1590]

7.441 The **Panel** recalls its finding above that although the import ban falls within the scope of measures covered by paragraph (b) of Article XX, it cannot be justified under Article XX because it is applied inconsistently with the requirements under the chapeau of Article XX(b). In our view, to the extent that the marketing prohibition has the same effect as the import ban by effectively prohibiting the marketing of imported retreaded tyres as noted above, it cannot be justified under Article XX(b) either for the same reasons that the import ban could not be justified under Article XX(b).

7.442 We will now turn to the disposal obligation contained in Law 12.381.

7.443 We have found that the disposal obligation under Law 12.381 is also inconsistent with Article III:4: the disposal obligation is not equally applied to imported retreaded tyres and domestic retreaded tyres made from imported used tyre carcasses and accords imported retreaded tyres less favourable treatment.

7.444 We also recall that the disposal obligation operates in a different manner from the marketing prohibition contained in Law 12.114, in that it allows the importation of retreaded tyres and used tyres under certain conditions. Brazil has also acknowledged that the disposal obligation seems to conflict with the marketing prohibition.[1591] To the extent the disposal obligation conflicts with the marketing prohibition by allowing imports of retreaded tyres as well as used tyre carcasses, it is not clear to us how they can be justified under Article XX(b) for the same reasons as in the case of the import ban as argued by Brazil.

[1588] Brazil's first written submission, paras. 186-189; Brazil's first oral statement, para. 77.

[1589] European Communities' first written submission, para. 189; European Communities' second oral statement, paras. 121-123.

[1590] For example, Brazil states that "[the state measure] does not restrict imports of retreaded tyres from the EC any more than the federal import ban does" (Brazil's first written submission, para. 186); and the European Communities states that "[the state law] would continue to restrict the marketing of imported retreaded tyres in Rio Grande do Sul" (European Communities' first oral statement, para. 109) and that "the [marketing] prohibition cannot be justified under Article XX...either...the EC can refer to what is set out above as regards the impossibility to justify the import ban under Article XX..." (European Communities' first written submission, para. 189).

[1591] Brazil's answer to panel question No. 57.

7.445 Further, as found above, the disposal obligation imposes the more strict obligation on imported retreaded tyres than on imported used tyre carcasses that would be used for the production of domestic retreaded tyres. This difference in treatment seems to go against Brazil's policy objective of reducing the number of waste tyres to the greatest extent. Specifically, we considered above in relation to the necessity of the import ban that the import ban on retreaded tyres could be considered as contributing to Brazil's policy objective only if imported retreaded tyres were to be replaced by either new tyres or domestic retreaded tyres produced using domestic used tyres. We also considered that the import ban on retreaded tyres should not lead to a substitution of imported used tyres for imported retreaded tyres.[1592] The disposal obligation at issue, however, facilitates the importation of used tyres, which in turn can be used for the production of domestic retreaded tyres, penalizing the importation of retreaded tyres. In our view, this contravenes the very objective sought to be achieved through the import ban.

7.446 In light of the above, the **Panel** is of the view that Brazil has not demonstrated that the disposal obligation can be justified under Article XX(b) for the same reasons as the import ban.

4. Conclusion

7.447 For the reasons above, the **Panel** finds that the state measures – i.e. the marketing prohibition and the disposal obligation – contained in Law 12.114, as amended by Law 12.381, of the Brazilian State of Rio Grande Do Sul are inconsistent with Article III:4 of the GATT 1994. We also find that Brazil has not demonstrated that the state measures can be justified under Article XX(b) of the GATT 1994.

D. EXEMPTION OF MERCOSUR COUNTRIES FROM THE IMPORT BAN AND THE FINES

7.448 The **European Communities** submits that the exemptions provided for retreaded tyres imported from MERCOSUR countries (i.e. Argentina, Paraguay and Uruguay) from the import ban (Article 40 of Portaria SECEX 14) as well as from the fines on the importation, marketing, transportation, storage, keeping or warehousing of imported retreaded tyres (Presidential Decree 3.919) are inconsistent with Articles XIII:1 *and* I:1 of the GATT 1994.[1593]

7.449 **Brazil** does not contest that the measures are a prima facie violation of Articles XIII:1 and I:1 of the GATT 1994.[1594] Brazil however responds that these exemptions are justified under Article XX(d), as measures necessary to secure compliance with laws and regulations that are not inconsistent with GATT 1994, and under Article XXIV, in the context of its customs union under MERCOSUR.

[1592] See paragraphs 7.139 above.

[1593] In its panel request, the European Communities identifies the following measures:

> "The exemption of retreaded tyres imported from other MERCOSUR countries from the import ban by means of Portaria No. 14 of 17 November 2004 of the Secretariat of Foreign Trade of the Brazilian Ministry of Development, Industry and International Commerce and from the above-mentioned financial penalties by virtue of Presidential Decree No. 4592 of 11 February 2003, in response to the ruling of a MERCOSUR panel established at the request of Uruguay." (underline added)

In its first written submission, the European Communities develops arguments in relation to both Portaria 14/2004 and Presidential Decree 4592. (European Communities' first written submission, paras. 65, 73, 74.)

[1594] Brazil's answer to panel question No. 33.

7.450 The provisions relevant to the MERCOSUR exemptions are Article 40 of Portaria SECEX 14/2004 and Presidential Decree 4.592.

7.451 Article 40 of Portaria SECEX 14/2004 provides:

> "Article 40 – Import licenses shall not be issued for imports of retreaded used tyres to be used as consumer goods or raw materials classified under NCM heading 4012, *with the exception of* remolded tyres classified under NCM heading 4012.11.00, 4012.12.00, 4012.13.00 or 4012.19.00, *originating in and coming from Member States of MERCOSUR under Economic Complementation Agreement No. 18*."[1595] (emphasis added)

7.452 Presidential Decree 4592 of 11 February 2003 provides:

> "Article 1: Article 47-A of Decree No. 3.179 of 21 September 1999 shall apply with the addition of the following paragraph, and the current sole paragraph shall be renumbered as (1):
>
> "paragraph (2) – Imports of *reconditioned tyres* classified under heading MCN 4012.11.00, 4012.12.00, 4012.13.00 and 4012.19.00, *originating in the MERCOSUR member countries under Economic Complementation Agreement No. 18 shall be exempt from payment of the fine* referred to in this Article.
>
> ..." (emphasis added)

7.453 The **Panel** notes that the legal bases of the exemptions are the very regulations that provide the legal bases for the import prohibition as well as the fines, namely Article 40 of Portaria SECEX 14/2004 and Presidential Decree 3.179 through Presidential Decree 4.592.[1596] As explained above, Article 40 of Portaria SECEX 14/2004 is the legal basis of the import prohibition at issue and Presidential Decree 3.179, through Presidential Decree 3.919, is the legal basis for the fines.

7.454 We recall that in discharging its duties as set out in Article 11 of the DSU, "a panel is not ... required to examine all legal claims made before it."[1597] A panel is required to address only those issues that are necessary for the resolution of the matter between the parties.[1598]

7.455 In this instance, we have already found that the import prohibition as well as the fines are inconsistent with Article XI:1 and are not justified under Article XX(b) and, in the case of the fines, are also not justified under Article XX(d). Given that the import prohibition and the fines themselves, which are the legal bases from which the exemptions are derived, have already been found inconsistent with the requirements of the GATT 1994, and that the exemptions only exist in relation to those measures, we find it unnecessary to examine the European Communities' separate claim on the exemptions.

7.456 Therefore, the **Panel** has decided to exercise judicial economy in respect of the European Communities' claims under Articles XIII:1and I:1 on Brazil's MERCOSUR exemptions and Brazil's defence under Articles XXIV and XX(d) of GATT 1994.

[1595] Exhibit EC-29.

[1596] Presidential Decree 4.592 incorporates an exemption clause into Presidential Decree 3.179, and Presidential Decree 3.919 incorporates the provision on the fines into Presidential Decree 3.179.

[1597] Appellate Body Reports on *Canada – Autos*, paras. 112-114 and *US – Wool Shirts and Blouses*, p. 18.

[1598] Appellate Body Report on *US – Wool Shirts and Blouses*, p.22.

VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 In light of the above, the Panel concludes that:

(a) with respect to Brazil's import prohibition on retreaded tyres:

(i) Portaria SECEX 14/2004 is inconsistent with Article XI:1 of GATT 1994 in that it prohibits the issuance of import licences for retreaded tyres, and is not justified under Article XX(b) of GATT 1994.

(ii) Portaria DECEX 8/1991, to the extent that it prohibits the importation of retreaded tyres, is inconsistent with Article XI:1 and is not justified under Article XX(b) of GATT 1994.

(iii) Resolution CONAMA 23/1996 is not inconsistent with Article XI:1.

(b) with respect to the fines imposed by Brazil on importation, marketing, transportation, storage, keeping or warehousing of retreaded tyres, Presidential Decree 3.179, as amended by Presidential Decree 3.919, is inconsistent with Article XI:1 of GATT 1994 in that it imposes limiting conditions in relation to the importation of retreaded tyres and is not justified under either Article XX(b) or Article XX(d) of GATT 1994.

(c) with respect to the measures maintained by the Brazilian State of Rio Grande do Sul in respect of retreaded tyres, Law 12.114, as amended by Law 12.381, is inconsistent with Article III:4 of GATT 1994 in that it accords less favourable treatment to imported retreaded tyres than to like domestic products and is not justified under Article XX(b) of GATT 1994.

8.2 With respect to the European Communities' claims that Brazil's MERCOSUR exemptions are inconsistent with Articles XIII:1 and I:1 of GATT 1994, the Panel has decided to exercise judicial economy.

8.3 Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment. The Panel concludes that, to the extent that the measures listed above are inconsistent with GATT 1994, they have nullified or impaired benefits accruing to the European Communities under that agreement.

8.4 Accordingly, the Panel recommends that the Dispute Settlement Body request Brazil to bring these inconsistent measures as listed above into conformity with its obligations under the GATT 1994.

ANNEX 1[1]
RESPONSES OF PARTIES TO QUESTIONS FROM THE PANEL

I. FOLLOWING THE FIRST SUBSTANTIVE MEETING OF THE PANEL

A. THE PRODUCTS AT ISSUE

Question 1. To both parties.
The Panel notes that different terms are used by the parties to designate retreaded tyres and the material from which they are made :

(a) "retreaded,"
(b) "recycled,"
(c) "reconditioned,"
(d) "top-capped,"
(e) "recapped,"
(f) "remoulded tyres,"
(g) "used tyre carcasses"
(h) "casings"
(i) "used tyres"

(see e.g. Brazil's first written submission paragraphs 15, Exhibits EC-29, EC-34, BRA-72 and BRA-84).
Could you please define these terms, and clarify which of these terms designate retreaded tyres, which of them designate types of retreaded tyres, and which of them designate the material from which retreaded tyres are made?

Response of the European Communities

1. "Retreaded tyres" are the product at issue in the present dispute. As the European Communities has explained in its first written submission, retreaded tyres are new products which are produced by reconditioning used tyres through the addition of new material replacing the worn tread.[2]

2. Since retreaded tyres are produced using a used tyre casing, it can be argued that they constitute part of a group of "recycled", "reconditioned" or "remanufactured" goods.[3] However, it should be noted that these terms are not sufficiently precise for the purposes of the present dispute. For instance, the term "recycled tyre" could also refer to a tyre produced partially from recycled rubber or other materials. Accordingly, the European Communities would suggest referring exclusively to "retreaded tyres" as the product at issue in the present case.

3. Retreaded tyres can be produced through a number of different processes. According to UNECE Regulations 108 and 109, there are three methods for retreading new tyres, namely top-capping (replacement of the tread), re-capping (replacement of the tread and with the new material extending over part of the sidewall) and bead to bead (replacement of the tread and renovation of the sidewall including all or part of the lower area of the tyre).[4] The Brazilian technical regulation contained in Portaria 133 of 27 September 2001 mentions the same three methods, namely top-

[1] Footnotes in this section are those of the parties.
[2] European Communities' first written submission, para. 2.
[3] For a definition of this latter term, which is used interchangeably with reconditioning, cf. Communication from the United States, TN/MA/W/18/Add.11 (Exhibit EC-65).
[4] UNECE Regulation 108, para. 2.37 (Exhibit EC-6); UNECE Regulation 109, para. 2.37 (Exhibit EC-7).

capping (recapagem), recapping (recauchutagem) and remoulding (remoldagem).[5] As the European Communities has explained in its first written submission, there are also different methods for applying the new tread, namely the cold and the hot method.[6] Regardless of the method used, the resulting new tyre is to be regarded as a "retreaded tyre" and must meet the required specifications.

4. The European Communities notes that the Brazilian legislation does not always appear to use these terms in a consistent manner. In particular, Article 40 of Portaria Secex 14/04 (Exhibit EC-29) bans the importation of "pneus recauchutados e usados", whereas it exempts from this ban "pneus remoldados" imported from MERCOSUR countries. The European Communities understands that the term "recauchutados" in Article 40 is not intended to refer only to retreaded tyres produced by the specific method of recapping, but all retreaded tyres, and that this is also how the ban has been applied. This finds further confirmation in Decree 3.919 of 14 September 2001 (Exhibit EC-34), which imposes a fine on the importation and internal marketing etc. of any "pneu usado ou reformado", i.e. for all retreaded tyres. Pneu reformado is also the generic term used in Portaria INMETRO No. 133.[7]

5. As far as the term "remoldado" in Article 40 of Portaria 14 is concerned, the European Communities notes Brazil's statements that the MERCOSUR exemption applies narrowly only to the one type of retreaded tyre that is called "remoldado" in Portaria 133.[8] In the light of the inconsistent terminology used in the Brazilian legislation, the European Communities finds this explanation doubtful. In this context, it is worth pointing out that Decree 4.592 (Exhibit EC-42) exempts from said fines "pneumáticos reformados", i.e. all retreaded tyres, originating in MERCOSUR countries. In any event, such a distinction between remoulded and other retreaded tyres would be arbitrary, since there are no differences between these tyres in terms of their effects for human life or health.

6. Used tyres are to be distinguished from retreaded tyres. As the European Communities has explained, a retreaded tyre is a new product intended to be placed on the vehicles in exactly the same way as a new tyre. This is also illustrated by the differences in tariff classification: retreaded tyres are classified under HS subheadings 4012.11, 4012.12, 4012.13 and 4012.19, whereas used tyres are classified under subheading 4012.20.

7. The term "used tyres" includes tyres which have undergone some use, but which may still be safely used on a vehicle (mid-life tyres). Moreover, the term used tyres also includes tyres which may no longer be used on a vehicle, since they no longer meet the minimum tread requirements, but which are suitable for being retreaded. Such tyres may be referred to as "retreadable casings" or "retreadable carcasses". Finally, the term also includes used tyres which are no longer usable nor retreadable, but which are destined for recycling, recovery or disposal.

Response of Brazil

8. Retreaded tyres, for purposes of international trade, are tyres classified under the following HS subheadings: 4012.11, 4012.12, 4012.13, and 4012.19. Brazil's internal regulations refer to retreaded tyres as "pneus reformados" (translated in Exhibit EC-11 as "reconditioned tyres") and include them in the general category of used tyres. *See* Technical Regulation annexed to Portaria INMETRO 133/2001, para. 3.28 (Exhibit EC-11).

[5] Exhibit EC-11, paras. 3.29-3.31. The terms used in the translation of this section provided by the European Communities should be adjusted as indicated above.

[6] European Communities' first written submission, para. 28.

[7] Exhibit EC-11, point 3.28.

[8] Brazil's first oral statement, para. 64.

9. Recycled tyres, a term used in Exhibit BRA-72, is an incorrect translation of "pneus reformados", which should have been translated as "retreaded tyres" or "reconditioned tyres". The term "recycled", when referring to tyres, describes devulcanized rubber (material obtained from a used tyre through devulcanization). A retreaded tyre is not a recycled good, but a reconditioned good, because it adds approximately 30 per cent of new material to 70 per cent of used material.

10. Reconditioned tyres is a term that Brazil's internal regulations use to describe retreaded tyres, as defined in Brazil's Response to Question 1(a).

11. Top-capped tyres are one of the three types of retreaded tyres. The top-capping process involves replacing the tread of a tyre. Brazil's technical regulations refer to the process of top-capping as "recapagem" (translated in Exhibit EC-11 as "recapping"). *See* Technical Regulation annexed to Portaria INMETRO 133/2001, para. 3.29 (Exhibit EC-11).

12. Recapped tyres are one of the three types of retreaded tyres. The recapping process involves replacing the tread and the shoulder of the used tyre. Brazil's technical regulations refer to the process of recapping as "recauchutagem" (translated in Exhibit EC-11 as "retreading"). *See* Technical Regulation annexed to Portaria INMETRO 133/2001, para. 3.30 (Exhibit EC-11).

13. Remoulded tyres are one of the three types of retreaded tyres. The remoulding process involves replacing the tread, the shoulders, and the sidewall areas of the used tyre. Brazil's technical regulations refer to this process as "remoldagem" (translated in Exhibit EC-11 as "remoulding"). *See* Technical Regulation annexed to Portaria INMETRO 133/2001, para. 3.31 (Exhibit EC-11).

14. Used tyre carcass is the structural part of a used tyre, made up of one or more layers with overlaying plies, to which the new tread is applied in the course of retreading. *See* Technical Regulation annexed to Portaria INMETRO 133/2001, para. 3.7 (Exhibit EC-11).

15. Casings is a term that describes used tyres in the context of future retreading.

16. Used tyres are, for purposes of international trade, tyres classified under the HS subheading 4012.20. In Brazil's internal regulations – note that there is no requirement that internal regulations follow the HS system – used tyres are defined as tyres that have undergone some form of use and/or wear and tear. This is a general category that embraces retreaded tyres, part-worn tyres and waste tyres that may be suitable for retreading or must be disposed of. *See* the Technical Regulation annexed to Portaria INMETRO 133/2001, paragraph 4.2 (Exhibit EC-11).

Question 2. To Brazil.
In paragraph 184 of its first written submission, Brazil states that "[B]ecause the tribunal limited its decision to remoulded tyres, Brazil likewise limited the scope of exemption and continued to prohibit MERCOSUR imports of tyres retreaded by other means (which is why the exemption from the ban is only limited)". A similar statement is made at paragraph 77 of the same submission.

What other types of retreaded tyres, if any, from MERCOSUR Member countries remain subject to Brazil's import prohibition? What proportion of other MERCOSUR countries' production remains covered by the import ban?

Response of Brazil

17. There are three different types of retreaded tyres: remoulded, recapped, and top-capped. The MERCOSUR dispute referred only to remoulded tyres and, therefore, Brazil lifted the ban for this category only. The importation of recapped and top-capped tyres produced in other MERCOSUR countries remains prohibited. Brazil has no information on the proportion of tyres retreaded by means

of recapping or top-capping in Argentina, Paraguay, and Uruguay. However, because remoulding is the most complex of the retreading processes, it is safe to assume that a country that produces remoulded tyres likewise has the capability to produce recapped and top-capped retreads.

Question 3. To both parties.
Do the Parties agree that the products at issue in this case are retreaded tyres classified under NCM codes 4012.11, 4012.12, 4012.13 and 4012.19? (see references in European Communities' first written submission paragraphs 16, 40 and 44, and Brazil's first written submission paragraph 16).

Response of the European Communities

18. Yes.

Response of Brazil

19. Brazil agrees.

Question 4. To both parties.
What are the differences, if any, among "commercial", "passenger" and "truck and aircraft" retreaded tyres? Does the scope of the products at issue in this case encompass all these different types of retreaded tyres? (see references in European Communities' first written submission paragraph 26 and Brazil's first written submission paragraph 16).

Response of the European Communities

20. The difference between retreaded tyres for passenger cars, commercial vehicles, and aircraft lies in the different technical standards that apply to their production.[9] One significant resulting difference is that passenger car tyres may only be retreaded once, whereas no similar limitation exists for tyres for commercial vehicles and aircraft.[10] A further difference is that the age of a casing for a passenger car tyre may not exceed 7 years when it is being retreaded, whereas no similar restriction exists for commercial vehicle and aircraft tyres.[11]

21. Article 40 of Portaria Secex prohibits the issuing of import licences for retreaded tyres falling under the heading 4012. This heading covers retreaded tyres of a kind used on motor cars (subheading 4012.11), of a kind used on buses or lorries (subheading 4012.12), of a kind used on aircraft (subheading 4012.13), and other (subheading 4012.19). The ban thus applies to all retreaded tyres for passenger cars, commercial vehicles, and aircraft. As the European Communities has confirmed, it challenges the import ban as such, and with respect to all of the retreaded tyres covered by it.[12]

Response of Brazil

22. While there are many technical and market differences, the functional difference relevant to this dispute is that unlike passenger car tyres, commercial vehicle, truck, and aircraft tyres can be retreaded more than once. The scope of the products at issue in this case encompasses all these types of retreaded tyres. All types of retreaded tyres are similar in one important aspect: when imported, they have a shorter remaining lifespan than new tyres.

[9] Cf. European Communities' first written submission, paras. 18, 23.
[10] European Communities' first written submission, para. 26.
[11] European Communities' first written submission, para. 26, fn. 18.
[12] European Communities' first oral statement, para. 32.

Question 5. To Brazil.
Is it Brazil's position that "commercial" and "passenger" retreaded tyres pose the same type and level of health and environmental risk? (see Brazil's first written submission, paragraph 4)

Response of Brazil

23. Commercial vehicle retreads pose the same type of health and environmental risk as passenger retreads. Retreaded tyres in both categories have fewer remaining lifecycles and become waste sooner. The level of risk from the commercial vehicle retreads is frequently higher than that from the passenger retreads because (1) commercial vehicle retreads are substantially heavier and, thus, produce more waste, and (2) a commercial retread that is imported closer to the end of its useful life could have less than 20 per cent of its useful life left compared to the 50 per cent in the case of the passenger car retread.

24. In its first written submission, Brazil referred mainly to passenger car retreads simply because these retreads represent virtually all of the European Communities' exports to Brazil. Brazil's analysis applies equally to the commercial vehicle retreads, however.

Question 6. To both parties.
Is there any difference between imported and domestic retreaded tyres, and between MERCOSUR and non-MERCOSUR retreaded tyres, that would be significant for the purposes of these proceedings, including with respect to their "likeness" within the meaning of Articles I.1, III.4, and XIII?

Response of the European Communities

25. No.

Response of Brazil

26. There is no difference with respect to the "likeness" of the products, within the meaning of Articles I:1, III:4, and XIII. There is an important functional difference, however, between the domestic and imported retreaded tyres. Domestic retreads help solve the waste tyre problem by extending the lifespan of tyres used domestically, which would otherwise have to be disposed of immediately. Imported retreads, on the other hand, exacerbate the waste tyre problem because they either cannot be retreaded at all (passenger car tyres) or have fewer remaining lifecycles (commercial vehicle tyres).

Question 7. To both parties.
Do the Parties agree that retreaded tyres are to be distinguished from used tyres? (see references in European Communities' first written submission paragraphs 17 and 39, and Brazil's first written submission paragraph 16)
If so, please explain in detail how they differ.

Response of the European Communities

27. Yes. The European Communities can refer the Panel to its response to Question 1 above.

Response of Brazil

28. Brazil agrees that retreaded tyres are to be distinguished from used tyres for purposes of international trade. *See* Brazil's Responses to Questions 1 and 30.

Question 8. To Brazil.
Does Brazil export any retreaded or used tyres? If so, please provide relevant data.

Response of Brazil

29. The amounts of Brazil's used and retreaded tyre exports are *de minimis*:

Brazil's exports of used and retreaded tyres, in tonnes

	2000	2001	2002	2003	2004	2005
Used Tyres	0	73.6	0.39	20.3	1.3	11.4
Retreaded Tyres	30.9	4.1	20.9	9.3	0.9	14.2

Source: Sistema Alice/MDIC

Question 9. To the European Communities.
In paragraph 45 of your first written submission, you highlight the benefits arising from retreaded tyres. In your view, do these benefits arise also for countries importing retreaded tyres ? If so, how ?

Response of the European Communities

30. In the view of the European Communities, these advantages benefit all countries, including the importing country.

31. Retreading of tyres leads first of all to savings in terms of energy and materials (such as rubber and oil). These resources are scarce, and are traded on a global scale. Accordingly, savings of these scarce resources is in the interest of all countries.

32. Similarly, reductions of emissions in comparison to the production of new tyres will lead to a reduction in air pollution, notably in relation to CO_2 emissions, one of the six greenhouse gases covered by the Kyoto Protocol to the United Nations Framework Convention on Climate Change.[13] Since air pollution and global warming are universal concerns, these effects are in the interest of all countries, including the importing member.

33. As further background, the European Communities provides a recent submission from the United States, which explains more broadly the environmental benefits of remanufacturing in terms of energy consumption, use of materials, and reduction of pollution (Exhibit EC-65).

Response of Brazil

34. The benefits from retreading that the European Communities describes in paragraph 45 of its first submission do not occur in the territory of countries importing retreaded tyres. As Brazil explained in paragraph 8 of its Oral Statement, a country that retreads the tyres it consumes reduces its waste tyre burden. Brazil could benefit from the European Communities' retreading activities only if the European Communities tyre manufacturers retreaded casings that had been collected in Brazil. Because this is not the case, Brazil realizes no benefit from the retreading activities that take place in the European Communities. On the contrary, retreaded tyre imports from the European Communities exacerbate Brazil's waste tyre problem because these tyres have a shorter lifespan.

[13] Exhibit EC - 66.

Question 10. To the European Communities.
In paragraph 18 of your first written submission, you refer to two regulations developed by the UNECE. In light of the fact that Brazil is not a Member of UNECE, could you please clarify what role such regulations should play in these proceedings ?

Response of the European Communities

35. The UNECE regulations lay down the technical standards according to which retreaded tyres for passenger vehicles (UNECE Regulation 108) and commercial vehicles (UNECE Regulation 109) are produced.

36. The UNECE Regulations are adopted by the administrative committee established by the UNECE Vehicles Agreement (Exhibit EC-5). The UNECE Vehicles Agreement currently has 44 Members representing countries from many regions of the world, and constitutes the most important standard-setting body for automobiles.

37. Even though Brazil is not a party to the UNECE Agreement, it has used the UNECE Regulations as the basis for the preparation of its own technical standard for retreaded tyres for passenger vehicles, and seems to be prepared to do the same with respect to retreaded tyres for commercial vehicles.[14] Since there appears to be no disagreement on this point between the parties, the Panel may assume that UNECE Regulations 108 and 109 constitute an appropriate technical standard for the production of retreaded tyres.

38. UNECE Regulations 108 and 109 are also relevant context for the evaluation of the justification of Brazil's import ban. In accordance with the fourth recital of its preamble, the objective of the Vehicles Agreement is to "facilitate the use in their countries of the vehicles, equipment and parts, where approved according to these prescriptions by the competent authorities of another contracting party". A major objective underlying the agreement is thus to facilitate trade in vehicles, equipment and parts which are in accordance with the Vehicles Agreement and the Regulations adopted under it.

39. The fact that the Contracting Parties adopted technical regulations for retreaded tyres indicates that they assumed that trade would occur in these products. It is clear that if Brazil was correct, and WTO Members were free to ban the importation of retreaded tyres, this would significantly reduce the useful value of UNECE Regulations 108 and 109. The fact that there exist accepted international standards for the production of retreaded tyres is thus a further indication that there is no justification for banning the importation of this product.

Response of Brazil

40. UNECE regulations establish technical standards for retreaded tyres. Brazil agrees with the European Communities that retreaded tyres manufactured in conformity with the UNECE standards are safe. Their safety, however, is immaterial to this dispute: Brazil prohibits imports of retreaded tyres not because they are somehow less safe, but because they have a shorter remaining lifespan. *See* UNECE No. 108, para. 6.2 (Exhibit BRA-2) ("passenger car tyres which have been previously retreaded shall not be accepted for further retreading").

[14] European Communities' first written submission, paras. 21-22.

Question 11. To the European Communities.
In paragraph 28 of your first oral statement, you refer to the existence of "cheap low quality new tyres, some of which can no longer even be retreaded". Could you please clarify whether different categories of new tyres exist, that are more or less retreadable ? Does this factor have any particular relevance to the issues under consideration in these proceedings ?

Response of the European Communities

41. Not all new tyres are, but virtue of the way in which they are constructed, necessarily suitable for being retreaded after their first use. The existence of low-quality tyres which are not suitable for retreading is regularly identified by the retreading industry as a constraint which limits the availability of casings suitable for retreading.

42. For instance, the European Retread Manufacturers Association provides the following explanations:[15]

> "Of the tyres rejected because of poor service repairs and casing integrity failures, around 64% were because of material failure making the casing unsuitable for further retreading. This included those tyres that have been retreaded as many times as is possible and served out their useful life. However, in excess of 35% of the repair and integrity rejects were classified as "unwanted", due to their size or load specifications or unsuitability of certain tyre brands for retreading. A substantial proportion of new tyres on the road are therefore not seen as being suitable to retread because the basic build is not sufficiently durable."

43. The same problem is also highlighted by the UK Environment Agency: [16]

> "The cost of many new tyres imported to the UK is similar to the price of a retreaded tyre, but the imported tyre may not be high quality and often cannot be retreaded. The motorist is likely to buy a new tyre rather than a retreaded tyre if there is little difference in cost."

44. In a report prepared of the Department of the Environment of Australia, the following statements can be found:[17]

> "While developments in tyre manufacturing technology have resulted in improvements in the life of tyres, the life of the casing appears to have followed the opposite trend, with evidence suggesting casing life is decreasing. Industry representatives have suggested that 'cheap' imported tyres are not generally suitable for retreading. It should also be noted that, increasingly, some locally produced tyres have also been identified as unsuitable for retreading."

45. In a study produced by a team from the University of Lund, Sweden, the following factors are mentioned as limiting the rate of retreading in Sweden:[18]

> "design/manufacture of most passenger car tyres without consideration of the need for retreading;

[15] Exhibit EC-67, para. 2.2.5 (emphasis added).
[16] Exhibit EC-15, para. 4.2 (emphasis added).
[17] Exhibit EC-68, Section 8.4.2.
[18] Exhibit EC-69, p. 12.

> ready availability of low cost and quality of tyres which are unsuitable for retreading; [...]"

46. In a study of the University of Missouri, the following statements can be found:[19]

> "Tyre retreading and remanufacturing offers one of the best opportunities to reduce the number of tyres requiring disposal. Tyre type determines the future life of a tyre. Radial passenger tyres, unlike the bias tyre, are not easily retreaded. New radials require retreaders to retool to state-of-the-art equipment. Generally, low-cost passenger tyre imports cannot be retreaded."

47. Similar statements are also found specifically with respect to truck tyres. For instance, in a recent publication, Marco Mandrioli, marketing director of a retreading business, makes the following statements:[20]

> "Tyres and Accessories: How Detrimental are imports of low-budget truck tyres from the far east to the European retreading business?
>
> Marco Mandrioli: In addition to the poor quality of those imported products, the true issue is that they are not retreadable. This fact increases the lack of casings for retreading."

48. The question whether new tyres are in all cases retreadable is relevant for assessing the contribution which Brazil's import ban makes to the reduction of waste tyres in Brazil. Brazil's defence is based on the assumption that all new tyres can be retreaded, whereas retreaded tyres cannot be retreaded again. The statements above show that this assumption does not hold true for all new tyres. The situation is even more striking for truck tyres, since a retreaded tyre, which is made from a good-quality casing, is frequently still retreadable several times, whereas a low-quality new tyre is not.

49. In order to show that its ban on the importation of retreaded tyres contributes to a reduction of waste tyres in Brazil, Brazil would therefore have to show the following:

(a) to which extent new tyres sold in Brazil are of a kind that is suitable for retreading after use;

(b) to which extent tyres typically are suitable for retreading after use in Brazil;

(c) and to which extent retreadable casings in Brazil are actually retreaded.

50. Accordingly, the quality and retreadability of new tyres sold in Brazil is an essential element in the demonstration of the contribution of Brazil's import ban to its stated goals.

51. Moreover, the fact that Brazil restricts the importation of retreaded tyres, whereas it does not take similar measures against low-quality new tyres is further evidence that the ban constitutes an arbitrary and unjustifiable discrimination against imported retreaded tyres.

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[19] Exhibit EC-70.
[20] Exhibit EC-71, p. 13.

Question 12. To Brazil.
In paragraph 28 of its first oral statement, the European Communities refers to the existence of "cheap low quality new tyres, some of which can no longer even be retreaded". Could you please comment on the types of new tyres used in Brazil and whether such distinctions are relevant on the Brazilian market ?

Response of Brazil

52. New tyres sold in Brazil (whether manufactured domestically or imported) are high-quality tyres that comply with strict technical and performance standards that are based on international standards. Tyres manufactured in accordance with these standards have the potential to be retreaded. New tyres sold in Brazil are not "cheap low quality new tyres" with no potential for future retreading.

B. RETREADING ACTIVITIES IN BRAZIL

Question 13. To Brazil.
Are used tyres from the European Communities or other sources currently being imported into Brazil? (see suggestion in European Communities' first written submission paragraphs 52, 82, 132, 147 and 155, and Brazil's first written submission paragraphs 76 and 153) If so, what is the legal basis for such imports?

Response of Brazil

53. Brazil prohibits imports of used tyres. *See* Portaria SECEX 14/04 (Exhibit BRA-84). However, used tyres from the European Communities and other sources have entered Brazil exclusively through preliminary injunctions issued by Brazilian courts. These preliminary injunctions were issued in *ex parte* proceedings, initiated by Brazilian retreaders that prefer cheaper foreign casings. When the government had an opportunity to present its case during the merits stage, the courts reversed the initial grant of an injunction in 67 per cent of the cases. On appeal, courts ruled against the injunction in 92.5 per cent of the cases.

Question 14. To Brazil.
What are the legal rights that the companies claim are affected by the import ban in making their requests for preliminary injunction?

Response of Brazil

54. Petitioners have typically advanced the following legal arguments in requests for preliminary injunctions:

(a) A *portaria* is not an appropriate instrument to restrict constitutionally-protected rights; a legislative act is required to ban used tyre imports;

(b) The government agency that imposed the initial ban (DECEX) lacked the constitutional authority to do so;

(c) Prohibiting imports of used, but not new tyres violates the constitutional principle of isonomy, in that it favours importers of new tyres over importers of used tyres;

(d) The import ban interferes with the constitutional principle of free enterprise because it restricts access to supplies of raw material necessary for domestic retreaders to carry on their business.

55. Brazil's Federal Supreme Court has already rejected the first three arguments, and the Government of Brazil anticipates that the Court will soon reject the remaining argument, at which point the injunctions will effectively end. So far, there is a large number of trial court decisions that affirm the compatibility of the import ban with the principles of legality, isonomy, and free enterprise. *See* Exhibit BRA-86.

Question 15. To Brazil.
According to Brazil, in 92.5 % of the cases in which preliminary injunctions have been ordered, the appeals court has upheld the import ban (see Brazil's first written submission paragraph 153). What happened in the rest of cases other than those 92.5% of the cases?

Response of Brazil

56. In the remaining cases, the appellate courts have either upheld the grant of a preliminary injunction, or reversed the previous denial of the injunction. Note that an appellate court ruling on preliminary injunctive relief has no effect on the outcome of the case on the merits – it only deals with the narrow issue of whether the petitioning party made a showing sufficient to obtain a preliminary injunction.

Question 16. To Brazil.
Are all used tyres currently imported into Brazil being retreaded ? If not, what is the utilisation of the remaining imported used tyres?

Response of Brazil

57. While the government of Brazil does not maintain these data, information presented in a public hearing in the Brazilian Senate by the president of BS Colway, Brazil's largest importer of used tyres, indicates that a large number of imported casings arrive unsuitable for retreading. In 2005, Brazilian retreaders imported almost 11 million casing, of which only 6 million were retreaded or stocked for later use by the importers. The remaining casings were either illegally sold or disposed of. *See* Exhibit BRA-94. Because the preliminary injunctions authorize the importation of used tyres only as raw material, the Government of Brazil has imposed heavy fines for illegal sales of used tyres.

Question 17. To Brazil.
Could you please comment on the statement made by the European Communities in paragraph 36 of its first oral statement?

Response of Brazil

58. Suitability figures aggregated by Mazola are the best available estimate of how many tyres collected in Brazil are suitable for retreading. Only the private sector keeps this kind of information, and no country, including Brazil, can provide a precise suitability figure. The Government of Brazil sought out other sources in addition to Mazola, but no other company kept record of the actual numbers of suitable tyres.

59. Brazil believes that the Mazola figures are both reliable and representative. Mazola selects suitable casings for Brazil's leading retailer of tyres, DPaschoal, which operates in more than 200 Brazilian cities in seven states, accounting for 78 per cent of the Brazilian fleet of motor vehicles. Because of the company's extensive footprint, a sample based on DPaschoal's numbers is representative of used tyre collections in Brazil. The suitability data are also reliable because they were not prepared for purposes of this dispute, but are Mazola's internal data.

60. Contrary to the European Communities' suggestion, Mazola figures do not contradict any statements made by the Brazilian authorities. *See* Brazil's Response to Question 25.

Question 18. To Brazil.
How many injunctions are currently in force, that allow imports of used tyres from the European Communities, and what volumes of imports does this represent? Is there a possibility that retreaders in Brazil may import (more) used tyres in the future by submitting new injunction requests? On what basis do you argue in paragraph 51 of your first oral statement that future requests for injunctive relief will soon be denied ad portas?

Response of Brazil

61. The cases related to the importation of used and retreaded tyres brought against the Federal Union are decided by the members of the Federal Judiciary. There are 988 federal judges in Brazil who adjudicate the cases in the first instance. At the appellate level, the country is divided into five regions and each has an Appeals Court. There are 133 federal justices acting in the five Appeals Courts. To obtain the information required by the Panel, the Brazilian Government is consulting these Appeals Courts. Brazil will provide this information as soon as possible.

62. The evolution of the Brazilian case law on the subject supports Brazil's statement that future requests for injunctions will soon be denied *ad portas*. As Brazil explained in the response to Question 14, the Federal Supreme Court and all Federal Appeals Courts have already rejected most of the arguments used by importers to obtain the preliminary injunctions. Imports of used tyres continue, for the most part, not because courts are issuing more injunctions, but because some of the previously-issued injunctions remain in effect. While nothing prevents domestic retreaders from submitting requests for new preliminary injunctions, fewer and fewer courts are now willing to grant them.

63. One of these imports authorizations is currently on the threshold of being analyzed by the Federal Supreme Court. In 2003, the larger importer of used tyres into Brazil obtained such an authorization to import used tyres as raw material. On March 10th 2006, the 2nd Regional Federal Tribunal ruled in favor of the Government and reversed the decision which granted the authorization. On May 17th, the importer presented an "Extraordinary Appeal" so as to submit the dispute to the Federal Supreme Court. The "Extraordinary Appeal" is now under consideration by the president of the 2nd Regional Federal Tribunal, which must analyze whether the appeal fulfills all the procedural requirements. Therefore, it is highly probable that in the next few months the Supreme Court will adjudicate the issue. Given the overwhelming prevalence of decisions recognizing the legitimacy of the ban, the Government anticipates that the Federal Supreme Court will put an end to the loophole that have allowed millions of used tyres to be imported into Brazil.

Question 19. To Brazil.
Could you please clarify what is, in your view, the relevance to the Panel's assessment of the fact that imports of used tyres are taking place, under court injunctions? Given that these imports are taking place under court injunctions (as opposed, for instance, to illegal trafficking), can they be considered to be taking place lawfully?

Response of Brazil

64. The fact that imports of used tyres are taking place under preliminary injunctions issued by some courts in Brazil is relevant to demonstrate that, in the absence of governmental intervention, domestic retreaders will continue to import high volumes of cheap casings instead of collecting and retreading tyres that have been used in Brazil. The fact that local retreaders are desperately seeking to circumvent the import ban through court injunctions demonstrates, therefore, that the ban is necessary to induce local retreaders to collect waste tyres accumulated in Brazil for retreading, rather than importing used tyres – many of which are discarded upon importing for not being suitable for retreading – which only exacerbates the waste tyre accumulation problem.

65. The imports of used tyres under preliminary injunctions can be considered to be taking place lawfully in a procedural sense in that the issuing courts had the legal power to do so. Nevertheless, the fact that imports of used tyres are taking place under procedurally correct court injunctions does not mean that those injunctions were properly granted as a matter of substantive law. As Brazil has stated numerous times in this proceeding, in two thirds of the cases, the courts that issued the injunctions concluded that they were in error to do so and reversed their own original decisions. Moreover, in 92.5 per cent of the remaining cases, the court of appeals has overruled the court of lower instance and lifted the injunction. Courts have taken notice of this precedent and will soon stop granting these *ex parte* injunctions altogether.

Question 20. To both parties.
Could you please provide further evidence in support of the claims that Brazilian used tyres are or are not suitable for retreading? (see positions in European Communities' first written submission paragraphs 81 and 85, and Brazil's first written submission paragraphs 79 and 108)

Response of the European Communities

66. First of all, the European Communities would like to remark that as regards the conditions of Article XX(b), the burden of proof is on Brazil. This means *inter alia* that Brazil must demonstrate the contribution its import ban makes to the reduction of waste tyres in Brazil. Therefore, it is for Brazil to prove whether and to which extent tyres used in Brazil are retreadable, and are actually retreaded.

67. This remark notwithstanding, the European Communities can refer the Panel to the evidence it has already submitted in para. 81 and 82 of its first written submission. Notably, it is recalled that INMETRO, as the Brazilian Standard Setting Authority, has confirmed that the use of Brazilian domestic casings for retreading is not viable (Exhibit EC-45). In addition, the European Communities has referred to Brazilian court judgments in which the importation of used casings was authorised as "indispensible primary matter" for domestic retreaders (Exhibit EC-46).

68. In addition, the European Communities submits, as Exhibit EC-72, a video produced by the Brazilian retreaders association ABIP and ABR. In this video, which documents the ongoing debate in Brazil on the prohibition of the importation of used tyres, several Brazilian retreaders testify that they require the importation of used tyres in order to be able to carry out their retreading business in Brazil. For instance, Ademir Serafin, President of the Association of Retreaders of the State of Sao Paolo, declares the following:[21]

> "We need good quality casings in order to supply the domestic market, casings that are not available currently, jeopardising our activity [...]"

69. The European Communities would also remark that there is no plausible explanation why Brazilian retreaders should dispense considerable resources in order to be obtain the right to import retreadable casings, if such casings were readily available in Brazil. Brazil's efforts to argue that importing casings is cheaper than procuring them domestically are unconvincing. Overall, the considerable and sustained effort by Brazilian retreaders to obtain the importation of used casings provides convincing evidence that retreadable casings are not available in sufficient quantity in Brazil.

Response of Brazil

70. Statistics on the retreadability of casings are scarce all over the world. There are no official sources for this information neither in Brazil nor anywhere else. When available, such information is always provided by the private sector, typically by collectors and retreaders. The Government of

[21] Exhibit EC-72, minute 8:35.

Brazil has researched intensively to obtain precise data on the retreadability of domestic casings and found no source other than Dpaschoal and Mazola. As Brazil explained in its response to Question 17, Brazil believes that the Mazola suitability figures are representative and reliable.

71. Indirect evidence also suggests that the share of retreaded tyres made from domestic casings is quite high. According to the industry data, between 2001 and 2005, more than 84 million tyres were retreaded in Brazil. In the same period, just 27 million used tyres were imported. Many imported casings are not suitable for retreading, but even if all imported casings had been retreaded between 2001 and 2005, 57 million retreads would have still been manufactured from domestic casings. *See* Exhibit BRA-95.

72. Finally, Brazil has a robust retreading industry that dates back to the 1950s. The industry relied solely on domestic casings before the imported casings began to come in 1990s. At the time, domestic retreaders reported no problems with finding suitable casings in Brazil.

Question 21. To Brazil.
Brazil submits in paragraphs 76 and 153 of its first written submission that while domestic court proceedings are pending on the importation of used tyres, the Brazilian government has worked vigorously to stop the importation of both retreaded and used tyres (see Brazil's first written submission paragraph 76). Could Brazil explain what specific efforts have been made by the Brazilian government in this regard?

Response of Brazil

73. Brazil is a democratic country where the rule of law prevails. Because the importation of used tyres occurs only through the judicial decisions, the only measure the Government can employ to oppose these imports is to present its perspective in the course of the proceedings and appeal when necessary. That is what the government has done with significant success so far. Every time a domestic retreader requested an injunction, the Government of Brazil has actively opposed it, once notified of the pending case. The Government participated in the proceedings through its various agencies, including DECEX and IBAMA. *See* Exhibit BRA-86.

74. In addition, the very regulation that the European Communities now challenges, Portaria SECEX 8/2000 (subsequently incorporated into Portaria SECEX 14/2004), was adopted in an effort to stop the injunctions. *See* Brazil's Response to Question 29.

Question 22. To the European Communities.
Please clarify whether the increase in the imports of used tyres between 2003 and 2005 described in paragraph 79 of the European Communities' first written submission is entirely attributable to import authorized under the injunctions granted by Brazilian courts?

Response of the European Communities

75. The European Communities understands that this is the case. However, since the administration of Brazilian law is the responsibility of the Brazilian authorities, it is primarily for Brazil to explain the reasons for which the importations were allowed.

Question 23. To the European Communities.
In paragraph 80 of your first written submission, you indicate that EU exports of retreaded tyres to Brazil have declined dramatically to reach "close to zero". In light of the import prohibition affecting imports of retreaded tyres from the European Communities, could you please clarify what the small amount of imports that does take place corresponds to ?

Response of the European Communities

76. According to Brazil's data base Alice, on which the graph provided in paragraph 79 of the European Communities' first written submission was based, Brazil still imported, in 2005, 302,435 kg of retreaded tyres from the European Communities. The extractions from the Brazilian data base are provided as Exhibit EC-73.

77. The European Communities does not know what is the exact reason for these numbers. To the knowledge of the European Communities, the import ban on retreaded tyres is generally applied against all imports from non-MERCOSUR countries, as evidenced by the dramatic decline in imports from the European Communities since 2000. The European Communities suggests asking the question to Brazil as the WTO Member applying the import ban.

Question 24. To Brazil.
On the Brazilian market for tyres, what is the distribution between sales of new and retreaded tyres? How is that distribution affected, if at all, by the existence of the import ban?

Response of Brazil

78. Between 2000 and 2005, the distribution in the market share of new and retreaded tyres in Brazil changed as following:

- New tyres (domestic): *decreased* from 54.2% to 50.8%.
- New tyres (imported): *increased* from 6.6% to 9.1%.
- Retreaded tyres (domestic): *increased* from 34.3% to 39.7%.
- Retreaded tyres (imported): *decreased* from 4.9% to 0.4%.

79. The data demonstrate that new tyre manufacturers in Brazil have not benefited from the import ban – their market share fell, while the market share of imported new tyres has increased.

80. The data on new tyres were provided by the new tyre manufacturers association, ANIP, and refers to sales in the domestic market. The data on domestic retreaded tyres were provided by the retreaders association, ABR, and refers to production, which, due to negligible exports, is practically equal to domestic market sales. The import data were provided by the Ministry of Development, Industry and Foreign Trade.

Question 25. To Brazil.
Please comment on the following passage of a Technical Note of 3 October 2000 of INMETRO cited by the European Communities at paragraph 81 of its first written submission and mentioned again in paragraph 35 of the European Communities' first oral statement:

"the national tyre reconditioning industry, mainly the remoulded tyre industry, needs to import used tyres in order to use the carcasses as raw material. It is widely confirmed that using domestic used tyres to obtain the carcasses is economically unviable given our conditions of use".

Response of Brazil

81. There are two reasons why the European Communities' reliance on Technical Note INMETRO 83/2000 is misplaced: first, the note merely memorializes the position of the industry's stakeholders as stated to INMETRO. It does not reflect INMETRO's position; and second, the note talks of *economic* viability, not about availability of suitable casings:

(e) Legal effect

The note's only function was to memorialize INMETRO's communications with representatives of Brazil's retreading industry. The views that the note reflects are not the official views of Brazil's authorities, as the European Communities suggests, but the views of the domestic retreaders. The note is not based on any independent investigation by INMETRO and is by no means a final rule or a statement of INMETRO's official position. INMETRO's actual position was formalized in Rule No. 13 of 23 January 2004, which made no mention of suitability.

The European Communities' reliance on the note is particularly disingenuous because INMETRO has repudiated the document. *See* Nota Técnica INMETRO DQUAL 15/2005 (Exhibit BRA-96). INMETRO took the unusual step of specifically repudiating the note because domestic retreaders used it in courts and in the media to support the low suitability argument, as the European Communities does now. In its letter to one of the retreaders, INMETRO threatened legal action should such misuse continue. In that letter, INMETRO expressed concern that the retreader's use of the note created an appearance that a quasi-governmental agency shared the retreader's position on suitability. INMETRO has made clear that the note "had no validity whatsoever" and that any technical note is but an "opinion, not binding the Administration or private parties to its motive or conclusions, unless approved by... Regulations." *See* Notificação INMETRO/DQUAL 10/2005 (Exhibit BRA-97).

(f) Economic viability

In addition, the note did not mention suitability at all – it only stated that obtaining domestic carcasses was not *economically* viable. Economic viability is not the same as the actual suitability of domestic casings – it merely refers to the higher costs of obtaining domestic casings.

Question 26. To Brazil.
Could you please comment on the statement made by the European Communities in paragraph 39 of its first oral statement about the origin of the used tyres retreaded in Brazil?

Response of Brazil

82. The rationale behind the import ban on retreaded and used tyres was to compel the Brazilian retreaders to use only casings collected in the country, and thus to carry out the waste management policy designed by the environmental authorities. However, due to the preliminary injunctions,

Brazil's retreaders processed not only domestic, but also foreign casings. The European Communities' own numbers, however, do not support its assertion that Brazilian retreaders operate largely with imported casings. Even if Brazil retreaded all of the 10.5 million casings imported in 2005, this would have accounted for just 56 per cent of tyres retreaded in Brazil that year. *See* Exhibit BRA-95. The actual percentage is even lower because, as explained in response to Question 16, many imported casings are not suitable for retreading and are discarded after pre-selection.

C. THE IMPORT PROHIBITION

Question 27. To the European Communities.
Could you please clarify whether you are seeking a ruling only in respect of Portaria No. 14, or also in respect of other measures? (see reference in European Communities' first written submission footnote 34 to 59).

Response of the European Communities

83. As regards the prohibition on imports of retreaded tyres, the European Communities is primarily seeking a ruling in respect of Portaria Secex No. 14, which it understands to constitute the current legal basis of the ban.

84. However, the European Communities notes that Brazil has, in the past, claimed that prohibitions on the importation of used goods equally apply to retreaded tyres.[22] During the first substantive meeting with the Panel, Brazil equally referred occasionally to retreaded tyres as a type of used tyre.[23]

85. As the European Communities has already set out, retreaded tyres are not to be considered as used tyres. However, if the Brazilian authorities were to apply the current measures banning the importation of used goods[24] also to retreaded tyres even if Portaria Secex No. 14 were amended by removing retreaded tyres from the import ban, then this would equally constitute a violation of Brazil's WTO obligations.

86. The European Communities would suggest asking Brazil for a clarification on this issue. Should Brazil reply that it would apply the measures banning importation of used goods to retreaded tyres, then the European Communities would equally request a ruling with respect to those measures, but only to the extent that they were to apply to imports of retreaded tyres.

Question 28. To Brazil.
The relevant Brazilian measures concerning the import prohibition on retreaded tyres have been revised twice respectively in 2003 and 2004 following the introduction of the first regulation to this effect (i.e. Portaria SECEX No. 8) in 2000 (see reference in European Communities' first written submission paragraphs 53-55). Could Brazil explain the purpose of these revisions?

Response of Brazil

87. *Portarias* SECEX 17/2003 and 14/2004 were adopted with the purpose of consolidating foreign trade regulations in a single legal document to improve transparency and facilitate foreign trade operations. These *portarias* simply mirror the text of Portaria SECEX 8/2000 and Portaria SECEX 2/2002, which introduced the MERCOSUR exemption.

[22] European Communities' first written submission, para. 71, on Brazil's defense before the MERCOSUR Arbitral Tribunal.

[23] Brazil's first oral statement, para. 26: "used tyres, including retreaded ones".

[24] European Communities' first written submission, para. 59, fn. 34.

Question 29. To Brazil.
Brazil states in paragraph 65 of its first written submission that the imports of retreaded tyres in its territory continuously increased until 1998, when it clarified that its existing import ban on used consumer goods included retreaded tyres. Please explain how specifically Brazil 'clarified' its policy? Does it mean that imports of retreaded tyres were banned by Brazil even before 2000 when Portaria SECEX No. 8 was established?

Response of Brazil

88. Yes, Brazil has banned imports of used and retreaded tyres since Portaria DECEX No. 8 of 10 May 1991. However, because that regulation dealt with used consumer goods in general, and did not explicitly name tyres or any other goods, some courts and customs authorities erroneously concluded that it did not apply to retreaded tyres or used tyres imported as raw materials for retreading. To safeguard the integrity of the prohibition, Brazil adopted Portaria SECEX 8/2000, which explicitly prohibited imports of retreaded and used tyres, whether imported as part-worn tyres or raw material for retreading.

Question 30. To Brazil.
Please clarify the meaning of the terms "used and retreaded tyres" in Article 40 of Portaria No. 14.

Response of Brazil

89. Because Portaria SECEX 14/2004 is a foreign trade regulation, it employs the HS terminology. Thus, the terms "used" and "retreaded tyres" refer, respectively, to HS tariff lines 4012.20 and 4012.11, 4012.12, 4012.13, and 4012.19.

Question 31. To the European Communities.
In paragraph 56 of your first written submission, you cite Article 40 of Portaria No. 14 as referring to "retreaded used tyres". It appears that the original text version of this provision refers to "retreaded and used tyres". Could you please clarify what products are, in your understanding, covered under this provision (i.e. on the one hand, used tyres, and on the other hand, retreaded tyres, or tyres that are both used and retreaded)?

Response of the European Communities

90. In the translation provided by the European Communities, the text "retreaded used tyres" should be corrected to read "retreaded and used tyres", in conformity with the Portuguese original. The European Communities understands Article 40 of Portaria No. 14 to apply both to used tyres and to retreaded tyres.

Question 32. To Brazil.
Article 40 of Portaria No. 14, as cited by the European Communities at paragraph 56 of its first written submission, refers to "imports of retreaded used tyres to be used as consumer goods or raw materials…". Could you please clarify whether any other uses of the tyres at issue would be possible? If so, what uses? Specifically, can retreaded tyres be imported for purposes other than being used as consumer goods?

Response of Brazil

91. No other uses exist. Retreaded tyres are imported to be used only as consumer goods. The language "to be used as consumer goods or raw materials" modifies the term "used tyres". The language clarifies that used tyre imports are prohibited whether they are imported as part-worn tyres for additional use "as is" (consumer goods) or as raw material for retreading. The purpose of this language is to remove any ambiguity about the legality of importing used tyres for retreading.

Question 33. To Brazil.
Brazil did not provide, in its first written submission any specific responses to the European Communities' claims that the import prohibition, the fines on importation and marketing, the state measure and the MERCOSUR exemptions are inconsistent with various provisions of the GATT (i.e. Article XI:1, Article III:4, Article I:1 and Article XIII:1). Does this mean that Brazil concedes the European Communities' claims in this respect and that the Panel can accept the European Communities' arguments in respect of these claims?

Response of Brazil

92. Brazil does not contest that the measures in question are prima facie inconsistent with Articles I:1, III:4, XI:1, and XIII:1. Nevertheless, Brazil has demonstrated that the measures are justified by Articles XX(b) and (d), and XXIV, and therefore are not inconsistent with the those provisions. To the extent that the European Communities claims that the fines violate Article III:4, Brazil does not acknowledge any inconsistency because the fines are ancillary to the import ban and, therefore, are a prima facie violation of article XI:1, not article III:4.

D. ARTICLE XX(B) DEFENCE AND THE EXISTENCE OF ALTERNATIVE MEASURES

Question 34. To the European Communities.
Do you accept that there are human health risks associated with waste tyres (see paragraph 16 of your first oral statement)? If so, could you please clarify whether, in your view, this is sufficient for the measures at issue to fall within the scope of Article XX(b) ?

Response of the European Communities

93. Waste tyres are considered as inert waste in the Brazilian legislation[25] and they are classified as non-hazardous waste in the European Communities' legislation.[26] Health risks may arise from waste tyres only in case of incorrect management. Some of the arguments advanced by Brazil in this case prove this assertion: only abandoned tyres or tyres negligently placed in monofills may become breeding places for mosquitoes and only accidents or arsons in badly designed or uncontrolled monofills cause smoke plumes.

94. Besides, in our case, the ban is not related to waste tyres but to retreaded tyres, which, as the European Communities has explained, are new products made with recycled material. Thus, the ban has no direct relationship with the interests protected, which are life and health in this case.

95. Finally, as the European Communities explained in its first written submission and its first oral statement and Korea in its third party submission, the import ban is not designed to protect the interest at stake because of three flaws in the design of the system: first, not all new tyres sold in Brazil are retreadable or retreaded; second, tyres other than passenger car tyres, whose import ban is also banned, are retreadable several times, and, third, the import ban is not applied to retreaded tyres from MERCOSUR countries. Moreover, confirmation that import bans on retreaded tyres are not related to environmental protection can also be found in the rulings, awards and submissions made by Brazilian and MERCOSUR authorities mentioned in paragraphs 130 to 133 and 164 to 166 of the European Communities' first written submission.

96. For all these reasons, the European Communities cannot accept that Brazil´s assertion that the aim of the ban is to protect life and health is sufficient for the measures at issue to fall within the scope of Article XX(b). The justification is apparent and not real.

[25] Article 1 (b) and 4 of Resolution CONAMA No 23 of 12 December 1996, Exhibit EC – 33.

[26] Code 16 01 03 of the Index in relation to paragraph 4 of the Annex to Commission Decision 2000/532/EC of 3 May 2000 establishing a list of wastes, Exhibit EC - 74.

Question 34*bis*. To Brazil.
Could you please clarify what are the exact environmental risks posed by the disposal of tyres (Brazil's first written submission paragraphs 18 and 29-37)?

Response of Brazil

97. Stockpiling, one of the disposal methods that the European Communities endorses, leads to propagation of mosquitoes that carry diseases, such as dengue, yellow fever, malaria, and West Nile virus. These diseases impact both humans and animals. Stockpiled tyres can also catch fire, and the pyrolytic oil released during tyre fires contaminates surface water, soil, and groundwater. This contamination damages animal and plant life. Dioxins and other pollutants released during tyre fires impact the health of animals in the same manner that they impact human health. The same pollutants are released during incineration in cement kilns, another method the European Communities endorses. While stockpiling and incineration are the disposal methods that cause the most harm to the environment, they are not the only ones. Studies have shown, for example, that artificial reefs made of waste tyres (a civil engineering use) produce toxic leachate that harms rainbow trout and other forms of aquatic life. *See* Exhibit BRA-1. *See also* Non-Party Submission by Humane Society International (Exhibit BRA-98) for additional information.

Question 35. To Brazil.
Could you clarify how exactly the environmental risks that you identify relate to the protection of "human, animal or plant life or health" within the meaning of Article XX(b)? (see statements in e.g. Brazil's first written submission paragraphs 4, 6, 20, 21 and 22).

Response of Brazil

98. Please see answer to Question 34*bis*.

Question 36. To Brazil.
Could you please clarify what exactly is the level of protection you are seeking to achieve through the import prohibition on retreaded tyres?

Response of Brazil

99. Brazil seeks to achieve a high level of protection through the import ban. The level of protection sought is achieved by avoiding the generation of additional tyre waste to the extent possible. The reduction of any amount of tyre waste contributes to the end pursued. As a legal matter, WTO Members have the right to set the level of protection they deem appropriate and are not required to quantify that level in exact terms, since, as a practical matter, such quantification would be very difficult, if not impossible. *See Appellate Body Report, EC – Asbestos, at para. 167.*

Question 37. To both parties.
Could you please elaborate on whether policies to address tyre waste by "non-generation of additional waste" are a generally recognized means of addressing the risks arising from waste tyres? Could you please also indicate the extent to which policies based on the "lifecycle" of the product are a generally recognized means of dealing with waste management issues? In addressing this question, please cite any relevant international standards or reference studies, as well as specific illustrations of the application of such policies.

Response of the European Communities

100. In relation to waste management, the reduction principle has only been recognised in Article 4(2)(a) Basel Convention, but limited to the waste streams covered by the Convention

(hazardous waste and households waste) and subject to taking into account social, technological and economic aspects. The Rio Declaration adopted in June 1992 does not mention the principle[27], though a reference can be found in Chapter 21, heading A, of Agenda 21, but only limited to the adoption of programmes to reduce the production of agrochemical wastes, containers and packaging materials, which do not meet hazardous characteristics.[28] Waste tyres are not mentioned.

101. This notwithstanding, the European Communities agrees that reduction of waste is, besides reuse, recycling, and recovery, one of the means of addressing waste management issues. However, this is a guiding principle and does not mean that reduction of waste should, under all environmental and economic conditions, be preferred to other waste management options. Such an approach would imply the prohibition of products that produce or turn into waste, which is not feasible for most products, including tyres. For the same reason, an import restriction cannot simply be justified by the desire to reduce waste from imported products.

102. As regards the second part of the question, the European Communities is not aware of any relevant international standards on the lifecycle of products. In 1994, the European Communities adopted Directive 94/62 on packaging and packaging waste, whose Article 4 requires the Member States to take preventive measures to reduce waste. This Directive also contains recycling and recovery targets that take into account the overall environmental benefits of these options over the life cycle of the concerned materials. Articles 7 and 8 lay down provisions on return, collection, recovery, marking and identification systems. Other specific obligations in relation to other waste streams are found in Articles 4 (product design) and 5 (separate collection) of Directive 2002/96 on waste electrical and electronic equipment and in Article 4 (prevention) and 5 (collection) of Directive 2000/53 on end-of life vehicles. None of these Directives establishes import ban as a measure to reduce waste production. The European Communities has not adopted specific measures on waste tyres, with the exception of the ban to landfill used tyres laid down in Article 5(3)(d) of Directive 1999/31 on the landfill of waste, which is aimed at increasing the reuse, recycling and recovery of used tyres.

103. Moreover, the European Communities would add that the present case concerns the justification of an import ban under Article XX(b). This requires Brazil to demonstrate the its measure is necessary for the protection of human, animal or plant life or health, and that it is in accordance with the requirements of the chapeau of Article XX. The European Communities does not see that considerations regarding the life-cycle of products, and of tyres in particular, are relevant in this context.

Response of Brazil

104. Yes, policies to address tyre waste by "non-generation of additional waste" are a generally recognized means of addressing the risks arising from waste tyres.

105. See EU Council Directive 75/442/EEC, of 15 July 1975, on Waste, Art. 3.1(a) (Exhibit BRA-105) – "Member States shall take appropriate steps to encourage the prevention, recycling and processing of waste, the extraction of raw materials and possibly of energy therefrom and any other process for the re-use of waste".

106. See EU Community Strategy for Waste Management, Communication from the Commission, COM(96)399 final, 30 July 1996, para. 20 (Exhibit BRA-106) – "The Commission therefore confirms the hierarchy of principles established by the strategy document of 1989 that prevention of the generation of waste shall remain the first priority, followed by the recovery of waste and finally by the safe disposal of waste".

[27] Exhibit EC-53.
[28] Exhibit EC-75.

107. See EU Council Directive 1999/31/EC, of 26 April 1999, on the landfill of waste, Recital (8) (Exhibit BRA-42) – "Whereas both the quantity and hazardous nature of waste intended for landfill should be reduced where appropriate".

108. See EU Directive 2000/53/EC of the European Parliament and of the Council, of 18 September 2000, on end-of-life Vehicles, Recital (4) (Exhibit BRA-43) – "In order to implement the precautionary and preventive principles and in line with the Community strategy for waste management, the generation of waste must be avoided as much as possible".

109. See EU Directive 2000/53/EC of the European Parliament and of the Council, of 18 September 2000, on end-of-life Vehicles, Recital (11) (Exhibit BRA-43) – "It is important that preventive measures be applied from the conception phase of the vehicle onwards and take the form, in particular, of reduction and control of hazardous substances in vehicles, in order to prevent their release into the environment, to facilitate recycling and to avoid the disposal of hazardous waste. In particular the use of lead, mercury, cadmium and hexavalent chromium should be prohibited. These heavy metals should only be used in certain applications according to a list which will be regularly reviewed. This will help to ensure that certain materials and components do not become shredder residues, and are not incinerated or disposed of in landfills".

110. See EU Directive 2000/53/EC of the European Parliament and of the Council, of 18 September 2000, on end-of-life Vehicles, Art. (1) (Exhibit BRA-43) – "This Directive lays down measures which aim, as a first priority, at the prevention of waste from vehicles and, in addition, at the reuse, recycling and other forms of recovery of end-of life vehicles and their components so as to reduce the disposal of waste, as well as at the improvement in the environmental performance of all of the economic operators involved in the life cycle of vehicles and especially the operators directly involved in the treatment of end-of life vehicles".

111. See EU Directive 2000/76/EC of the European Parliament and of the Council, of 4 December 2000, on the incineration of waste, Recital (8) (Exhibit BRA-34) – "The Communication from the Commission on the review of the Community Strategy for waste management assigns prevention of waste the first priority, followed by reuse and recovery and finally by safe disposal of waste; in its Resolution of 24 February 1997 on a Community Strategy for waste management (6), the Council reiterated its conviction that waste prevention should be the first priority of any rational waste policy in relation to minimising waste production and the hazardous properties of waste."

112. See EU Decision nº 1600/2002/EC of the European Parliament and of the Council, of 22 July 2002, laying down the Sixth Community Environment Action Programme, Recital (5) (Exhibit BRA-107) – "Greater focus on prevention and the implementation of the precautionary principle is required in developing an approach to protect human health and the environment".

113. See EU Decision nº 1600/2002/CE of the European Parliament and of the Council, of 22 July 2002, laying down the Sixth Community Environment Action Programme, Art. (8) (Exhibit BRA-107) – "The aims set out in Article 2 should be pursued by the following objectives: (...) Achieving a significant overall reduction in the volumes of waste generated through waste prevention initiatives, better resource efficiency and a shift towards more sustainable production and consumption patterns; a significant reduction in the quantity of waste going to disposal and the volumes of hazardous waste produced while avoiding an increase of emissions to air, water and soil".

114. See Environment Agency (UK), Tyres in the Environment, at § 4.1 (Exhibit BRA-1) – "The most efficient way of dealing with waste is to find ways to prevent or reduce its production in the first place. It is currently only possible to produce tyres with a limited lifespan, and there will always be used tyres to deal with. But there are ways to reduce the number of tyres we use and therefore the quantity of waste generated".

115. See also Non-Party Submission by Center for International Economic Law (Exhibit BRA-99).

Question 38. To the European Communities.
In paragraph 84 of your first oral statement, you indicate that Brazil has numerous alternatives at its disposal, "including measures aiming to reduce the accumulation of waste tyres". In light of this statement, could you please clarify :

(a) whether you consider that measures aiming to reduce the accumulation of waste tyres can, as a matter of principle, constitute a legitimate response to the health problems arising from waste tyres ; and

(b) what alternatives you are referring to, other than an import ban, as far as retreaded tyres are concerned ?

Response of the European Communities

116. The European Communities considers that, as a matter of principle, measures aiming to reduce the accumulation of waste tyres can constitute a legitimate response to health problems arising from waste tyres, provided that the reduction measures are not discriminatory and that the necessary measures have been taken to manage all waste tyres streams correctly. Otherwise, the measures may hide the protection of non-legitimate interests.

117. Paragraph 84 of the European Communities' first oral statement refers to measures aiming at reducing the accumulation of waste tyres that are mentioned in paragraphs 57 to 67 of the European Communities' FOS. In relation to tyres that have already been retreaded, any policy aiming at a longer safe use of retreaded tyres will contribute to the reduction in the accumulation of waste tyres. Better vehicles maintenance, including technical inspection, as well as educational campaigns on better driving habits are two examples of this kind of policies. In addition, Brazil might also adopt measures which reduce the use of cars in Brazil, for instance through the promotion of public transport in urban areas.

Question 39. To the European Communities.
Please comment on the following passage of the EC directive on Incineration of Waste cited at paragraph 75 of Brazil's first written submission:

"waste prevention should be the first priority of any rational waste policy in relation to minimizing waste production and the hazardous properties of waste."

Response of the European Communities

118. This passage cited by Brazil in its first written submission is taken from recital 8 of Directive 2000/76 on the incineration of waste and forms part of a policy declaration made by the Council of Ministers of the European Communities in its Resolution of 24 February 1997 on a Community Strategy for waste management.

119. The recital makes a reference to the first in the hierarchy of policy principles in waste management in the European Communities: reduce, reuse, recycle and recover. These principles are guidance for the European Communities and the EC Member States when adopting legislation on those waste streams requiring specific legislation. However, as the European Communities has already explained in its answer to Question 37, this does not mean that policies to reduce waste should preferred to other waste management options at all cost, nor that the reduction of waste justifies restrictions imposed on imported products.

Question 40. To Brazil.
What is the precise impact of the restriction on the importation of retreaded tyres, on the generation of additional waste in Brazil? In answering this question, please indicate as precisely as possible how much less waste Brazil accumulates, on an annual basis, as a result of the import restriction? How is this calculated?

Response of Brazil

120. The precise impact of Brazil's restriction on the importation of retreaded tyres on the generation of additional waste in Brazil is clearly indicated by the following figures:

Brazil: Importation of Retreaded Tyres
(in tonnes)

Year	Imported Retreaded Tyres
1999	18,455
2000	17,597
2001	8,181
2002	3,610
2003	1,507
2004	2,274
2005	1,727

121. The importation of retreaded tyres into Brazil in 2005 corresponded to less than 10 per cent of the volume in 1999, the year before the adoption of Portaria SECEX 8/2000. As Brazil has largely demonstrated in this dispute, retreaded tyres are short lifespan products and their importation generates unwanted additional volumes of waste tyres in the territory of the importing country. Therefore, any reduction in the importation of such product necessarily also leads to a corresponding reduction in the volume of waste tyres generated in the importing country.

122. Brazil never doubted that restricting the importation of retreaded tyres would reduce the generation of waste tyres in its territory. In fact, that is exactly why it banned imports of retreaded tyres, as well as of used tyres. The precise calculation of how much less waste tyres Brazil accumulated in the last years as a result of the import restriction applied on retreaded tyres is not an easy task. To obtain such figures – which would always be estimates – reflecting the non-generation of wastes in the Brazilian territory, it would be necessary to work with different trade flow scenarios, from the most conservative to the most explosive one. Moreover, since Brazil's measure is a non-generation measure, any calculation of the benefits to the Brazilian environment of the restriction should take into account what would happen if the measure was not in place.

123. The European Communities does not deny that it expects to export a lot of retreaded tyres to Brazil in case the ban is removed and that is exactly why it is challenging Brazil's measures in this dispute. Brazil will be flooded with retreaded tyres from the European Communities and other countries if it is forced to lift the ban. Since retreaded tyres are short-lifespan products which generate wastes earlier than new tyres, an opening of the Brazilian market to imports of such products is certain to increase the generation of dangerous unwanted rubber wastes in Brazil.

124. Although Article XX does not require any kind of quantification, Brazil will do its best to present to the Panel, as soon as possible, estimates as precise as possible on how much less tyre waste it accumulates as a result of the import ban on retreaded tyres.

Question 41. To Brazil.
The European Communities argues, in paragraph 127 of its first written submission, that the import ban on retreaded tyres does not reduce the rate of accumulation of waste tyres, inter alia because :

"... it can be assumed that practically every potential sale of an imported retreaded tyre is currently, due to the import ban, substituted by a sale in Brazil of a new (domestic or imported) tyre or of a domestic retreaded tyre, most likely manufactured from an imported used tyre… ".

Please comment on this assertion.

Response of Brazil

125. The assertion is wrong. It is based on the assumption that virtually all tyres retreaded in Brazil are manufactured from imported used tyres. This is not the case. *See* Exhibit BRA-95. As explained in the response to question 20, between 2001 and 2005, more than 84 million tyres were retreaded in Brazil. In the same period, only 27 million used tyres were imported. Not all of the imported casings are suitable for retreading, and even if they were, some 57 million tyres would have still been retreaded from domestic casings.

Question 42. To the European Communities.
Please comment on Brazil's arguments in paragraph 55 of its first oral statement, including the conclusions of the report of the British Used Tyre Working group cited by Brazil in that paragraph.

Response of the European Communities

126. Contrary to what Brazil claims in paragraph 55 of its first oral statement, paragraph 11.5 of that report does not refer to the problems raised by imports of retreaded tyres. The report refers, on the contrary, to the existence, within the European Communities single market, where goods (waste included) flow freely across borders of the EC Member States, of different national regimes on the management of waste tyres. This is not the issue at stake in the case before the Panel.

Question 43. To Brazil.
Under CONAMA Resolution 258, are the disposal plans submitted by tyre importers and manufacturers approved by the Brazilian authorities? If so, what types of disposal methods do such authorities usually approve? What types of disposal methods are used by the Brazilian companies (46 according to Brazil) that are authorized to process waste tyres in Brazil? (see statement in Brazil's first written submission paragraphs 71 and 74).

Response of Brazil

127. Under CONAMA Resolution 258, before they can import tyres, the importers must demonstrate that they have already disposed of the amount of waste tyres corresponding to the number of tyres they intend to import. Manufacturers must present annual reports of their production and demonstrate that they have disposed of the corresponding amount of wastes in the same period.

128. The disposal methods are not proposed by the importers and manufacturers. Rather, they are licensed by state environmental authorities according to their assessment of the best disposal alternatives available. The disposal methods usually approved by these authorities are: co-processing in cement kilns, co-processing with bituminous schist (a form of pyrolysis), rubber asphalt, rubber products and appliances (sandals, shoes, carpets).

Question 44. To Brazil.
Could Brazil provide more information on the waste tyre disposal schemes implemented in the States of Paraná, Pernambuco and Paraíba, including on the amount of tyres disposed of under these schemes and the disposal methods used? (see references in European Communities' first written submission paragraph 113).

Response of Brazil

129. These programs are *collection* schemes that private companies have introduced to meet the obligations of CONAMA Resolution 258. Under these programs, private companies typically compensate people to collect waste tyres and take them to *ecopontos* (collection points for waste tyres). According to the participating companies, most of the collected tyres are then incinerated in cement kilns.

130. These programs are not innovative waste tyre disposal solutions – they are merely collection initiatives implemented by the private sector to comply with federal collection and disposal obligations. While these programs may reduce waste tyre accumulation risks, they do not in any way reduce or eliminate the disposal risks.

Question 45. To Brazil.
Are there any disposal obligations for vehicle owners in Brazil in relation to their new and retreaded tyres after the end of their life cycles?

Response of Brazil

131. No. Brazil has opted to attribute collection and disposal obligations in relation to tyres to manufacturers and importers and has reinforced these obligations by heavy fines. Brazil believes that it is more effective, from an enforcement perspective, to impose such post-consumption obligations on importers and manufacturers than on the consumers.

Question 46. To the European Communities.
Please comment on Brazil's comments on the availability of alternative measures at paragraph 54 of its first oral statement, especially the existence of a "gap between supply and demand" in respect of certain disposal methods.

Response of the European Communities

132. Brazil's comment refers to the availability of alternative measures in relation to material recycling, namely two disposal methods: civil engineering and the construction of playgrounds. Though there are other material recycling methods, the European Communities would like to point out that Brazil insists on the tactic of eliminating alternative methods one by one by claiming, among other arguments, that the disposal capacity of each of these methods is very limited. The European Communities considers that, even if in respect of a certain disposal method there could be a gap between supply and demand, this cannot imply that the method is discarded as irrelevant for the purposes of protecting the interest that the measure at issue is pretended to pursue. As the European Communities explained in paragraph 72 of its first oral statement, all options should be implemented within a policy scheme, not in isolation, in order to ensure a sound management of waste tyres. Brazil's arguments show that this kind of policy scheme does not exist for its territory.

Question 47. To the European Communities.
Could you please clarify what is, in your view, the relevance of circumstances specific to the country implementing the measures, in an assessment of the availability of alternative measures under Article XX(b), including:

(a) Technical and financial constraints; and

(b) Specific geographical conditions.

Please also indicate which such circumstances are relevant in this case and how they might affect the availability to Brazil of the alternative measures you have identified.

Response of the European Communities

133. Circumstances specific to a country implementing measures that are claimed to be justified under Article XX(b) are relevant for assessing the availability of alternative measures. It is not easy to list those circumstances, but those mentioned in the question should be taken into account.

134. However, the European Communities considers that Brazil cannot claim to have difficulties in implementing alternative measures to the import ban on retreaded tyres. According to the World Bank's classification, Brazil is a low middle income country, but its gross national product in 2003 amounted to 1,556,182 million R$ (around 565,885 million €).[29] Brazil is a country with a functioning political system and administration and a civil society capable of reacting to the problems arising from waste management, as it is shown in the presentation prepared by Mr Marco Antonio Borzino, Solid Waste Programme Coordinator in the Ministry of Environment in Brazil,[30] where it is explained that many cities in Brazil are developing projects with non-governmental organisations and with garbage pickers associations to ensure environmentally sound management of solid wastes. The programme "Paraná Rodando Limpo" and similar programmes implemented in some other States in Brazil also prove the initiative and capacity of the Brazilian society and companies to contribute to the correct management of waste tyres.[31]

135. Moreover, Brazil is the 12th cement producer in the world, with 58 cement installation and a production of 34 million tons in 2003, as explained by the "Sindicato Nacional da Indústria do Cimento" in its 2004 Report.[32] It also has 111 paper mills located in its territory, 45% of the paper mills in Central and South America, according to the 2004 Guide to Paper Mills across the Globe.[33] Finally, the "Paraná Rodando Limpo" programme counts with the participation of "Petróleo Brasileiro S.A." (Petrobras), a partially state-owned company in the energy sector, one of the most important in the world with a capitalisation of 28,680,653 thousand € in 2006,[34] and net earnings of 49,675 billion € in 2005.[35] Besides its financial capacity, Petrobras has developed its own technology and has the capacity to transform 400 tons of tyres a day into oil and gas in its installation in São Mateus do Sul (Paraná).

136. Therefore, the European Communities believes that there are no technical constraints preventing Brazil from using the different alternatives for the disposal of waste tyres.

[29] Exhibit EC – 76.
[30] Exhibit EC – 77.
[31] The European Communities has already referred to these programmes in para. 113 of its first written submission and in para. 73 of its first oral statement.
[32] Exhibit EC – 78.
[33] Exhibit EC – 79.
[34] Exhibit EC - 80.
[35] Exhibit EC - 81.

137. In relation to the geographical conditions, Brazil has claimed that the huge size of its territory creates difficulties in managing waste tyres. The European Communities considers that whereas managing waste tyres might be a problem for small and micro States, this is not the case for countries of the size of Brazil, which, moreover, has 83 % of urban population.[36] If the argument is that there are large, isolated and virgin regions in Brazil, as the Amazon, the first flaw in that argument would be that Brazil is not expected to deal with a huge number of waste tyres in that region, due to the extreme low population density (less than 1 inhabitant per km² in general terms) and the very limited road infrastructure, as evidenced in the maps from the Brazilian Institute for Geography and Statistics.[37] Moreover, these regions will not have a retreading industry, which will often mean that new tyres become waste tyres after their first life, in the same way as retreaded tyres. Finally, the problems of the distribution and transportation of tyres into and from such regions pose themselves one way or another, no matter what kind of tyres are involved.

Question 48. To the European Communities.
What is the position of the European Communities in relation to Brazil's statement that incineration of waste tyres produces health and environmental risks even if it is carried out under controlled conditions? (see position in Brazil's first written submission paragraphs 43 and 122).

Response of the European Communities

138. Incineration of tyres under controlled conditions does not represent a significant risk for health and environment. In the European Communities, and surely also in Brazil, operational conditions, technical requirements and emission limit values for plants incinerating waste guarantee a high level of environmental and human health protection. Otherwise, incineration of tyres in kilns would have been prohibited, which is not the case either in the European Communities or in Brazil. The 2006 Report by the European Tyre & Rubber Manufacturers' Association[38] and the 2004 Report of the "Sindicato Nacional da Indústria do Cimento" in Brazil[39] show clearly that co-incineration of waste tyres in cement kilns are common practice in both WTO Members.

139. Moreover, as the document on "Formation and Release of POPs in the Cement Industry" acknowledges,[40] the most recent scientific evidence has shown that incineration of waste tyres in cement kilns does not influence or affect the emissions of dioxins and furans, as compared with the combustion of conventional fuels. Finally, SO^2 emissions may be reduced when waste tyres are co-incinerated with conventional fuels due to their lower sulphur content (1% in tyres versus around 5% in coal and petcoke). A study performed by IVL Swedish Environmental Research Institute Ltd reached the conclusion that "the utilization of used tyres [is] environmentally beneficial compared to the use of 'virgin' raw materials" and that replacing coal as a fuel in the cement kiln with used tyres was the second best scenario out of the six that were assessed in the study.[41] This study also concludes that, for lead, nickel, chromium and cadmium, exactly the same result is obtained as for the fossil energy use.

[36] Exhibit EC - 82.
[37] Exhibit EC – 83.
[38] Exhibit EC – 84.
[39] Exhibit EC – 85; at p. 44, the report states that "O co-processamento nas fábricas de cimento brasileiras é crescente, tendo aumentado 22 per cent entre 2002 e 2003" (Co-incineration in Brazilian cement kilns is increasing, having grown 22 per cent between 2002 and 2003).
[40] Exhibit EC – 86.
[41] Exhibit EC - 87.

Question 49. To Brazil.
Please comment on the argument made by the European Communities, in paragraph 92 of its first oral statement, that "what is an arbitrary or unjustifiable discrimination must be established in relation to the objectives of the measure at issue".

Response of Brazil

140. There is no defined set of factors on the basis of which it may be determined whether a measure is being applied in an arbitrary or unjustifiable manner. The objective of the chapeau is to prevent abuse of the exceptions contained in paragraphs (a) through (j) of Article XX. It is concerned with the manner in which the measure is applied. Any and all factors that would help determine whether the Member acted in good faith and had good cause for applying the measure in the manner that it did are relevant. Which are those factors can only be determined on a case by case basis and in light of the specific facts and circumstances of each case.

141. The objective of the measure at issue may be one of the many factors taken into account when determining whether a measure provisionally justified under Article XX is being applied in a manner that is not consistent with the chapeau of Article XX. Also relevant in this case are the reasons and circumstances that led Brazil to exempt MERCOSUR countries from the import ban. The fact that the exemption of MERCOSUR countries was introduced to comply with MERCOSUR provisions, as interpreted by an arbitral award, demonstrates that Brazil is not acting capriciously or in bad faith in how it applies the import ban and has not abused its right to take measures that are necessary to protect human, animal or plant life or health.

Question 50. To Brazil.
Please comment on the European Communities' arguments in paragraph 93 of its first oral statement regarding:

(a) Article XXIV:8(a) of GATT 1994; and

(b) Article 34 of the Vienna Convention on the Law of Treaties.

Response of Brazil

(a) Article XXIV:8(a) of GATT 1994

142. The MERCOSUR exemption is not incompatible with Article XXIV:8(a), as the European Communities claims. The relevant part of Article XXIV:8(a) – the parenthetical – gives Members that are part of a customs union the right to maintain duties and other restrictive regulations between the constituent territories, based inter alia on the general exceptions in Article XX, and still meet the requirement under Article XXIV:8 that restrictions be eliminated with substantially all the trade between the constituent territories. Article XXIV:8(a) cannot possibly be interpreted as imposing an obligation on Members to maintain trade restrictions between the constituent territories by invoking Article XX. A Member may be required under a regional trade agreement to eliminate trade restrictions between the constituent territories, without exception, and still exercise its right under Article XX to take measures that are necessary to protect human health and the environment, including an import ban.

143. Contrary to the European Communities' suggestion, WTO Members cannot justify otherwise inconsistent measures by simply concluding agreements with other Members that provide for discriminatory treatment. First, the European Communities is assuming that Members would act in bad faith by trying to circumvent its obligations under the GATT by relying on an exception. However, Members are presumed to act in good faith. *See EC – Hormones* (US) (Article 22.6 – EC),

para. 9. Moreover, that hypothetical agreement between the Members that the European Communities refers to would still have to meet the requirements of Article XXIV for it to justify discriminatory treatment that is contrary to Article I:1. Article XXIV contains safeguards ensuring that only bona fide customs union parties could invoke the Article to justify prima facie-discriminatory treatment. In other words, in the European Communities' hypothetical, countries attempting to discriminate against other WTO members would have to prove that they have liberalized substantially all trade among themselves and substantially harmonized duties and trade regulations for non-parties – all without raising outside trade barriers. By imposing such a high burden, Article XXIV ensures against any potential abuse.

144. In this case, it is clear that the presumption of bad faith on which the European Communities bases its argument is not present. The European Communities cannot possibly be suggesting that MERCOSUR, the second biggest customs union in the world, was designed and executed with the sole purpose of discriminating in favor of MERCOSUR retreaders. The European Communities' argument is both far-fetched and offensive. The European Communities' reliance on an extreme hypothetical reveals that it cannot formulate a well-founded rebuttal argument based on the *facts* of this case. It simply has no grounds to counter the concrete facts that fully support Brazil's invocation of Article XXIV as a justification for its limited MERCOSUR exemption.

(b) Article 34 of the Vienna Convention on the Law of Treaties (VCLT)

145. Brazil's defense is in no way contrary to Article 34 of the VCLT, which provides that "[a] treaty does not *create* either obligations or rights for a third State without its consent" (emphasis added). The Treaty of Asunción does not create any rights or obligations whatsoever for the European Communities. The European Communities' reading of Article 34 is incorrect when it substitutes the word *create* with the word *affect*, as if it indicated rights and obligations of a third State under other treaties. Clearly this is not the meaning of Article 34 of the VCLT. In any case, the Treaty of Asunción is not affecting the rights and obligations of the European Communities under the GATT, because Brazil, under Articles XX and XXIV, has the right to exempt MERCOSUR countries from the import ban. In other words, Brazil is simply exercising its rights under the GATT to take measures that are necessary to protect human health and the environment, provided that it applies that measure in a manner that is not arbitrarily or unjustifiably discriminatory – which Brazil does.

Question 51. To the European Communities.
Please clarify how exports of used tyres "to other MERCOSUR countries" (see your first oral statement, paragraph 97) contribute to a disguised restriction on international trade that would benefit the Brazilian industry. Is it your position that imports of European Communities' used tyres to Brazil and other MERCOSUR countries is an advantage to Brazil's retreaded tyre industry and a disadvantage to the European Communities' retreaded tyre industry?

Response of the European Communities

146. The chapeau of Article XX refers only to a disguised restriction on international trade without requiring the existence of an advantage to traders in the importing country and a simultaneous disadvantage in the exporting country. However, in our case, these two conditions are met. The import ban on retreaded tyres protects Brazilian retreaders and Brazilian manufacturers of new tyres from the competition of imported retreads and it has excluded European Communities and other WTO Members exporters from the Brazilian market.

147. The continuing import of used tyres into Brazil from the European Communities (and other WTO Members) contributes to the protection of the Brazilian domestic retreaders by ensuring them the supply of the material necessary to continue its production of retreaded tyres, i.e. by enabling them to produce and sell the retreads that can no longer be imported

148. Moreover, a disguised restriction to the benefit of imports from a particular country lies in the fact that retreads may no longer be imported into Brazil from the European Communities, but they can be imported from other MERCOSUR countries. The export of used tyres from the European Communities to other MERCOSUR countries, notably Uruguay, is also relevant in this context, since these tyres are used to produce retreaded tyres, which are then exported to Brazil. This further increases the trade diversion created by the Brazilian ban, which benefits retreaders located both in Brazil and in other MERCOSUR countries.

Question 52. To Brazil.
How does Article 50(d) of the Montevideo Treaty differ from Article XX(b) of GATT 1994?

Response of Brazil

149. Article 50 of the Treaty of Montevideo (1980) provides:

> "No provision under the present Treaty shall be interpreted as precluding the adoption and observance of measures regarding:
>
> (a) Protection of public morality;
>
> (b) Implementation of security laws and regulations;
>
> (c) Regulation of imports and exports of arms, munitions, and other war materials and, under exceptional circumstances, all other military equipment;
>
> (d) Protection of human, animal and plant life and health;
>
> (e) Imports and exports of gold and silver in bullion form;
>
> (f) Protection of national treasures of artistic, historical or archeological value; and
>
> (g) Exportation, use and consumption of nuclear materials, radioactive products or any other material used for the development and exploitation of nuclear energy."

Question 53. To the European Communities.
Please comment on Brazil's argument, at paragraph 64 of its first oral statement, that the application of the exemption for MERCOSUR imports is not arbitrary because it is included in the measure itself.

Response of the European Communities

150. The European Communities considers that what matters in interpreting the chapeau of Article XX is the practical effects of the measure. One possibility is when the laws and regulations are applied in a discriminatory manner by the administration or the judiciary. Brazilian courts granting injunctions for the import of used tyres is an example mentioned in this case. But if the discrimination is already lay down in the law itself and applied accordingly, this situation is also covered by the chapeau. A different interpretation would allow to circumvent the requirements of the chapeau and to diminish the role played by the principle of good faith that, according to the Appellate Body,[42] is at the origin of the chapeau.

[42] Appelate Body Report, *US – Shrimps*, para. 158, already mentioned in European Communities' first written submission, para. 144.

Question 54. To both parties.
Is the consistency of the MERCOSUR exemptions under Article XXIV of GATT 1994 a relevant consideration in assessing whether "arbitrary or unjustifiable discrimination" within the meaning of the chapeau of Article XX exists in the application of the import ban as a result of these exemptions?

Response of the European Communities

151. No. Justification under Article XXIV and the assessment of an unjustifiable discrimination under the chapeau of Article XX are separate exercises. The assessment of the chapeau is only related to the specific interests protected in letters a) to j) in Article XX. Because Articles XX and XXIV are self-standing exceptions, the fulfilment of one cannot be a sufficient or necessary requirement for satisfying the other.

Response of Brazil

152. No. Brazil and the European Communities agreed that it is not a relevant consideration in their responses to the Panel's questions during the first substantive meeting of the Panel.

E. MEASURES AT STATE LEVEL

Question 55. To Brazil.
In light of the fact that an import prohibition is in place at the federal level, could you please clarify what was the purpose of the State of Rio Grande do Sul's imposition of measures relating to the importation and marketing of imported retreaded tyres?

Response of Brazil

153. The State of Rio Grande do Sul adopted the measures in question in an attempt to prevent imports of remoulded tyres from the bordering Uruguay, after the federal government authorized such imports. As the federal government understands, Rio Grande do Sul authorities were concerned that the imports would increase the amount of tyre waste in the state, and the associated risks for the environment and public health.

Question 56. To Brazil.
Could Brazil clarify its statement during the first substantive meeting with the Panel that the state laws at issue have no legal effect?

Response of Brazil

154. In Brazil, only the Federal Government can regulate importation of products and issue import licenses. Without an import license, which is issued by DECEX, no good can enter the country. State measures that purport to regulate imports have no effect because states do not issue import licenses, and the federal government will follow federal – not state – regulations, in determining whether a license should issue. Because Rio Grande do Sul cannot effect an import ban on its own, the state measures at issue have no legal effect.

Question 57. To Brazil.
Does Law No. 12.381 establish an exception to the import prohibition set out in paragraph 1 of Article 1 of Law No. 12.114 of the Brazilian State Rio Grande do Sul of 5 July 2004 (see Exhibits EC-35, EC-37, BRA-80 and BRA-81)?

Response of Brazil

155. The amendments introduced by Law 12.381, permitting imports under certain conditions, seem to conflict with Article 1 of Law 12.114, which prohibits imports of used tyres. It is not clear whether the amendments intended to lift the import prohibition. In any event, this is irrelevant because these state measures have no legal effect: Article 22 (VIII) of Brazil's Constitution (Exhibit BRA-100) gives the federal government exclusive power to regulate foreign and interstate trade (see answers to questions 61 and 62).

Question 58. To Brazil.
Please clarify the meaning of the terms "imports" and "importation" in Laws No. 12.114 and 12.381. Could this refer to the importation from another state in Brazil to the Brazilian State of Rio Grande do Sul? Is it possible for the State of Rio Grande Do Sul to prohibit the circulation of retreaded tyres in the state?

Response of Brazil

156. The terms "imports" and "importation" refer to the importation from other countries into Brazil. These terms do not apply to trade among Brazilian states. Under Brazilian law, a state cannot prohibit the circulation of goods within its territory. Interstate commerce falls within the *exclusive* jurisdiction of the federal government, under Article 22 (VIII) of the Brazil's Constitution.

Question 59. To Brazil.
Do the marketing restrictions imposed by Law No. 12.114 and/or the disposal obligations established by Law No. 12.381 apply to retreads from other MERCOSUR countries?

Response of Brazil

157. The marketing restrictions imposed by Law 12.114 and the disposal obligations established by Law 12.381 were intended to apply to retreads from every country, including the MERCOSUR countries. In fact, these state laws seem to have been passed in reaction to the exemption of MERCOSUR countries from the national import ban. In any event, these state measures have no legal effect. *See* Brazil's Responses to Questions 61 and 62.

Question 60. To Brazil.
Have any retreaded tyres from the European Communities been imported into the Brazilian State Rio Grande do Sul since the introduction of Law 12.381?

Response of Brazil

158. Approximately 27 tons of retreaded tyres entered Brazil through Rio Grande do Sul since December 2005, the month following the introduction of Law 12.381. Brazil has no information on their eventual destination, nor does it have information on how many of these imports came from the European Communities (Brazil does not disaggregate origin information by port). However, nearly all retreaded tyres imported into Brazil during those months came from Paraguay and Uruguay. If any retreaded tyres from the European Communities did enter Brazil through Rio Grande do Sul, this would have been a direct result of the preliminary injunctions, not of operation of the state measures.

Question 61. To Brazil.
Please explain what kind of demonstration by importers on their collection and disposal of used tyres is necessary to satisfy the requirements under Law 12.381.

Response of Brazil

159. Brazil has no information on collection and disposal requirements contemplated by the state legislators. Ultimately, there are no requirements in any state law that importers can satisfy in order to obtain a permission to import, because only the federal government can regulate foreign trade and grant import licenses (*see* Brazil's Response to Question 62). If importers attempted to obtain licenses to import based on State Law 12.381, the federal body responsible for granting such licenses (DECEX) would deny the request, whether the federal import ban existed or not, and the likely outcome of this situation would be a declaration of the unconstitutionality of State Law 12.381 by the Federal Supreme Court. This has not happened yet because Law 12.381 lacks any practical effect, given the existence of the federal import ban.

Question 62. To Brazil.
Please comment on the European Communities' assertion, at paragraph 110 of its first oral statement, that Brazil has offered no proof for its statement that to the extent that the state measure conflicts with the federal measure, the federal measure will prevail. In addressing this question, please clarify the legal basis for the hierarchy of norms that you refer to between state and federal measures in Brazil. Setting aside the question of the hierarch of norms between state and federal measures in Brazil, is a specific court ruling required to have the state measures at issue declared null and void? Could you identify a competent state court, if any, that is responsible for enforcing federal laws?

Response of Brazil

160. Technically, this is not a matter of hierarchy of norms, but rather a matter of jurisdiction. Under Article 22 (VIII) of Brazil's Constitution, the federal government enjoys exclusive jurisdiction to legislate on foreign and interstate trade. A Brazilian state, therefore, is constitutionally prohibited from legislating on matters of foreign trade, unless a supplementary federal law ("lei complementar") authorises it to legislate upon a specific question related to such matter (Article 22, sole paragraph). There is no supplementary law in the present case.

161. Article 23 (VI) of the Constitution gives states and the federal government concurrent jurisdiction over environmental protection. Thus, Rio Grande do Sul can legislate, for instance, on matters related to disposal of waste, but not on the importation. Consequently, every aspect of the Rio Grande do Sul measures that relates to foreign or interstate trade is unconstitutional, and the federal measures prevail.

162. In order to have the state measures at issue declared null and void, a specific court ruling – *i.e.*, a ruling by the Federal Supreme Court in an unconstitutionality action ("ação direta de inconstitucionalidade", cf. Art. 102 (I) (a) of the Constitution) – is required. A declaration by the Supreme Court on the unconstitutionality of a law or a provision in this type of a proceeding has *erga omnes* retroactive effects. While lower courts can also rule on constitutionality, their rulings will apply only *inter partes*.

163. Every court in Brazil, be it a federal court or a state court, is responsible for enforcing federal laws. The jurisdiction of different state courts varies according to the subject matter and to the geographic location, but federal laws are valid in the entire country and must be enforced by every court. If a decision by a state court in any way contradicts a federal law, such decision will be subject to a special appeal ("recurso especial") to the High Court of Justice (cf. Art. 105 (III) (a) and (b) of the Federal Constitution).

Question 63. To the European Communities.
The European Communities cites Law No. 12.381 of the Brazilian State Rio Grande do Sul of 28 November 2005 as follows:

"where importers can demonstrate that they will collect on Brazilian territory and destroy, in an environmentally sound manner, 1 (one) used tyre on Brazilian territory for each used tyre carcass to be imported"? (Exhibit EC-37 and the European Communities' first written submission paragraph 63)

Could you please clarify whether you meant "ten" used tyres?

Response of the European Communities

164. Yes, in the translation of Article 1 §2 II of Law 12.381, the reference to should be to "10 (ten) used tyres". The quotation in paragraph 63 of the European Communities' first written submission should be corrected accordingly.

Question 64. To the European Communities.
In paragraph 187 of your first written submission, you refer to the requirement of having to dispose of ten "retreaded tyres". Could you please clarify whether you meant "used tyres"?

Response of the European Communities

165. Yes, in paragraph 187, the reference should be to "used tyres" instead of "retreaded tyres".

F. FINES

Question 65. To the European Communities.
Please clarify how the fines on marketing relate to importation. Could you please clarify whether you consider that these fines fall at the same time within the scope of Articles XI.1 and III:4?

Response of the European Communities

166. As the European Communities has set out in its first written submisison,[43] the fines on the marketing, transportation, storage, keeping or warehousing of imported retreaded tyres aim to complement and enforce the import ban. To this extent, they are ancillary to the ban and fines on importation. Moreover, despite their apparently internal nature, there is no doubt that their intended and real effect is to restrict the importation of retreaded tyres. Accordingly, Presidential Decree No. 3919 as a whole is to be regarded as contrary to Article XI:1.

167. In the alternative, should the Panel consider that unlike the fines on importation, the fines on marketing, transportation, storage, keeping or warehousing of retreaded tyres do not as such constitute a restriction on importation, then the European Communities submits that Presidential Decree No 3919 to this extent is incompatible with Article III:4.[44]

[43] European Communities' first written submission, para. 174.
[44] European Communities' first written submission, para. 175 et seq.

Question 66. To Brazil.
The European Communities claims in paragraph 172 of its first written submission that the level of the fines (i.e. 400 reals per unit) exceeds the "normal per unit value" of retreaded tyres. Is this correct? What is the "normal per unit value" in Brazil, for :

(a) domestically produced retreaded tyres;
(b) imported retreaded tyres; and,
(c) new tyres, either imported or domestically produced?

Response of Brazil

168. The fines were *intended* to exceed the per unit value of most tyres because, as the European Communities correctly pointed out, they are a "punitive measure intended to sanction a violation of the import ban imposed by Brazil". *See* European Communities' first written submission, at para. 172. Nevertheless, if this information may be of assistance to the Panel, Brazil can roughly estimate average prices (note that the actual price depends on many factors, such as the tyre type, brand, size, type of car, type of terrain, and the point of sale):

(a) Domestically produced retreaded tyres for passenger cars – R$ 100-280, trucks – R$ 450-930.

(b) Information to be provided if available

(c) New tyres for passenger cars, whether imported or domestically produced – R$ 150-550, trucks – R$ 560-1300.

Question 67. To both parties.
If the fines on importation and marketing can be considered as ancillary to the import prohibition, what would a finding of GATT 1994 violation in respect of the import prohibition imply as to the GATT-consistency of the fines? (European Communities' first written submission paragraph 174 and Brazil's first written submission paragraph 157)

Response of the European Communities

169. A finding of violation in respect of the import ban would necessarily entail that the fines on importation and marketing are equally incompatible with the GATT. For further detail, the European Communities refers the Panel to paragraphs 102 to 106 of its first oral statement.

Response of Brazil

170. The fines would likewise be inconsistent.

G. MERCOSUR EXEMPTIONS

Question 68. To Brazil.
Which MERCOSUR countries, and in what proportion, export retreaded tyres and used tyres into Brazil? What annual volumes of imports does this represent?

Response of Brazil

171. Only Uruguay and Paraguay export remoulded tyres to Brazil. In 2005, Paraguay exported 850 tonnes and Uruguay exported 574 tonnes, for a total of 1,424 tonnes. In comparison, some 18,455 tonnes of retreaded tyres were imported into Brazil in 1999, the year before Portaria SECEX 8/2000 went into effect.

172. The trade of used tyres between MERCOSUR countries is negligible. In 2003, there were no exports of such tyres by MERCOSUR countries to Brazil. In 2004, Argentina exported 23 tonnes and Uruguay exported 7 tonnes of used tyres to Brazil, which accounted for less than 0.05 per cent of the total volume of used tyre imports.

Question 69. To both parties.
Does the exemption from the import ban on retreaded tyres for MERCOSUR countries apply equally to retreaded tyres produced with imported carcasses and retreaded tyres produced with domestic MERCOSUR carcasses?

Response of the European Communities

173. Yes.

Response of Brazil

174. Yes. After a retreaded tyre is produced, it is not possible to identify the origin of the carcass used.

Question 70. To Brazil.
What is the potential for tyres initially used or retreaded in the European Communities, or in other non-MERCOSUR countries, to be imported into Brazil as a result of the MERCOSUR exemption?

Response of Brazil

175. It is possible for tyres used in the European Communities to be remoulded in a MERCOSUR country and then exported to Brazil because Brazil has no control over remoulded tyre production in other MERCOSUR members. However, it should be noted that only Paraguay and Uruguay export remoulded tyres to Brazil. The production capacity of these countries is fairly limited. Therefore, the actual volume of tyres initially used in the European Communities that could be imported into Brazil through MERCOSUR is very small when compared to the volume that could have been imported directly from the European Communities and other countries if the import ban did not exist.

176. It is *not* possible for tyres retreaded by means other than remoulding (no matter the origin of casings) to enter Brazil because the import ban continues to apply to such imports. Finally, it is *not* possible for tyres retreaded in the European Communities to enter Brazil through other MERCOSUR countries. If an importer from another MERCOSUR country attempted to import a tyre retreaded in the European Communities and then export it to Brazil as a MERCOSUR tyre, this circumvention would violate the MERCOSUR rules of origin.

Question 71. To the European Communities.
During the first substantive meeting with the Panel, the European Communities stated that Uruguay's main retreaded tyres producers use only 10% of domestic casings. Do you have any evidence in support of this statement?

Response of the European Communities

177. The information that only 10% or even fewer of the carcasses used by SERISUR S.A. presently originate in Uruguay or other MERCOSUR countries was communicated orally on 28 March 2006 (and confirmed again on 19 July 2006) by Mr. Gustavo ALBANO, the responsible Director of Serisur, the main Uruguyan company producing retreaded tyres (and only exporter to Brazil at the moment), to Mr. Lothar Ehring, Administrator in the Directorate-General for Trade of the European Commission.

178. This information is confirmed in a very recent newspaper article (Exhibit EC-88), which states (in English translation) that "Serisur produces about 60.000 tyres per month, working with carcasses which originate in Europe, Japan and the US, and Brazilian rubber".

179. This equally finds information in the MERCOSUR arbitral award of 25 October 2005 in the dispute between Argentina and Uruguay, which mentions that Uruguay produces retreaded tyres from carcasses "generally imported from developed countries".[45] Further confirmation also lies in the sharp rise in the importation of used tyres by Uruguay since 2002,[46] the year in which the Brazilian ban was lifted on MERCOSUR countries, which is due to the increased demand for retreadable casings by Uruguyan retreaders.

Question 72. To Brazil.
Among retreaded tyres imported into Brazil from MERCOSUR countries:
(a) how many are made from tyres not initially used in Brazil? What proportion of such imports does this represent?
(b) how many are made from tyres initially used in non-MERCOSUR countries? What proportion of such imports does this represent?

Response of Brazil

180. Brazil does not have information on the origin of casings used in the production of retreaded tyres by other MERCOSUR countries. After a retreaded tyre is produced, it is not possible to identify the origin of the casing used.

Question 73. To Brazil.
What options were available to Brazil in order to implement the MERCOSUR Ad Hoc tribunal's ruling of 9 January 2002?

Response of Brazil

181. The MERCOSUR Ad Hoc Tribunal concluded that the Brazilian legislation – Portaria SECEX 8/2000 – was "incompatible with MERCOSUR regulations", and specifically, with Decision CMC 22/2000, which prohibited new restrictions on trade. The tribunal required Brazil to "adapt its internal legislation in view of such incompatibility". Apart from non-compliance, the only alternative available to Brazil was to exempt MERCOSUR member states from the import ban.

182. Some third parties have suggested that one of the options available to Brazil to comply with the MERCOSUR ruling was to exempt *all* WTO members from the import ban, *i.e.*, eliminate the import ban. This is clearly not a reasonable option because it would have forced Brazil to abandon its policy objective and its level of protection, which is to reduce unnecessary generation of tyre waste *to the maximum extent possible*. To preserve its policy objective, Brazil implemented the decision of the MERCOSUR tribunal as narrowly as possible. The dispute involved remoulded tyres, and Brazil exempted MERCOSUR imports of remoulded tyres *only*. Permitting imports of top-capped and re-capped tyres from MERCOSUR would not have reduced waste to the maximum extent possible because it would have permitted imports of shorter-lifespan products that Brazil did not have to allow. An exemption of all WTO members would have far exceeded what was necessary under the MERCOSUR tribunal's ruling and would not have allowed Brazil to reduce unnecessary generation of tyre waste to the maximum extent possible.

[45] Exhibit EC-43, para. 101.
[46] Cf. European Communities' first written submission, para. 84.

Question 74. To Brazil.
Did Brazil attempt to use the procedure contained in Article 22.1 of the Protocol of Brasilia to request a clarification as to how Brazil should comply with the MERCOSUR ad hoc tribunal's ruling of 9 January 2002?

Response of Brazil

183. No. Article 22.1 of the Protocol of Brasília provides for a procedure to obtain (i) clarification on the content of an award or (ii) an interpretation on how a decision should be complied with. The award was clear and there was no need for an Article 22.1 clarification. As Brazil explained in its response to question 73, there were no alternatives to implementing the ruling, other than exempting MERCOSUR members from the import ban.

Question 75. To Brazil.
In paragraph 169 of your first written submission, you indicate that MERCOSUR is consistent with Article XXIV, because:

MERCOSUR parties have eliminated duties and other restrictive regulations with respect to substantially all the trade within MERCOSUR. And they apply substantially the same duties to the trade with non-Members.

Could you please elaborate on this argument ? Specifically, could you explain how "substantially all the trade" within MERCOSUR is covered and how you apply "substantially the same" duties to trade with non-Members?

Response of Brazil

184. The European Communities has recognized, during the first substantive meeting with the Panel, that MERCOSUR is a customs union. Therefore, it is unnecessary for the Panel to examine whether MERCOSUR meets the Article XXIV requirements for customs unions.

185. In any event, MERCOSUR is currently under examination in the Committee on Regional Trade Agreements. The WTO Secretariat has already concluded that MERCOSUR meets the requirements of Article XXIV:5(a). *See* WT/COMTD/1/Add.15.

Question 76. To the European Communities.
Please comment on Brazil's argument, in paragraph 70 of its first oral statement, that the European Communities has recognized MERCOSUR as a customs union, as evidenced by its engagement in "bi-regional FTA negotiations" with MERCOSUR. Is the European Communities' position that it recognizes MERCOSUR as a customs union regardless of whether it meets the conditions under the provisions of Article XXIV:8 and 5?

Response of the European Communities

186. The European Communities has not contested that MERCOSUR, in accordance with Article 1 of the Treaty of Asuncion, involves the establishment of a customs union. The European Communities would also like to confirm that it is supportive of efforts of regional integration worldwide, including of MERCOSUR.

187. However, the question in the present case is not merely whether MERCOSUR is a customs union in a general sense, but whether it is fully in accordance with the conditions of

Article XXIV:5 (a) and 8 (a). As the European Communities has remarked, it is for Brazil, as the party invoking Article XXIV, to demonstrate that these conditions are met.[47]

188. The negotiations between the European Communities and MERCOSUR are of no relevance in this context. Since 2000, the European Communities and MERCOSUR have been in the process of negotiating a bi-regional association agreement. This regional approach reflects *inter alia* the fact that MERCOSUR has a common external tariff and a common external trade policy. However, this is unrelated to the question whether the MERCOSUR agreements itself is in compliance with Article XXIV.

Question 77. To the European Communities.
How do you reconcile the statement you made in paragraphs 121 and 122 of your first oral statement with the ruling in the US – Line Pipe *case that you cited in footnote 106 of your first written submission?*

Response of the European Communities

189. In *US – Line Pipe*, the Panel expressed doubt as to whether the necessity test formulated by the Appellate Body in *Turkey – Textiles* should also apply in circumstances other than *Turkey - Textiles*, notably where "where the alleged violation of GATT 1994 arises from the elimination of 'duties and other restrictive regulations of commerce' between parties to a free-trade area."[48]

190. The European Communities does not share these doubts. In the view of the European Communities, there is no indication that the necessity test applied in *Turkey – Textiles* would apply only in cases where the restriction is immediately and solely imposed on imports, but not to cases where the restriction is first imposed on all goods, and then subsequently selectively removed for goods from within the customs union.[49] This is also the view the European Communities defended before the Appellate Body in *US – Line Pipe*.[50]

191. It is also noteworthy that the question in *US – Line Pipe* was a highly specific one, namely whether the United States could include, in the context of a safeguards investigation, Canada and Mexico in the analysis of serious injury while excluding the same countries from the application of the safeguards measure. The Appellate Body concluded that this absence of "parallelism" between the investigation and the effects of the measure was incompatible with Articles 2 and 4 of the Safeguards Agreement.[51] For this reason, the Appellate Body did not rule on the question of whether Article 2.2 of the Safeguards Agreement, or Article XXIV, would allow to exclude Members of a free trade area from the scope of a safeguards measure.[52] Moreover, the Appellate Body also declared the findings of the Panel with respect to Article XXIV to be "moot and having no legal effect".[53]

192. Finally, it is worth mentioning that safeguards are addressed in Article XIX, an exception which, unlike Article XX, is not mentioned in the list of exceptions in Article XXIV:8(a)(i). Therefore, even if it were permissible, under Article XXIV, to exempting imports from within a customs union from a safeguards measure,[54] this would not mean that the same is true for measures under Article XX.

[47] European Communities' first oral statement, para. 118.
[48] Panel Report on *US – Line Pipe*, para. 7.148.
[49] Cf. European Communities' first oral statement, para. 121-122.
[50] Cf. Appellate Body Report on *US – Line Pipe*, para. 66.
[51] Appellate Body Report on *US – Line Pipe*, para. 197.
[52] Appellate Body Report on *US – Line Pipe*, para. 198.
[53] Appellate Body Report on *US – Line Pipe*, para. 199.
[54] On this question, cf. also footnote 1 to Article 2 of the Agreements on Safeguards.

Question 78. To the European Communities.
In paragraph 129 of your oral statement you suggest that measures adopted years after the conclusion of the customs union cannot be necessary for its formation. Does this imply that no measure adopted by parties to a customs union after its formation could ever be justified under Article XXIV?

Response of the European Communities

193. The European Communities does not wish to suggest that only measures which are adopted at one single point in time, defined as the "formation of the customs union", can be justified under Article XXIV.

194. In the view of the European Communities, the formation of a customs union may also be, and typically is, a gradual process. This is recognised in Article XXIV:5 (c), which allows the adoption of interim agreements necessary for the formation of a customs union within a reasonable length of time.[55] Therefore, in the view of the European Communities, a measure may also be regarded as adopted on the formation of the customs union if it is adopted at a later point than the initial formation of a customs union, provided it is necessary for the formation of the customs union, and is adopted within a reasonable period of time.[56]

195. However, as the European Communities has remarked in its first oral statement,[57] this is not the case for the measures adopted by Brazil. When MERCOSUR was concluded in 1991, trade between MERCOSUR countries in retreaded tyres was unrestricted. It is only later that Brazil decided to restrict trade, only in order to then still later remove the restriction for its MERCOSUR Members. Such an erratic policy course can hardly be regarded as part of the "gradual formation of a customs union". Accordingly, given the specific circumstances of the case, the MERCOSUR exemption cannot be regarded as introduced "upon the formation of a customs union".

Response of Brazil

196. The Panel's question illustrates the difficulty with overextending the analysis of *Turkey - Textiles* to cover measures of internal liberalization that do not raise outside trade barriers, as the panel in *US – Line Pipe* recognized. GATT members intended Article XXIV to be an effective tool of regional liberalization, not its death knell.

Question 79. To Brazil.
In paragraph 22 of its first oral statement, the European Communities argues that the sequencing of the measures which result in a discrimination between goods originating within the customs union, and goods from outside the customs union, does not change the standards applicable under Article XXIV:5. Could you please comment?

Response of Brazil

197. Brazil notes that paragraph 22 does not refer to sequencing of the measures, rather paragraph 122 does. Brazil will respond to the European Communities' arguments in paragraph 122.

198. In the present case, the sequencing of measures demonstrates that Brazil did not engage in unjustifiable and arbitrary discrimination. Brazil maintained an import prohibition that applied to imports of *all* countries. When Uruguay challenged the prohibition in MERCOSUR, Brazil

[55] Paragraph 3 of the Understanding on the Interpretation of Article XXIV of the GATT 1994 provides that the "reasonable length of time should exceed 10 years only in exceptional cases".
[56] Cf. also Panel Report on *Argentina – Footwear (EC)*, para. 8.98.
[57] European Communities' first oral statement, para. 129.

vigorously defended the ban before the MERCOSUR Ad Hoc Tribunal. It was only after the MERCOSUR tribunal ruled against Brazil, that Brazil exempted MERCOSUR members from the ban, and only to the minimum extent required. If anything, the sequencing of Brazil's measures demonstrates that Brazil's goal has always been intent in protecting public health and the environment by applying the import ban as rigorously and comprehensively as possible.

Question 80. To both parties.
Could you please clarify what, in your view the phrase "except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX" (emphasis added) in Article XXIV:8(a) means? Specifically, could you please clarify how, in your view, "necessity" is to be assessed under this provision, in relation to measures permitted under Article XX?

Response of the European Communities

199. The quoted phrase makes it clear that in order to fulfil the requirement to liberalise "substantially all trade" within a customs union, it is not necessary to also abolish the measures which are permitted, *inter alia*, by Article XX.[58]

200. Of course, this does not mean that Article XXIV:8(a) requires the maintenance of restrictive regulations of commerce between Members of a customs union. This is expressed by the words "where necessary" within the brackets in Article XXIV:8(a). However, where restrictive regulations are not necessary for the purposes of Article XX, and therefore abolished between Members of the customs union, they must be abolished for all Members, and not just those members of the customs union.

201. In conclusion, the discriminatory application of a measure justified under Article XX cannot be justified as necessary for the formation of a customs union.

Response of Brazil

202. As Brazil explained in its response to Question 50, the phrase "where necessary" gives WTO-Members that are part of a customs union the right to maintain duties and other restrictive regulations between the constituent territories, based *inter alia* on the general exceptions in Article XX, and still meet the requirement under Article XXIV:8 that restrictions be eliminated with substantially all the trade between the constituent territories. However, Article XXIV:8 does not *require* or impose the obligation on customs union members to maintain trade restrictions by invoking Article XX. That interpretation of the parenthetical in Article XXIV:8(a) would contradict the very purpose behind the formation of customs unions – which is to eliminate trade barriers among members – and be contrary to Article XXIV, which encourages the highest level of internal liberalization ("eliminated with respect to substantially all the trade").

Question 81. To Brazil.
Please comment on the European Communities' assertion, in paragraph 134 of its first oral statement, that "contrary to the claims of Brazil, (legislative) Decree (88/1992) does not contain the obligation set out in Article 21.2 of the Protocol of Brasilia, but merely approves the protocol on behalf of Brazil".

Response of Brazil

203. Incorporation of international treaties into Brazilian law is a complex process that requires the participation of the Executive and Legislative powers. The first step is the conclusion (signature) of the treaty by the President of the Republic, who has the exclusive power to do so under

[58] Cf. also Panel Report on *Argentina – Footwear (EC)*, para. 8.96.

Article 84(VIII) of the Federal Constitution. The treaty must then be approved through a Legislative Decree by the National Congress, which has the exclusive competence to decide conclusively on international treaties, in accordance with Article 49(I) of the Constitution. Once approved, the President will act again and promulgate a decree, which will be published in the Official Journal together with the text of the treaty translated to the Portuguese language. At that point, the treaty becomes a part of Brazil's domestic law. Incorporated international treaties are equal in hierarchy to other laws in the Brazil's legal system. A private party can even bring a legal action based on provisions of an incorporated international treaty (*see, e.g.*, Articles 102 (III) (b), 105 (III) (a) and 109 (III) of the Federal Constitution).

204. The Protocol of Brasília was approved by the National Congress through Legislative Decree 88/1992 (Exhibit BRA-76), and subsequently it was promulgated and published by Decree 922 of 10 September 1993 (Exhibit BRA-101). While Legislative Decree 88/1992 may not "contain" the obligation set out in Article 21.2 of the Protocol of Brasília, Decree 922/1993 certainly does, and the Protocol of Brasília is undoubtedly a part of the Brazil's domestic law. Therefore, the European Communities' assertions in paragraph 134 of its oral statement with respect to the status of the Protocol of Brasília in Brazilian law are absolutely incorrect.

Question 82. To Brazil.
Please comment on the European Communities' argument, at paragraph 137 of its first oral statement, that the exemptions are not "securing compliance" with the ruling of the Arbitral Tribunal by anyone else and that, rather, Brazil was simply itself complying with its obligations.

Response of Brazil

205. The European Communities' argument attempts to differentiate between municipal laws that bind private parties (whether physical or juridical) and laws that bind the State or its organs. There is no basis for that differentiation. Neither the text of Article XX(d) nor the WTO jurisprudence provides basis for such a distinction. In *Mexico – Soft Drinks*, the Appellate Body distinguished between laws that regulated domestic conduct and laws that sought to secure compliance with "international obligations of *another* WTO Member". *See* Appellate Body Report, *Mexico - Soft Drinks*, para. 70 (emphasis added). It ruled that laws in the latter category could not be justified under XX(d). It made no similar finding with respect to municipal laws that secured compliance with the government's *own* international obligations. On the contrary, the Appellate Body unequivocally stated that that for purposes of Article XX(d),

> "the terms "laws or regulations" cover rules that form part of the domestic legal system of a WTO Member, including rules deriving from international agreements that have been incorporated into the domestic legal system of a WTO Member or have direct effect according to that WTO Member's legal system."
>
> Appellate Body Report, *Mexico – Soft Drinks*, para. 79 (emphasis added).

206. This clear and unambiguous language leaves no room to argue that Article XX(d) applies only to laws regulating private conduct, especially given that most international agreements obligate governments, and not private parties.

Question 83. To the European Communities.
Is your argument in paragraph 137 of your first oral statement related to your position that Brazilian Decree (88/1992) does not clearly show that the provisions of the MERCOSUR Agreement are incorporated into the Brazilian domestic laws and regulations?

Response of the European Communities

207. No. In order to successfully invoke Article XX(d), Brazil has to show a) that the obligation to comply with the ruling of the MERCOSUR arbitral tribunal is contained in a "law and regulation" within the meaning of Article XX(d), and b) that its measure is necessary to "secure compliance" with this law or regulation.

208. The argument made by the European Communities in para. 137 relates to the second of these conditions. As the European Communities has explained, to "secure compliance" with a law or regulation means to "enforce" this law or regulation as regards other actors, typically natural or legal persons.[59] With the adoption of the MERCOSUR exemption, Brazil was not "securing" compliance by anyone else, but simply complying itself with its international obligation. Brazil's measure therefore does not fall within the scope of Article XX(d).

Response of Brazil

209. Brazil notes that its commitments under MERCOSUR, including the Protocol of Brasília, have been incorporated into the domestic law. *See* Brazil's Response to Question 81.

Question 84. To the European Communities.
In light of your observations, at paragraph 137 of your first oral statement in respect of Brazil's invocation of Article XX(d), could you please comment on the statement by the Appellate Body in Mexico – Soft Drinks *that the terms "laws or regulations" in Article XX(d) "cover rules that form part of the domestic legal system of a WTO Member, including rules deriving from international agreements that have been incorporated into the domestic legal system of a WTO Member". ?*

Response of the European Communities

210. At the outset, the European Communities would recall that its argument in paragraph 137 of its FOS does not concern the meaning of the term "laws or regulations", but the meaning of the term "to secure compliance" in Article XX(d).

211. As regards the meaning of the term "laws and regulations", the European Communities agrees with the Appellate Body that such laws or regulations include international agreements when they are incorporated into the domestic legal order of the WTO Member in such a way as to be enforceable as against individuals.[60]

212. The reason for this interpretation is that international agreements may deal with matters which require enforcement in the internal legal order of WTO Members. An example would be international agreements dealing with the protection of intellectual property rights, such as trademarks, copyrights, or geographical indications. If such an agreement, rather than being transposed through internal

[59] European Communities' first oral statement, para. 135.

[60] Before the Panel in *Mexico – Soft Drinks*, the European Communities expressed its views as follows (Panel Report on para. 5.51, emphasis added):

> At a general level, the European Communities would not exclude that an international agreement concluded by a WTO Member might also constitute a "law or regulation" within the meaning of Article XX(d) of the GATT 1994, provided that the agreement is directly applicable in the internal legal order of such member, and is therefore capable of being directly enforced on individuals.

legislation, is directly applicable in the domestic legal order, then it may also be the subject of enforcement measures within the meaning of Article XX(d).

213. However, this does not mean that the international obligations contained in an international agreement equally become "laws or regulations" within the meaning of Article XX(d). Accordingly, Article XX(d) cannot be invoked when a Member, rather than enforcing an international agreement in its internal order, simply complies with its international obligations.

H. REQUEST FOR SPECIFIC INFORMATION

Question 85. To Brazil.
Could Brazil provide an English translation of the parts of The National Code of Traffic, which are meant to contribute to the promotion of better tyre care?

Response of Brazil

214. *See* Exhibit BRA-102.

Question 86. To Brazil.
Could Brazil provide an English translation of the MERCOSUR ad hoc tribunal ruling (Exhibit BRA-74)?

Response of Brazil

215. *See* Exhibit BRA-103.

II. FOLLOWING THE SECOND SUBSTANTIVE MEETING OF THE PANEL

A. GENERAL

Question 87. To Brazil.
Does Brazil have a system of regular mandatory vehicle inspections in place (see Brazil first written submission, paragraph 82 and EC second written submission, paragraph 78)?

Response of Brazil

216. Yes. The National Code of Traffic (Law No. 9.503/1997) (Exhibit BRA-102) establishes a system of mandatory vehicle inspections in Brazil. The Code requires examination of the vehicle's safety, including tyres, and its compliance with emission rules. Under the law, states have the jurisdiction to develop and enforce safety standards and inspection procedures in their individual territories and, at present, that is what happens. However, the Executive has submitted a bill to establish uniform federal inspection standards (Bill 5.979/2001) (Exhibit BRA-167). The bill is presently being considered by the legislature.

217. The absence of nationwide rules at present does not mean that Brazilian states and municipalities cannot in the interim use local rules to carry out regular inspections. They can and they do, as Brazil noted in its response to the European Communities' Question 8. In addition, the inspections in Brazil are not limited to the annual inspections. Every vehicle in Brazil is inspected when it is first licensed, when its ownership changes, and also when the vehicle owner moves to a different state. According to the National Traffic Department, 30 per cent of the Brazilian automobile fleet is annually inspected because of a change in ownership or the owner's move to a different state.

Comments of the European Communities

218. In its reply to the Panel's Question, Brazil claims that it has a system of regulatory mandatory vehicle inspections in place. However, this claim is unsupported by the evidence provided by Brazil, and incompatible with Brazil's own statements on this issue.

219. In its reply, Brazil claims that the National Code of Traffic Law (Law No. 9.503/1997, Exhibit BRA-102) establishes a system of mandatory vehicle inspections in Brazil. However, this is not true. Article 104 of the said law merely announces that vehicles "*will* have their safety […] evaluated via inspection, which *will* be mandatory". As Brazil itself clarifies, there are currently no rules at the federal level in Brazil which would establish such a system, and relevant inspection procedures therefore must be laid down by the Brazilian states and municipalities.

220. As regards the rules existing at the level of Brazilian states, Brazil has also clarified in its reply to the European Communities' question No. 8 and 9 that only one out of its 27 States, namely the State of Rio de Janeiro, has a system of mandatory regular vehicle inspections.[61] Accordingly, it is simply not true that there exists a system of mandatory regular vehicle inspections throughout Brazil.

221. Brazil has also once again referred to a draft law which would establish a uniform federal inspection scheme, and has finally produced a copy of this bill (Bill 5.797/2001, Exhibit BRA-167). However, it is noted that this bill, which dates from 2001, is still not adopted, and it is not clear whether and when it will be. Moreover, what matters is the date of establishment of the Panel, and at that date, Brazil clearly had no mandatory system of regular vehicle inspections in place.

222. Brazil has also argued that every vehicle in Brazil is inspected when its ownership changes, or when the owner moves to a different state, and has claimed that 30 per cent of the Brazilian automobile fleet is annually inspected for this reason.[62] However, Brazil has provided no evidence to prove that such inspections are indeed mandatory and effectively carried out throughout the territory in Brazil. Moreover, it seems highly unlikely that 30% of the Brazilian automobile fleet would be affected by a change in ownership or a move to a different state every year. Since Brazil has not provided any proof to substantiate its assertion, it can therefore not be assumed that such inspections would serve as a substitute for regular vehicle inspections.

223. In conclusion, it is recalled that Brazil has itself recognised that "automotive inspections are an important instrument to increase the number of retreadable casings in the country".[63] Accordingly, Brazil has failed to take a reasonably available alternative to the import ban on retreads, which would have resulted in a reduction of the number of waste tyres arising in Brazil.

Question 88. To Brazil.
Could Brazil provide examples of tyre fires that took place in Brazil, their dimension and an assessment of their negative effect on human, animal or plant life or health (see EC second written submission, paragraph 60)?

Response of Brazil

224. Brazil has provided information on tyre fires in the States of Paraná, Minas Gerais and in the Federal District in paragraph 36 of its first written submission Brazil has not been able to obtain information on tyre fires in other states because fire brigades of those states do not maintain records that distinguish between tyre fires and other fires. Unavailability of these records does not mean, of course, that tyre fires do not occur in other states.

[61] European Communities' second written submission, para. 78 and fn. 73.
[62] Brazil's answer to panel question No. 87, para. 2.
[63] Brazil's answer to European Communities' question No. 8.

225. There is no need to assess the negative effect on human, animal or plant life or health of tyre fires specifically in Brazil because there is extensive evidence of the risks resulting from fires all over the world. Fires in Brazil are no different from fires elsewhere. The European Communities' argument with regard to tyre fires in paragraphs 60 and 61 of its second written submission is specious. It is based on what is referred to as the problem of induction, i.e., reasoning that just because experience shows that event A has always followed event B, it does not mean that it will do so again. Governments cannot base their decisions on this reasoning. Prudent governments believe that if stockpiles of used tyres can be set on fire by lightning or arson elsewhere, the same can happen in their territory. Likewise, prudent governments also believe that if those fires emitted deadly pollutants elsewhere, the same will happen in their territory.

226. When, in the 1990s, Brazil set out to combat dengue and other mosquito-borne diseases by, among other things, collecting the used tyres that were scattered over its vast territory, Brazilian officials also realized that simply collecting and stockpiling them was no panacea. Not only do stockpiles risk contaminating the soil and ground water through leaching, and becoming breeding grounds themselves for mosquitoes, they also can catch fire through lightning or criminal behaviour. Brazil was aware of the devastating tyre fires in Wales,[64] in California,[65] in Ontario,[66] and in many other locations, both in Brazil and in other countries. Brazil was also aware of studies showing the toxic risks of such fires.

227. No prudent government could or would have ignored such warnings with the unsound reasoning that, simply because tyres caught fire elsewhere, and simply because those fires emitted deadly toxins into the atmosphere elsewhere, there is no basis on which to conclude that the same could happen in its territory. Brazil saw those warning signs and acted on them, responsibly and prudently.

Comments of the European Communities

228. Contrary to the claims of Brazil in its answer to this question from the Panel, Brazil has provided no relevant information on tyre fires in its territory. The only information given is limited to the number of tyres fires in two states and in the Federal District, without giving information, as the European Communities has already pointed out,[67] on their location, origin/causes, dimension and duration and an assessment of their real negative effects on health. Brazil has also admitted that it has not been able to obtain information on tyre fires in other states.

229. This already shows that tyre fires in Brazil do not appear to have the dimensions of the tyres fires in the United Kingdom, United States, and Canada to which Brazil has referred in its submissions.[68] Otherwise, it would have been very easy for Brazil to attach, in relation to waste fires in its territory, similar reports and press clippings to those that it has found for tyre fires abroad. The

[64] *See* Health Protection Agency (UK), Chemical Hazard and Poisons Report 8 (2003) (Exhibit BRA-10).

[65] Mike Martinez, "Cleanup of Tracy tyre fire ending soon," *Oakland Tribune*, January 3, 2006 (Exhibit BRA-35); California Environmental Protection Agency (US), Integrated Waste Management Board, Five-Year Plan for the Waste Tyre Recycling Management Program 18 (2003) (Exhibit BRA-36).

[66] Laurent Simon & Thierry C. Pauchant, Developing the Three Levels of Learning in Crisis Management: A Case Study of Hagersville Tyre Fire, Review of Business, Fall 2000, at 7 (Exhibit BRA-139).

[67] European Communities' second written submission, para. 60. The EC had already asked Brazil to provide information on these issues at the beginning of the proceeding: see European Communities' Question No 13.

[68] It is quite important to point out that the fires mentioned by Brazil in its answer involved several million of tyres: 10 million tyres in Powys (Wales) (Exhibit BRA-10), 7 million tyres in Tracy (California), 5 million in Westly (California) (Exhibit BRA–36) and in Hagersville (Ontario) 14 million tyres (Exhibit BRA-139). In another tyre fire in Wyandot (Ohio), 26 million tyres were involved (Exhibit BRA-38, at p. 2).

dimension of the site in number of tyres is an important element to assess the adverse effects of tyre fires. Thus, Exhibit BRA-10 shows in its table 1, at page 8, that in two more reduced waste fires, one in Washington (Pennsylvania) with 1.7 million tyres, and the other in Gila River Reservation (Arizona) with 3 million tyres, no adverse environmental effects were reported. In another tyre fire in Cheshire (England), with 500,000 tyres, the only adverse effect was limited to the site.

230. Brazil claims that prudent governments are entitled to rely on inductive inference in order to conclude that, if tyres fires occur and have negative effects in other parts of the world, it will also happen in their respective territory. But this argument does not take into account that the adverse consequences arising from waste tyres depend on the variables mentioned above. Neither the risk of fires occurrence is the same between different countries, because the vast majority of fires are due to arson,[69] which is an event very much depending on social factors.

231. In any case, it is astonishing to learn that Brazil does not keep records of the tyres fires occurred in its territory, as all prudent governments do. That information is essential to prevent and fight future fires, and the evidence attached by Brazil to its submissions reflects clearly that preoccupation.[70]

232. The European Communities would finally recall that tyre fires are a problem that is not related to the importation of retreads, but to the management of tyre waste. Given the numbers involved, the resumption of trade in retreaded tyres would in the worst case have a small impact on the overall quantity of the tyre waste that arises. Also for that reason, Brazil has not demonstrated in any manner the connection between the importation of retreaded tyres and the frequency, magnitude or harmful effects of tyre fires.

Question 89. To Brazil.
Could Brazil comment on a statement made by a representative of the Brazilian Minister of Health on 14 April 2002 before the Consumer, Environment and Minority Protection Committee explaining that "even if we were to eliminate all tyres from Brazil we would still not prevent transmission of [dengue]"? (see EC second written submission, paragraph 59)

Response of Brazil

233. The statement is correct. As Brazil explained in paragraphs 125-130 of its second written submission and in paragraph 91 of its second oral statement, waste tyres are one of the three major contributors to the dengue epidemic in Brazil. Reducing the accumulation of waste tyres by itself will not eliminate dengue because doing so would eliminate only one of the mosquito sources. This is why, in addition to collecting tyres, Brazil's campaign against dengue also targets other key containers. The campaign also educates the public about dengue prevention, carries out mosquito surveillance, monitors mosquito resistance to insecticides, and offers guidance on treatment of dengue patients.

[69] Table 1 of Exhibit-BRA-10, at p. 8, shows that, out of the 11 tyres fires listed there, only in one there were no data available concerning its cause; for the other 10 the cause is "arson suspected" or "arson a potential cause".

[70] Thus, the document "Tyre Pile Fires", attached as Exhibit BRA-29, at p. D-1, explains that "[t]he extinguishment of the last flame is by no means the end of activities at a tyre pile fire. Part D of this volume describes the post-fire activities. These post-fire activities include […] and 3) preparation of reports describing the fire fighting activities, health and safety concerns, environmental concerns, and lessons learned during the entire fire process".

234. Nevertheless, it is important to underline that waste tyres are the favourite breeding site for mosquitoes, as Brazil extensively demonstrated in paragraphs 17 to 32 of its second written submission. The European Communities argued in its SOS that other containers are much more relevant to dengue control and, in support, presented a study of *aedes aegypti* in two neighbourhoods in Manaus, Brazil (Exhibit EC-124). Yet even this study – with its very limited scope – proves that tyres are highly relevant. It specifically states at page 6 that among the positive containers, "*Tyre*, Flask, Construction Material and Storage groups stood out," and that "[t]he tyre group [] showed very high averages at Praça 14."

Comments of the European Communities

235. Brazil's answer to this question is, first of all, in contradiction with what the Brazilian Minister for Environment explained at the first substantive meeting with the Panel. Now Brazil argues that "waste tyres are the favourite breeding site for mosquitoes".[71] According to the Minister, only in 25 per cent of the 1.140 municipalities having notified dengue cases in 2003, were tyres the most important breeding place for dengue-carrying mosquitoes. However, this statement has also to be taken with great prudence because Brazil has never submitted to the Panel the survey conducted by the Minister of Health on which this assertion was made.

236. In any case, the reports on which Brazil based its assertions in paragraphs 17 to 32 of its second written submission are not valid to demonstrate that waste tyres are *generally* the predominant breeding site for mosquitoes. The report attached as Exhibit BRA-109 was conducted in 1985 and is limited to 14 city blocks in the municipality of Sao José do Rio Preto (state of Sao Paulo). The survey enclosed as Exhibit BRA-110 was carried out also in a municipality of the state of Sao Paulo and positive values for tyres only represented 11,9 per cent of the containers. The report attached as Exhibit BRA-111 is limited to two islands on the river Paraná and positivity of tyres was nearly equal to the one of tins. The report attached as Exhibit BRA-112 only used waste tyres as collecting places, which were set up as traps in the municipality of Nova Iguaçu (Rio de Janeiro). The surveys enclosed as Exhibit BRA-113 and BRA-114 only used waste tyres and bamboos as collecting places, which were set up in forests in the municipalities of Cambé and Londrina (Panará).

237. Finally, even if tyres were considered, *quod non*, as the main breeding place for mosquitoes, it is clear that the elimination of waste tyres as breeding places will not depend on the maintenance of the import ban on retreaded tyres but on a better management of waste tyres arising from all sources in Brazil, not only those arising from imported retreaded tyres. As the European Communities stated in its second written submission, the relevance of waste tyres arising from imported retreaded tyres in the fight against dengue must be minimal.[72]

Question 90. To both Parties.
What is the average life of a passenger tyre in Brazil? (see EC second written submission, paragraph 57)

Response of Brazil

238. There is no official estimate of the average life of a passenger tyre in Brazil. INMETRO clarifies that the durability of a tyre depends on many factors, such as the region's terrain, road quality, and climate.

239. Brazil's tyre industry estimates that a 175/30 passenger car tyre lasts about 60,000 km or about six years. Mazola estimates that a 165/70 tyre lasts about 40,000 km or four years. Given that

[71] Brazil's answer to panel question No. 89, para. 8.
[72] European Communities' second written submission, para. 59, *in fine*.

retreading regulations in Brazil and in the European Communities prohibit tyres that are older than seven years from being retreaded, it is safe to assume that a tyre seldom lasts longer than seven years.

Response of the European Communities

240. The average life of a tyre, when expressed in years, is the average total number of kilometres which a car drives with a tyre before it is replaced, divided by the average number of kilometres driven by a passenger car per year.

241. The number of five years referred to in paragraph 57 of the European Communities' second written submission, was, as is made clear in the paragraph itself, a mere assumption adopted for the purposes of analysing the information on the numbers of dengue cases provided by Brazil. The European Communities notes that Brazil used the same assumption of a lifespan of five years in its Exhibit BRA-162.[73]

242. In the European Communities, according to information received from the tyre industry, the average number of kilometres which are driven with a passenger car tyre before it is replaced is between 60.000 and 75.000 kilometres. According to the European Automobile Manufacturers Association, the average number of kilometres driven per passenger car in the European Communities is around 15,000 kilometres per year. On this basis, the average lifespan of a passenger car tyre in Europe may be assumed to be between four and five years.

243. The European Communities does not have specific information regarding the same numbers for Brazil, and considers that these are for Brazil to provide. However, the European Communities notes that according to information received from Brazilian retreaders, the average mileage of a passenger car tyre in Brazil is around 45,000 km. This lower mileage of Brazilian tyres would appear to reflect the rougher road conditions in Brazil and the accordingly higher wear of tyres to which Brazilian retreaders have equally referred.[74]

244. Assuming an average number of 15,000 kilometres driven per year, the average life of a tyre in Brazil may therefore be somewhat shorter than in the European Communities.

Comments of the European Communities

245. As regards the average number of kilometres driven with a tyre in Brazil, Brazil indicates a maximum mileage between 40.000 and 60.000 kilometres depending on the tyre type. While it is not clear how representative the tyre types indicated by Brazil are, and to which extent these numbers take into account risks of tyres being damaged due to road conditions, it is noteworthy that even according to Brazil's own figures, the average mileage of passenger car tyres in Brazil appears to be lower than in the European Communities. This confirms implicitly the fact that there is a higher factor of wear and tear on tyres in Brazil due to the local road conditions.

246. As regards the number of kilometres driven by a vehicle per year in Brazil, Brazil appears to use an average of 10.000 km. According to Brazilian retreaders, however, it would appear that this number is closer to 15.000 km. Accordingly, the lifespan of tyres in years in Brazil would appear to be somewhat lower than the one indicated in Brazil's reply.

247. Finally, Brazil argues that because passenger car tyres which are older than seven years may not be retreaded, "it is safe to assume that a tyre seldom lasts longer than seven years". This is not correct. The seven-year maximum is purely a limitation on the age of the casing used in the retreading process, after which the casing can be used again for a number of years. Accordingly, it is

[73] Cf. Exhibit BRA-162, Note (2), which refers to new tyre and new vehicle exports, "5 yrs prior".
[74] Exhibit BRA-157, para. 6.

clear that if a tyre is not used much, it may effectively last much longer than 7 years. Similarly, if a tyre is retreaded again after having been in use for 6.5 years, it will also normally achieve a total lifespan of far longer than 7 years, when adding up the lifespans of the new and the retreaded tyre.

Question 91. To Brazil.
Are all new tyres imported in Brazil retreadable? Does Brazil have measures in place to prevent imports of cheap low quality new tyres?

Response of Brazil

248. As Brazil pointed out in its Response to Question 12 from the Panel, all new tyres sold in Brazil – whether produced domestically or imported – are high-quality tyres that comply with strict technical and performance standards. They are not "cheap low quality new tyres" with no potential for future retreading. This is best demonstrated by the high rate of retreadability in Brazil.

249. Neither Brazil nor any other country, as far as Brazil understands, employs any measures "to prevent imports of cheap low quality new tyres." Brazil is not aware of a means to distinguish between new tyres that are capable of being retreaded and those that are not before the tyres have actually been used.

Comments of the European Communities

250. In its reply to the Panel's question, Brazil claims that all new tyres sold in Brazil are "high-quality tyres" which can be retreaded. At the same time, Brazil also concedes that "it is not aware of a means to distinguish between new tyres that are capable of being retreaded and those that are not".[75]

251. This statement is entirely unsubstantiated and at the same time contradictory. In reply to the Panel's Question No. 11, the European Communities has produced ample evidence that not all new tyres are retreadable. Brazil has not refuted this evidence in any way. Moreover, the European Communities does not see how Brazil can claim that all new tyres sold in Brazil can be retreaded, if at the same time it recognises that it cannot distinguish between tyres which can and such which cannot be retreaded. The European Communities would like to clarify that new tyres that are not be retreadable from the outset nevertheless manage to satisfy the "strict technical and performance standards" which exist in Brazil, in the European Communities and elsewhere, and which do not include the question of retreadability.

252. The European Communities would like to clarify that it is not asking Brazil to ban the importation of certain types or brands of new tyres. However, the European Communities challenges Brazil's unfounded assumption that all new tyres can always be retreaded, whereas passenger car retreads tyres cannot. Obviously, to the extent that Brazil allows the importation and domestic production of certain new tyre types or brands that *a priori* are not suitable for retreading, this constitutes an additional discrimination against imported retreaded tyres, which are banned. Moreover, the unsuitability of certain new tyres will also have the effect of reducing the rate of retreading, which, contrary to Brazils' assertion, is very low in Brazil for passenger car tyres.

Question 92. To Brazil.
In its answer to Panel's Question n° 18, you indicated that "some of the previously-issued injunctions remain in effect". Could you please clarify how long these could remain in place and what you expect their continued impact on imports of used tyres to be?

[75] Brazil's answer to panel question No. 91, para. 12.

Response of Brazil

253. The injunctions that are still in effect can be, and are being, challenged through a number of appeals or actions for rescission. They can also be challenged on constitutional grounds and the President's Chief of Staff is presently in the process of initiating one of these constitutional actions. *See* Exhibit BRA-168, Exhibit BRA-169. As a result of such constitutional actions, Brazil expects that the Federal Supreme Court will annul these injunctions in the very near future. As Brazil explained in paragraphs 135-141 of its second written submission, imports of used tyres through preliminary injunctions – both existing and new – will soon end. While Brazil cannot provide the Panel with a specific date when the last injunction import will take place, it believes that imports of used tyres by means of preliminary injunctions will become *de minimis* in the near future.

Comments of the European Communities

254. At the outset, the European Communities would like to recall that Brazil's measures must be evaluated as in existence at the time of the establishment of the Panel. This also includes the question of whether the import ban makes a contribution to the reduction of the number of waste tyres in Brazil, and of whether Brazil has taken other reasonable available alternatives to the ban.

255. As the European Communities has demonstrated in its previous submissions,[76] high numbers of used tyres are being imported into Brazil, on the basis of court injunctions, for the purpose of being retreaded in Brazil. As the European Communities has explained, the importation of large amounts of used tyres reduces the contribution that the ban could make to the reduction of waste tyres arising in Brazil, and equally signifies that Brazil has not taken other available measure to the ban. For this reason, the European Communities considers that Brazil's unsupported assurances that the importation of used tyres on the basis of court injunctions will soon cease are legally irrelevant for the evaluation to which the Panel must proceed in the present case.

256. In its reply to the Panel's question, as in its previous submissions, Brazil has not contested that the injunctions are in force, and that the importation of used tyres occurs in the amounts indicated by the European Communities. Rather, Brazil has claimed that the injunctions "can be, and are being, challenged through a number of appeals or actions", including "actions for recission" or actions on constitutional grounds. On this basis, Brazil renews its assurance that imports of used tyres through preliminary injunctions "will soon end".[77]

257. In this respect, it must be noted that Brazil's statements relate to decisions which Brazilian courts might take in the future. There is no way of knowing when and how Brazilian courts might decide any of the appeals or actions which might be introduced in the future. However, as the Appellate Body has confirmed, speculation about future court decisions cannot be a basis for the objective assessment of the facts to which a Panel must proceed in accordance with Article 11 DSU.[78]

258. It must also be noted that contrary to Brazil's explicit claims,[79] there is no indication that any of the appeals or actions in question have already been introduced. As Exhibits BRA-165, BRA-168, and BRA-169, Brazil has merely introduced technical notes prepared by Legal Advisers to the Brazilian President which expressly recommend that certain actions be introduced. However, Brazil has not submitted any proof that such actions have already been commenced.

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[76] European Communities' second written submission, para. 81 et seq; European Communities' second oral statement, para. 62 et seq.

[77] Brazils' answer to panel question No. 92, para. 13.

[78] Appellate Body Report on *US – Shrimp (Article 21.5 – Malaysia)*, para. 95; for the full citation, cf. European Communities' second written submission, para. 87.

[79] Brazil's answer to panel question No. 92, para. 13, and para. 99 of Brazil's second oral statement.

259. Moreover, the notes in question were prepared during the Panel proceedings and as recently as 25 August 2006 (Exhibit BRA-165) or 15 September 2006 (Exhibits BRA-168 and BRA-169). Moreover, as is clear from the content of the notes, notably the references to the agency requesting these notes and the frequent references to the ongoing WTO proceedings, the notes were prepared specifically because of the ongoing WTO dispute and for the purposes of submission to the present Panel. This fact significantly undermines the credibility of the legal analysis contained in these notes. In fact, if indeed the legal actions recommended in those notes were promising, the question would arise why they have not been initiated earlier by the Brazilian government.

260. As regards the specific actions addressed by the notes, Exhibit BRA-165 recommends a "recissory action" and a "declaratory action of non-existence of legal relation" against the final court decision confirming an injunction held by the Brazilian retreader Pneuback to import used tyres. It is noted that a "recissory action" is an exceptional legal remedy directed at decisions which have become *res judicata*. This is explicitly acknowledged in Exhibit BRA-165, which explains that a "recissory action is the legal and procedural remedy for dismissing a legal decision that can no longer be attacked through appeals".

261. For this reason, Exhibit BRA-165 explicitly confirms the European Communities' earlier submission that the injunctions held by Pneuback are *res judicata*,[80] and disproves Brazil's statement that "the case is far from closed", that it is "subject to further appeal and is being appealed by the Brazilian government" and that the "European Communities is misinformed on these proceedings".[81] The legal action envisaged by Brazil also shows the irrelevance of the comment made by Brazil that the "injunction involved an entirely different measure – a 15 years old ban on imports of used goods".[82] What matters is not how old the injunction is, but whether it is still in force and can be used to import used tyres. Otherwise, it would not be clear why Brazil is considering a recissory action and an action of non-existence of legal relation against this injunction.

262. Finally, it should also be noted that given their character as exceptional remedies, a recissory action and a nullity action can only succeed under very narrow conditions.[83] This exceptional character of the remedy makes it even more doubtful whether it would succeed if it were introduced.

263. As regards the action for non-compliance with fundamental constitutional principles considered in Exhibits BRA-168 and 169, this appears to be an even more exceptional remedy with an equally uncertain outcome. In fact, the action recommended is based on the assumption that the injunctions at issue would violate certain general principles of the Brazilian constitution, such as the right to an ecologically balanced environment (Article 225 of the Brazilian Constitution), or the right to health (Article 196 of the Constitution). It is manifest that the outcome of an action based on such general principles is highly uncertain at best.

264. What is far more interesting about Exhibit BRA-168, however, is that it contains a list of 24 Brazilian retreaders who hold injunctions which entitle them to import used tyre casings. The same exhibit also contains a list of cases in which the requests for injunctions have been rejected, which however is notably shorter than the first. With this exhibit, Brazil therefore disproves its own claim that the injunctions are an isolated phenomenon, that the Brazilian government has been

[80] European Communities' second written submission, para. 89.

[81] Brazil's second oral statement, para. 99. This is incidentally also proven by Exhibit BRA-161, which concludes that "the decision that granted the injunction and ensured the right of Pneuback to import used tyres in order to carry out its [commercial] activities is still in effect".

[82] Brazil's second oral statement, para. 99.

[83] For the recissory action, cf. Article 485 of the Brazilian Civil Procedural Code, referred to in Exhibit BRA-165.

successful in fighting the injunctions, and that the European Communities was "cherry-picking" its examples.[84]

265. Finally, the European Communities would also like to comment on the specific case of the importer BS Colway. It is noteworthy that Colway is equally referred to in Exhibit BRA-168 as one of the companies benefiting from an injunction. This disproves the contrary impression Brazil has tried to create in its second oral statement, where it claimed that the European Communities had ignored a March 2006 ruling which was positive for the government.[85] In fact, the ruling referred to by Brazil was a ruling by a mid-level court which does not affect the validity of the injunction in force.[86]

266. In conclusion, the European Communities submits that Brazil did not give a credible answer to the Panel's question of how long the existing injunctions could remain in place and what their continued impact on imports of used tyres can be expected to be. The facts suggest that these injunctions could remain in effect for a very long time and especially, but not only, those of the two largest Brazilian retreaders and importers of casings, BS Colway and Pneuback, are likely to ensure a large-scale ongoing importation of used tyres into Brazil.

Question 93. To Brazil.
In its answer to Panel's Question n° 16, Brazil said : "Because the preliminary injunctions authorize the importation of used tyres only as raw material, the Government of Brazil has imposed heavy fines for illegal sales of used tyres."
Do retreading companies that import used tyres sell these (as used tyres) and if yes to whom?

Response of Brazil

267. Brazil estimates that at least nine per cent of the used tyres imported as raw material for retreading are sold to the general public as part-worn (used) tyres. *See* Exhibit BRA-94. Such sales are illegal in Brazil and are subject to fines of R$ 400 per tyre under the Presidential Decree 3.179 - the same regulation that imposes fines for imports of retreaded tyres. In 2005, Brazil fined Brazilian retreaders a total of R$ 22.7 million for resale of imported used tyres as part-worns. *See* Exhibit BRA-69.

Comments of the European Communities

268. In reply to this question, Brazil informs the Panel that on the basis of Exhibit BRA-94, it believes Brazilian retreaders in 2005 sold 9% of the imported 11 million imported used tyres as part-worn tyres, i.e. 1 million tyres. At the same time, Brazil refers to the information contained in Exhibit BRA-69 concerning fines imposed by Brazil, which indicates 59,885 as the number of imported tyres for which fines were imposed in 2005. The European Communities does not know what explains this discrepancy in the numbers provided by Brazil, but they either undermine the credibility of the information provided, or cast serious doubt on the efficiency with which Brazil enforces its relevant legislation.

269. The European Communities would also point out that the sale of mid-life imported used tyres to consumers for direct use as such seems to be a side-effect of the importation of casings (by way of court injunctions). It would not exist if Brazil allowed the importation of retreads instead of the casings, and in comparison the effect of such imports and sales on waste accumulation can be

[84] Brazil's second oral statement, para. 101.
[85] Brazil's second oral statement, para. 101; cf. equally Brazil's second written submission, para. 140.
[86] Exhibit BRA-151 admits that the decision of 7 March 2006 is not valid at present and confirms that that BS Colway maintains its import right based on the 22 May 2006 decision by the vice-president of the Regional Federal Court of the Second Region, which prevails.

presumed to be more negative. According to Brazil's own response, this phenomenon of mid-life sales to consumers continues to exist, despite the above-mentioned fines.

Question 94. To Brazil.
In its answer to Panel's Question n°60, Brazil said : "If any retreaded tyres from the European Communities did enter Brazil through Rio Grande do Sul, this would have been a direct result of the preliminary injunctions, not of operation of the state measures."
Have preliminary injunctions been granted for the import of retreaded tyres?

Response of Brazil

270. Yes, a few preliminary injunctions that permitted limited imports of retreaded tyres have indeed been granted, but the volumes imported through these injunctions have been minimal.

Question 95. To Brazil.
The European Communities submits in paragraph 91 of its second written submission that "presently ongoing legislative developments in both houses of the Brazilian legislature are moving, with quite some support, in the direction of formally permitting, not prohibiting, the importation of casings (and retreads)" and mentions inter alia bill 216/03 approved by the Social Affairs Committee of the Brazilian Senate. Could Brazil explain the legal status of these "legislative developments"?

Response of Brazil

271. The European Communities' discussion of what may happen to draft bills 203/1991 and 216/2003 is speculative and has no legal relevance. Nevertheless, Brazil will briefly discuss these bills to respond to the Panel's question.

272. At the outset, Brazil notes that one measure dates back to 2003 and another to 1991, as the bill numbers indicate, but neither has become law to this date. Bill 216/2003 was introduced by a Senator from Paraná, the home state of Brazil's largest retreader. As Brazil has explained, Brazilian retreaders actively pursue imports of used tyres because these imports are substantially cheaper.

273. Brazil's Executive has actively opposed the bills from the start and will veto them if they manage to clear the legislative hurdles. These bills are very unlikely to be enacted, which would require them to be approved by both the Senate and the House of Representatives and then signed by the President. To this date, neither of the bills has been passed even by one of the houses. Supporters of Bill 216/2003 managed to get the bill approved by the Social Affairs Committee. Instead of scheduling a vote by the full Senate, the President of the Senate has scheduled public hearings on the bill because of the bill's health and environmental ramifications. Even if the bill is passed by the Senate, it will then need to be passed by the House of Representatives and avoid the president's veto. Because this scenario is very unlikely, the European Communities' conclusion that Brazil will soon lift its ban on imports of used and retreaded tyres has no basis. Had the European Communities truly believed in what it claims, it is puzzling why it would even continue its WTO challenge, instead of just letting Brazil's legislative process take its course.

Comments of the European Communities

274. In its reply to the Panel's question, Brazil has argued that the European Communities' reference to the two draft bills is "speculative and has no legal relevance".[87]

275. At the outset, the European Communities would agree with Brazil that the two draft laws are not yet in force, and for this reason do not affect the measures at issue in the present dispute, which

[87] Brazil's answer to panel question No 95, para. 16.

must be evaluated as in force at the time of the Panel's establishment. For this reason, the draft bills are of no relevance to the recommendations which the Panel must make in accordance with Article 19(1) DSU.

276. This being said, it is somewhat surprising to see Brazil insisting on the irrelevance of future developments when it itself has repeatedly referred to future measures it claims it will adopt, for instance as regards the enforcement of the import ban on used tyres, the establishment of a mandatory system of vehicle inspections, or the removal of the MERCOSUR exemption.

277. In fact, the European Communities referred to the bills in particular in response to the Brazilian claim that it would soon end the importation of used tyres.[88] Moreover, the European Communities believes that these legislative developments are useful context for the Panel in evaluating the ban's justification under Article XX(b). It is significant that at a time when the Brazilian government is defending the ban as indispensable for the protection of life and health in Brazil, bills aiming at the revocation of the ban are finding considerable support among Brazilian legislators, including of a specialised body such as the Special National Waste Policy Commission of Brazil, where an overwhelming majority of the deputies oppose the government's position as well as the kind of arguments which Brazil has submitted to this Panel.

278. This being said, the European Communities has no certainty that any bill revoking the import ban will indeed be adopted, which is why it was forced to initiate the present dispute settlement proceedings.

Question 96. To Brazil.
In relation to the video contained in Exhibit EC –73:

(a) Please clarify what the "Raupp opinion" is and what its relevance to these proceedings might be;

(b) Please comment on the suggestion made in the document that the Brazilian retreading industry can only function at 60% of its capacity using domestic carcasses.

Response of Brazil

279. The exhibit is a 12-minute video produced by Brazil's largest retreader, BS Colway, to persuade Brazilian legislators to support Bill 216/2003 that would have permitted imports of used and retreaded tyres. See Brazil's Response to Question 95 of the Panel. The Raupp Opinion is the amended version of this bill, introduced by Senator Waldir Raupp. The amended bill reflects the position of Senator Raupp alone, not of Brazil's Government or legislature. It is not a law and thus has no legal relevance.

280. The video offers valuable evidence, however, that directly contradicts the argument on which the European Communities has based its case – that tyres used in Brazil are not suitable for retreading. The video states: "Nowadays, 60 per cent of the raw material used by the Brazilian retreaders are domestic casings." This is an effective admission by the Brazilian retreaders that of some 18.7 million retreaded tyres made in Brazil in 2005, at least 60 per cent, or 11.2 million retreads were made from domestic casings. If 80 per cent, or 6.2 million of truck tyres in 2005 were made from domestic casings, as ABR states[89], this means that the remaining 5 million domestic casings were used to make passenger car retreads, and that of the 10.8 million passenger car retreads, at least 46 per cent were made from domestic casings in 2005. This directly contradicts the

[88] European Communities' second written submission, paras. 91-92.
[89] ABR Report, para. 5 (Exhibit BRA-95).

European Communities' claims that "Brazilian used tyres are not suitable for being retreaded"[90] and that "retreaded passenger car tyres produced in Brazil are made overwhelmingly from imported casings."[91]

281. With respect to part (b), if Brazilian retreaders indeed cannot operate at full capacity on Brazilian casings alone, this is a direct consequence of excess capacity, as Brazil explained in paragraph 119 of its SWS. This is the only plausible conclusion because Brazil has already achieved some of the highest suitability and retreadability rates reported by any country – a third of the total waste arisings are retreaded according to the retreaders' numbers (roughly 32 million used tyres are generated in Brazil every year, and based on the 60-per cent figure in the video and the ABR production numbers, 11 million of them are retreaded).

Comments of the European Communities

282. As regards the first part of the Panel's question, the European Communities would like to clarify that contrary to Brazil's reply, the Raupp opinion does not merely reflect the opinion of Senator Raupp, since it was approved by the Federal Senate's Social Affairs Commission with a majority of 18 to 1.[92] For the more general relevance of this opinion, the European Communities refers to its comments on Brazil's reply to the Panel's Question No. 95.

283. As regards the second part of the Panel's Question, Brazil avoids a meaningful response by stating that "if Brazilian retreaders cannot operate at full capacity on Brazilian casings alone, this is a direct consequence of excess capacity".[93] This is a circular response which avoids addressing the central issue, namely the problems in the supply of retreadable casings which is the underlying cause of the low level of capacity utilisation. This low capacity utilisation makes Brazil's statement that "Brazil has already achieved some of the highest suitability and retreadability rates reported by any country" entirely implausible. In fact, Brazil suggests essentially that Brazilian retreaders have been acting in an economically irrational fashion by building up capacity which even under the best of scenarios they could not expect to use. The European Communities submits that a far more plausible explanation for the presently unused capacity is the one it has already offered, namely that the adaptation of Brazilian industry to the standards of INMETRO Portaria 133 has led to a higher demand for good quality casings, which are not available in Brazil.[94]

284. In relation to the Video contained in Exhibit EC-73, Brazil also claims that the video states that "Nowadays, 60 per cent of the raw material used by the Brazilian retreaders are domestic casings".[95] However, the video contains no such statement. The video reports a statement by Roberto de Oliveira, Marketing Director of ABR, who states the following:[96]

> National casings are already being used. Due to the bad conditions of the country's roads and highways, we have only been able to use enough to meet 60% of our need, *that is, our segment operates with 40% idleness.*

285. Accordingly, the needs to which reference is made is the overall production capacity, which is used only at 60 per cent. However, as is not contested, the Brazilian retreading industry uses large numbers of imported used casings to reach even this 60% capacity utilisation. Contrary to Brazil's

[90] European Communities' first written submission, para. 81.
[91] European Communities' second written submission, para. 33.
[92] European Communities' second written submission, para. 91 and Exhibit EC-101.
[93] Brazil's answer to panel question No. 96, para. 21.
[94] European Communities' answer to panel question No. 107, para. 30.
[95] Brazil's answer to panel question No. 96, para. 20.
[96] Exhibit EC-73, minute 8:18 (emphasis added).

claim, the statement does not confirm that 60% of casings used by the retreading industry are of domestic origin.

286. For this reason, Brazil's calculations[97] are based on a fatal misunderstanding of what the 60 % stand for. The result of allegedly 46 % of passenger retreads being made from domestic casings is accordingly flawed. Such a result would also contradict the evidence adduced by Brazil in Exbihit BRA-95, stemming from ABR, which "believes that the large majority, but not the totality, of passenger car casings reformed in Brazil are imported, and is unable to precise the percentage of casings that is effectively obtained in the local market."

287. Moreover, it is also noted that the ABR representative speaks of capacity for the industry as a whole, i.e. including both truck and passenger car tyres. In this context, it must be recalled that the use of domestic casings for passenger car tyres is far lower than for truck tyres.

Question 97. To Brazil.
Please comment on the Euopean Communities' statement in paragraph 85 of its second oral statement that "the technology and equipment for ensuring the respect of [dioxin] emission limits exist, and the Brazilian cement, steel and paper mills companies can surely afford the investments, if they have not done it yet".

Response of Brazil

288. As Brazil explained in paragraphs 78-93 of its second written submission, properly operated, stateof-the-art cement kilns can only mitigate – not completely eliminate – health and environmental harm. Because harm from incineration cannot be avoided, no matter how high the standards, it is necessary to reduce – as much as possible – the volume of tyres that must be incinerated. As Brazil pointed out in paragraphs 74, 85, and 95 of its second written submission, the European Environment Agency itself recognizes the dangers of incineration and advises member States to incinerate waste tyres only "if no other outlet is possible."[98]

289. There is also a practical side to setting permissible emission levels. As Brazil explained in paragraph 14 of its Concluding Statement in the Second Panel Meeting, neither the European nor Brazilian governments can require cement kilns, paper mills, and other facilities to incinerate waste tyres. These facilities are private businesses that will incinerate tyres only if the incineration makes business sense. As the emission standards increase, costs of incinerating tyres increase, and the number of incinerators willing to accept tyres decreases. The OECD report (Exhibit EC-16) states at page 140 that introduction of strict environmental laws caused the use of incineration to decline in several OECD countries. In Austria, for example, the share of incineration dropped from the original share of 70 per cent to 40 per cent.[99]

290. Governments, therefore, face the difficult task of setting the standards high enough to reduce the unavoidable risks of incineration to a level they believe is acceptable under the circumstances, yet low enough to ensure that incinerators continue to accept waste tyres, which would otherwise have to be landfilled or stockpiled – at an even greater health and environmental cost. The issue, therefore, is not whether Brazilian incinerators can afford the safest technology available, but whether incineration of waste tyres would continue to make business sense if expensive investments were required. This especially is a concern in a developing country with fewer resources available.

[97] In paragraph 20 of Brazil's answer to panel question No. 96.
[98] European Environment Agency, Waste from Road Vehicles 2 (2001) (Exhibit BRA-108).
[99] OECD Environment Directorate, Improving Recycling Markets 140 (2005) (Exhibit EC-16).

Comments of the European Communities

291. Brazil has eluded the answer to this Question from the Panel and has decided to continue its evasive tactics in relation to co-incineration as an alternative, which Brazil insists in citing wrongly as "incineration".[100] Instead of providing information to the Panel on the state of the installation co-incinerating or capable of co-incinerating waste tyres in its territory, Brazil repeats that co-incineration produces health and environmental harm and that the Brazilian government can neither require these installations to co-incinerate waste tyres nor to increase the emission standards because the number of installations willing to accept tyres would decrease.

292. The European Communities will respond in relation to the harms caused by co-incineration in its comments on Brazil's answer to Question 123 from the Panel.

293. For the rest, it is quite surprising to learn that the Brazilian government has no regulatory powers to require cement kilns, paper mills and other facilities to co-incinerate waste tyres. This is not a question of business sense but one more related to the protection of the general interest, notably life and health. If it is true that Brazil is confronted with such important life and health challenges related to waste tyres as it has described in its submissions before the Panel, making compulsory co-incineration of waste tyres would be among the best solutions to those problems.

294. This is not a question related to the level at which emission standards for co-incinerating installations should be laid down. Brazil has already adopted those standards, and the European Communities has to presume that the level chosen by Brazil is sufficient to protect its population and environment. In any event, it is the level which Brazil has chosen in reality.

295. The only questions are whether Brazil has these installation in its territory, whether they are capable of and still have unused capacity to co-incinerate waste tyres, and, if some investments are needed, whether these are financially acceptable.

296. Brazil has not provided any information in this respect and it has limited itself to attaching, as Exhibit BRA-166 to its second oral statement, a list with the names and addresses of the companies that are authorized to dispose of waste tyres. This list gives a hint of the halting policy that Brazil has in relation to co-incineration: out of the 9 industrial groups producing cement in Brazil and listed in Exhibit EC-78,[101] only 4 have an authorisation to co-incinerate waste tyres.[102] Brazil has not provided any information about the reasons for this gap, which evidences on the face that Brazil's cement industry has unused capacity to co-incinerate more waste tyres than it currently does, a point that is also made in the video contained in Exhibit EC –73.

297. Finally, Brazil cannot defend its policy by arguing that it is a developing country.[103] The European Communities has already demonstrated that Brazil is one of the world's foremost producers of cement, paper and steel.[104] It is worth noting that, in the European Communities, only Spain and Italy produce separately more cement than Brazil. The companies in those three sectors have sufficient resources to face the investments needed to built or upgrade installations where waste tyres can be co-incinerated. Moreover, financing in Brazil of these investments are ensured by the gate fees

[100] The differences between "co-incineration" and "incinerations" have been explained by the European Communities in its answer to panel question No. 125, para. 61.

[101] These groups are: Joao Santos, Votorantim, Cimpor, Lafarge, Camargo Correa, Soeicom, Holcim, CP Cimento and Itambé.

[102] CP Cimento, Cimpor, Lafarge and Votorantim, the latter also controls Cimento Poty, Cimento Rio Branco and Cimento Tocantins.

[103] Brazil's answer to panel question No. 97, para. 24, *in fine*.

[104] European Communities' answer to panel question No. 47, para. 61, and European Communities' second written submission, para. 127.

that, in order to comply with their disposal obligations under Resolution CONAMA No. 258/99, producers and importers of tyres have to pay to those industrial installations for accepting waste tyres for co-incineration.

Question 98. To Brazil.
Please clarify whether the increase in the imports of used tyres between 2003 and 2005 described in paragraph 79 of the European Communities' first written submission is entirely attributable to import authorized under the injunctions granted by Brazilian courts?

Response of Brazil

298. Yes, the described increase is attributable solely to imports authorized under preliminary injunctions granted by Brazilian courts.

B. TRADE DATA

Question 99. To Brazil.
Could you please comment on the European Communities' statement in footnote 151 to paragraph 178 of its second written submission claming that the graph submitted by Brazil in paragraph 148 of its first written submission actually shows an increase in the total number of new tyre sales?

Response of Brazil

299. The increase in the sales of new tyres in Brazil was caused not by the import ban, but by the fact that there are simply more cars on Brazilian roads. From 2001 to 2005, the Brazilian fleet expanded from 32 million registered motor vehicles to 42 million, according to the National Traffic Department (*see* table below). During this period, the replacement market expanded by 9.4 million, or 22 per cent, from about 42.7 million to 52.1 million. During the same period, sales of new tyres produced in Brazil increased by only 900,000, or a mere five per cent. The European Communities' suggestion that these sales increased by "a few millions" in footnote 151 is untrue and misleading. Even if one counts 1999 and 2000 – for which Brazil does not have retread production information to calculate the market size – the sales of domestic tyres increased by only 1.6 million, or nine per cent. At the same time, imports of new tyres more than doubled from 1999 to 2005.

Registered Motor Vehicles in Brazil, million units

2001	2002	2003	2004	2005	Change, units	Change, %
31.9	35.5	36.7	39.2	42.1	10.2	32%

Source: National Traffic Department (http://www.denatran.gov.br/frota_03.htm)

Sales of New and Retreaded Tyres in Replacement Market in Brazil, 2001-2005 in million units

	1999	2000	2001	2002	2003	2004	2005	Change, 1999-2005, units	Change, 1999-2005, percent	Change, 2001-2005 units	Change, 2001-2005, percent
Sales of domestic new tyres	18.0	19.4	18.7	19.7	20.0	21.3	19.6	1.6	9%	**0.9**	**5%**
Imports of new tyres	6.5	9.3	10.0	8.1	7.5	9.2	13.8	7.4	114%	**3.9**	**39%**
Production/sales of retreaded tyres in Brazil			14.1	15.5	17.6	18.6	18.7			**4.7**	**33%**
TOTAL			**42.7**	**43.3**	**45.0**	**49.1**	**52.1**			**9.4**	**22%**

*Retread production numbers are substituted for retread sales and imports/exports of retreaded tyres are excluded because the import/export volumes are insignificant
Sources: ANIP, DECEX, ABR

Comments of the European Communities

300. The European Communities notes that Brazil's reply essentially confirms the comment made by the European Communities in footnote 151 to paragraph 178 of its second written submission, namely that there was an increase in the sale of new domestic replacement tyres in Brazil from 1999 to 2005 of 1.6 million. It should be noted that if one compares 2004 with 1999, the increase is even of the magnitude of 3.3 million.[105] Accordingly, Brazil's claims in paragraph 148 that the figures had remained stable were inaccurate.

301. As regards the relative magnitude of the change, Brazil suggests that 1.6 million additional new tyres represents an insignificant increase. This is a remarkable contrast to Brazil's statements regarding the justification of the ban, where it has claimed that even an additional number of 500 waste tyres was sufficient to justify the import ban on retreaded tyres.[106]

302. This contradiction also becomes apparent in the fact that Brazil's total imports of retreaded tyres in 2000 were in the order of 2 million tyres, and thus not of a very different magnitude from the change in the number of new tyres which Brazil now tries to dismiss as insignificant.

Question 100. To both parties.
What is an appropriate method to calculate the number of individual tyres contained in one ton of retreaded tyres? Can the same calculation method be applied in the case of used tyres? Is the difference between passenger car and commercial tyres relevant for this calculation?

Response of Brazil

303. According to the EC-commissioned report on implementation of the Landfill Directive, the approximate weights are as follows:

- new car tyre – 8 kg, used car tyre – 6.5 kg;
- new bus/truck tyre – 60 kg, used bus/truck tyre – 52.5 kg.

See Exhibit BRA-41, at p. 124.

304. The difference between passenger car and commercial tyres is relevant because commercial vehicle tyres are substantially heavier. However, because the weight of different types of commercial vehicle tyres can vary significantly, the industry's trend has been to calculate the number of waste tyres using passenger tyre equivalents (PTEs), also referred to as equivalent passenger units (EPUs).[107]

Response of the European Communities

305. The appropriate method to calculate the number of individual tyres contained in one ton of retreaded tyres is to divide 1000 kilograms by the average weight of a tyre in kilograms.

306. This general method can be applied for any type of tyre, including used tyres and new tyres. Similarly, it can be applied to passenger, truck and aircraft tyres.

307. However, when applying the method, and as will be explained in response to the following two questions, it has to be taken into account that there are considerable differences in the average

[105] See the table in para. 26 of Brazil's responses to the panel's second set of questions. Apart from the small fall in 2001, 2005 is the first year in that row where sales fell (by 1.7 million).

[106] Brazil's second oral statement, para. 78.

[107] See, e.g., Commonwealth Department of Environment (Australia), A National Approach to Waste Tyres 39-I (2001) (Exhibit BRA-8).

weight of passenger, truck, and aircraft tyres. Accordingly, the conversion has to be done separately for each of these categories.

308. Moreover, there are also differences in the average weight of new and used tyres. According to information received from both European and Brazilian retreaders, the difference in weight between a new and used tyre can be around 25% to 30%, depending on the degree of use of the tyre. The difference in weight tends to be relatively more important for truck tyres than for passenger car tyres. Accordingly, when carrying out the conversion, it must be taken into account whether this conversion is done for new tyres, used tyres, or end-of-life tyres. In contrast, it does not appear that there are significant differences in weight between new tyres and retreaded tyres.

309. When establishing the average weight of tyres, it must furthermore be noted that there may be considerable differences in the average weight of tyres even within the same category, such as passenger, truck and aircraft tyres. Moreover, as the European Communities will also explain, there may also be differences between countries in the average weight of a particular category of tyre (such as a passenger car tyre), depending on the car and tyre models typically used in the market.

Question 101. To the European Communities.
Could you please comment on Brazil's statement in paragraph 47 of its second written submission that the average weight of one passenger car tyre is approximately 6.5 kilograms?

Response of the European Communities

310. The European Communities notes that in paragraph 47 of its second written submission, Brazil speaks of waste passenger car tyres in the European Communities. The European Communities considers that whereas 6.5 kilograms may be a roughly accurate average for waste passenger car tyres in Brazil, this number may be somewhat too low for the European Communities.[108]

311. As for Brazil, which is the relevant market, the Brazilian retreader Colway has indicated that popular new car tyres have around 8 kg and high performance car tyres have around 10 kg of weight. Taking into account a loss of around 25 % to 30 % of their weight after being used, Colway suggests a weight of used passenger car tyres of around 6 kg to 6.5 kg, on average.[109]

312. The European Retreads Manufacturers Association (RMA) advises that in the United Kingdom, 130 tyres correspond to one ton of scrap car tyres, which gives a weight of 7.7 kg per car tyre. As an explanation for this higher weight, one must bear in mind that car and tyre sizes are on average somewhat larger in Europe.

Question 102. To both parties.
What is the average weight of truck, buses and aircraft tyres?

Response of Brazil

313. As Brazil explained in its response to Question 100 of the Panel, the weight of truck/bus tyres varies depending on the type of the vehicle. The typical weight of truck/bus tyres is generally assumed to be 52.5-60 kg. The weight of an aircraft tyre can vary significantly, from as low as 14 kg to as high as about 120 kg, depending on the type of the aircraft.

[108] For this reason, the average disposal cost of 1.2€ indicated by Brazil is somewhat overstated.

[109] It is noted, however, that Art. 4(c) of Instrução Normativa IBAMA n° 08/02 (Exhibit EC-48) defines 5 kg as the weight equivalent for one automobile (car) tyre for the purposes of "fiscalisation and control" in the context of the CONAMA 258/99 tyre disposal scheme.

Response of the European Communities

314. According to the Brazilian retreader Colway, the average weight of used truck and bus tyres is around 45 to 50 kg in Brazil.[110] In the European Communities, the Retreads Manufacturers Association (RMA) advises that 18 used truck tyres correspond to one ton of truck tyres, resulting in a weight of 55.6 kg for a used truck tyre. Once again, this difference in average weights between the European Communities and Brazil reflects the fact that that new truck tyres in the European Communities are somewhat larger on average.

315. As regards aircraft tyres, one must note that their sizes not only vary between those below the nose (smaller) and those below the wings (bigger, and called "principal") on the same aircraft, but there are also very different sizes corresponding to different aircraft models. In general, the average weight of an aircraft tyre would therefore not appear to be very meaningful, given that the variation between the sizes and weights of airplanes (from glider to Airbus A380) is of a totally different order of magnitude than for cars, trucks and buses.

316. This remark notwithstanding, Goodyear Aviation Tyres informed the European Communities that Aircraft tyres can weigh from 5 kg to 130 kg depending on the tyre size. A typical fully worn aircraft tyre may have lost up 10 % of its weight in service, varying from size to size and design to design. The European Tyre and Rubber Manufacturers Association (ETRMA) supplied the following information on two typical aircraft types:

- Airbus 320: principal tyre: 207 lb; nose tyre: 52 lb (1 lb = 0.4536 kg);
- Boeing 737 new generation: principal: 185 lb; nose: 39 lb.

317. While a weighted average can theoretically still be calculated, the European Communities has no such information on the general market, either in the EU or in Brazil, because this would imply knowing either the total number and total weight of all aircraft tyres sold, or the respective numbers and weights of the various types of aircraft tyres sold.[111] More easily, one can calculate an average from trade statistics, for instance in a given year (2003) Brazil imported 40 retreaded aircraft tyres weighing 3.5 tonnes (average 87.5 kg), and exported 54 retreaded aircraft tyres weighing 1 tonne (average 18.5 kg). If one takes the European Communities trade statistics for imports and exports of new and retreaded aircraft tyres, it seems more cautious to speak of an average weight of 20-40 kg. However, due to the small sample sizes and possible variations between tyres, it is not clear that these numbers are representative for the entire market.

Question 103. To both parties.
Brazil indicates in paragraph 47 of its second submission that a passenger car tyre weighs approximately 6.5 kilograms. Would it be correct to assume, on that basis, that the importation of 6,500 tons of tyres could be considered to represent the importation of 1 million passenger car tyres?

Response of Brazil

318. Yes.

[110] Once again, Art. 4(e) of Instrução Normativa IBAMA n° 08/02 (Exhibit EC-48) uses a slightly lower figure, namely 40 kg, as the weight equivalent for one truck or bus tyre for the purposes of "fiscalisation and control" in the context of the CONAMA 258/99 tyre disposal scheme.

[111] It its noteworthy that IBAMA Instruction 8/2002 (Exhibit EC-48) does not stipulate a standard weight conversion for aircraft tyres, which is due to the fact that the CONAMA 258/99 collection and disposal system does not cover aircraft tyres, but only tyres for automotive vehicles and bicycles (cf. Articles 1 and 2 of Resolution CONAMA 258/1999, Exhibit EC-47).

Response of the European Communities

319. As the European Communities has explained in its Reply to the Panel's Question No. 101, the figure of 6.5 kilograms is a roughly accurate average for waste passenger car tyres in Brazil. It is not the accurate number for new or retreaded passenger car tyres in Brazil, nor for new, retreaded, or waste passenger car tyres in the European Communities. Subject to this clarification, the Panel's calculation is correct.

Question 104. To the European Communities.
Is the figure of 2 million retreaded tyres imported to Brazil from the European Communities mentioned in footnote 151 to paragraph 178 of your second written submission equivalent to the 14,000 tons of retreaded tyres you referred to in paragraph 80 of your first written submission?

Response of the European Communities

320. At the outset, the European Communities would note that Footnote 151 is a reference to paragraph 175 (not 178) of its second written submission. In the footnote, the European Communities speaks of the Brazilian imports of retreads being "in the order of 2 million when the [import] ban was introduced" in 2000. This "order" was given because those imports were 2.00 million in 2000, 2.02 million in 1999, 3.33 million in 1998, 2.25 million in 1997, and 0.97 million in 1996.[112]

321. This is not equivalent to the 14,000 tonnes of imported retreads in para. 80 of the European Communities' first written submission (and reflected in the graph in para. 79). The reason is that "imports in the order of 2 million in 2000" refers to all imports of retreads, whereas the "close to 14,000 tonnes" refers to imports from the European Communities only (13,559.10 tonnes exactly) in 2000. Equivalence would be attained by taking the total weight of all retread imports (17,598 tonnes) or the number of EC imports in units (1,582,984).

Question 105. To Brazil.
Is Brazil aware of the reasons why the Brazilian Association of Retreaders (ABR) was able to estimate the proportion of domestic casings used by domestic truck and bus tyre retreaders, but it was unable to provide the same information in relation to domestic passenger car tyres? Is it feasible to determine the proportion of domestic casings used by passenger car retreaders in Brazil? If so, can Brazil provide the Panel with this information since 2000 (broken down by year)?

Response of Brazil

322. Brazil is not aware of the reasons why ABR did not estimate the proportion of passenger car retreads produced with domestic tyres. It seems that if the retreaders can provide this number for truck and bus retreads, they should be able to do the same for passenger car retreads. The reason for this refusal may be that because the actual share of passenger car retreads made from domestic casings is very high, providing this information would contradict the low suitability claims that these retreaders make before Brazilian courts and legislature.

323. While the ABR reports do not provide a specific proportion figure, the production data provided in the reports plainly demonstrates that a high proportion of passenger car retreads in Brazil are made from domestic casings. According to the ABR numbers, between 2001 and 2005, Brazilian retreaders produced some 43.7 million passenger car retreads. However, during the same period these retreaders imported 27.3 million casings. The European Communities agrees that at least 15 per cent

[112] According to official Brazilian import statistics (ALICE).

of the imports are discarded as "technical losses."[113] These technical losses are common in every market (e.g., in the United Kingdom they reach 30 per cent).[114]

324. To avoid argument over proper assumptions, Brazil assumes that the remaining 85 per cent were retreaded (although the actual share of imports that are retreaded is even lower, as admitted by Brazilian retreaders in Exhibit BRA-94). This means that even if all imports were passenger casings and the highest possible number of them was retreaded, even then, they would have been used to produce just 23.2 million of the 43.7 million retreads between 2001 and 2005.

325. In reality, the proportion of imported passenger casings used is even lower, not only because far more than just 15 per cent of imported casings are unsuitable for retreading, but also because some of the imports are truck and bus casings. It is impossible to tell what share of imported casings were passenger car tyres because used passenger car and truck/bus tyres share the same HS subheading – 4012.20. The ABR numbers suggest that roughly 15 per cent are truck/bus tyres and the rest are passenger car tyres.[115] This only leaves 19.8 million passenger car casings that were imported and could have, in principle, been retreaded. This means that at least 23.9 million, or 55 per cent of passenger car retreads made in Brazil necessarily had to be made from domestic casings.

326. From 2001 to 2003, before the imports of used tyres substantially increased, this proportion was even higher. The table below provides the calculations employed above for each year, from 2001 to 2005. The table shows that even under the most conservative assumptions, as much as 74 per cent of passenger retreads in Brazil were made from domestic casings. Brazil cannot provide the Panel with the information for 2000 because the Government of Brazil has no independent access to the retread production data and the ABR did not provide it.

Proportion of passenger car retreads made with domestic casings in Brazil						
	2001	**2002**	**2003**	**2004**	**2005**	**TOTAL**
PRODUCTION AND IMPORT DATA (ABR; DECEX)						
Production of passenger car retreads in Brazil, million units	6.50	7.50	9.00	9.90	10.80	43.70
Imports of used tyres into Brazil (passenger car and truck/bus)	2.40	2.66	4.24	7.56	10.48	27.34
Imports less technical losses	2.04	2.26	3.60	6.43	8.91	23.24
PASSENGER CAR RETREADS MADE WITH DOMESTIC CASINGS						
If all used tyre imports are passenger car tyres	4.46	5.24	5.40	3.47	1.89	20.46
Percentage if all casing imports are passenger car tyres	**69%**	**70%**	**60%**	**35%**	**18%**	**47%**
If 85 percent of used tyre imports are passenger car tyres	4.77	5.58	5.94	4.43	3.23	23.95
Percentage if 85 percent of casing imports are passenger car tyres	**73%**	**74%**	**66%**	**45%**	**30%**	**55%**

[113] See European Communities' second oral statement, at para. 33.

[114] *See* Used Tyre Working Group (UK), Sixth Report of the Used Tyre Working Group, at para. 14.1 (2003) (Exhibit BRA-55).

[115] Information Regarding the Tyre Retreading Sector in Brazil (prepared by Associação Brasileira do Segmento de Reforma de Pneus), at para. 5 (Exhibit BRA-95).

Comments of the European Communities

327. In its reply to the Panel's question, Brazil begins by questioning the good faith of the Brazilian retreading association ABR for not providing information on the share of domestic casings used for retreading of passenger car tyres.

328. In this respect, it is recalled that it is Brazil which has introduced the statements by ABR contained in Exhibits BRA-95 and BRA-157 into the present dispute, and which has relied on various statements contained in these exhibits. It is not admissible for Brazil to rely selectively on certain parts of its own exhibits, and to question the credibility of other parts of the same exhibit. In passing, it should also be noted that there may be certain reasons for why ABR may not be able to provide the information in question, not least the large number of retreaders in Brazil, the large number of injunctions in force, and the unverified figures for total production.

329. Subsequently, Brazil attempts to recalculate the rate of domestic tyre utilization, using a similar methodology to the one applied in Exhibit BRA-162. At a general level, the European Communities can therefore refer to the comments it has already provided in this regard in response to the Panel's Question No. 107. However, Brazil's reply exposes an additional number of inaccuracies and incorrect assumptions, which the European Communities would like to point out hereunder.

330. First of all, Brazil once again relies on the production figures provided by ABR in Exhibit BRA-157.[116] However, the European Communities has already shown that these productions figures are based on a number of unverified assumptions, and therefore do not appear reliable.[117]

331. Second, Brazil assumes that only 85% of imported casings are being retreaded, the rest being technical losses.[118] In this respect, Brazil relies on Exhibit BRA-94. In this respect, it must first of all be noted that this exhibit indicates technical losses as amounting only to 1 million out of 11 million tyres, i.e. less than 10 per cent. Also, it is noted that Exhibit BRA-94 provides for information only for one single year, namely 2005. In contrast, Brazil has provided no corresponding information for the other years covered in its calculations.

332. Moreover, in support of its assumption of a low rate of retreading of imported casings, Brazil argues that there are rates of technical losses of up to 30% which are common for every market.[119] However, whereas this may true for industries which use local casings, this can certainly not be true for the rates of retreading of imported casings, which are already specifically pre-selected for their retreadability.[120]

333. Finally, Brazil refers to the fact that from 2001 to 2003, before the imports of used tyres substantially increased, the proportion of use of domestic tyres was substantially higher. However, as the European Communities has already explained,[121] this reflects the earlier utilisation of sub-standard casings not compatible with the standards of Portaria 133, to which the Brazilian retreading industry has been adapting since their promulgation. The proportion of domestic casings in the production of retreads from 2001 to 2003 is therefore no longer relevant for the situation today.

[116] Brazil's answer to panel question No. 105, para. 32.
[117] European Communities' answer to panel question No. 107, para. 24.
[118] Brazil's answer to panel question No. 105, para. 32-33.
[119] Brazil's answer to panel question No. 105, para. 32.
[120] Cf. the invoices contained in Exhibit EC-91, which identify the good as "tyre casings (Class A) for retreading process (raw material), selected according portaria INMETRO nr. 133/01".
[121] European Communities' answer to panel question No. 107, para. 29-30.

334. Third, Brazil makes the assumption that 15% per cent of the imported tyre casings are truck tyre casings.[122] In support for this assumption, Brazil refers to para. 5 of Exhibit BRA-95. However, the quoted passage deals with a completely different issue when it states that "out of the 8 million [cargo] tyres retreaded in 2003, approximately 85% were recapped and 15% were top-capped". Accordingly, Brazil's assumption that 15% of imported casings are truck casings is not based on any evidence.

335. For all the reasons, as well as the reasons already set out in the European Communities' Reply to the Panel's Question No. 108, Brazil has not demonstrated that domestic passenger car casings are currently being used in significant numbers for the production of retreaded tyres in Brazil.

Question 106. To Brazil.
How do you reconcile your position that domestic casings are retreadable and that there is a waste tyre accumulation problem in Brazil with the statement made by the Brazilian Association of Retreaders (ABR) in the document submitted as Exhibit BRA-95, that "In 2004... there was a supply shortage of casings in Brazil, leaving [the Brazilian] tyre retreading sector vulnerable"?

Response of Brazil

336. At the outset, Brazil notes that it submitted the ABR report because it is the only source of information on retread production in Brazil. Brazil has no reason to doubt the reliability of the production figures, but it expressly disagrees with the report's suggestions that few Brazilian casings are suitable for retreading.

337. There is no evidence that there was indeed a shortage of domestic casings in 2004, as ABR claims. As a general matter, Brazilian retreaders' claims of unavailability of retreadable domestic casings are unfounded, as figures provided in Brazil's response to Questions 96 and 105 of the Panel plainly demonstrate.

338. In its entirety, the statement quoted states: "In 2004, when their export numbers were excellent (see ANIP numbers), there was a supply shortage of casings in Brazil, leaving our tyre retreading sector vulnerable." First, by singling out year 2004, the statement seems to suggest that in previous years, there was no shortage of domestic casings. Second, the statement is internally inconsistent. It blames high levels of exports and, by implication, lower domestic sales of new tyres in 2004 for a shortage of casings in the same year. However, casings retreaded in 2004 would have come from new tyres produced in prior years – not in 2004 – because a tyre is used for several years before it is retreaded. Brazil therefore expresses reservations about the statement's credibility.

339. These reservations notwithstanding, it is possible, in principle, that there may be fewer domestic casings in Brazil than necessary to fully utilize the production capacity of domestic retreaders. As Brazil explained in paragraph 119 of its second written submission and in its response to Question 96, however, this would merely be a consequence of excess capacity in the industry, not of the lack of suitable casings.

Comments of the European Communities

340. In its reply to the Panel's Question, Brazil again cherry-picks on the information provided by ABR by expressing its trust in those figures that suit Brazil's defence and disagreeing with those that do not. After all the information which the European Communities has submitted in relation to the suitability of Brazilian passenger casings for retreading, it is astonishing that Brazil asserts that "[t]here is no evidence that there was indeed a shortage of domestic casings in 2004". Contrary to Brazil's claim, its responses to Questions 96 and 105 do not demonstrate that "Brazilian retreaders'

[122] Brazil's answer to panel question No. 105, para. 34.

claims of unavailability of retreadable domestic casings are unfounded", also because of the flaws on which these responses are based.[123]

341. Brazil also draws baseless *a contrario* conclusions from ABR's remarks in relation to casing shortages in 2004, to the effect that there therefore would have been no casing shortages in the previous years. In paragraph 6, the new ABR Exhibit BRA-157 makes general statements, not related to a specific year, on the scarcity of good quality Brazilian casings, which is indeed the unanimous position of the Brazilian retreading industry.[124] The European Communities has drawn the Panel's attention in its closing statement at the second oral hearing.[125]

342. Regarding Brazil's statements in relation to the "excess capacity" existing in the Brazilian retreading industry, it is interesting to note that Brazil's judgment of what is "excess" is premised on the number of casings which the domestic market can supply, or rather cannot supply. Brazil omits the existing and unsatisfied demand for higher numbers of retreads that could be produced and sold in Brazil at the current prices. Given their success on the domestic market, it is not inconceivable that the quite competitive Brazilian retreaders would also be capable of exporting more retreads in the future. This presupposes of course that they are freed from their current capacity utilisation constraints. The European Communities would also refer to its above comments on Brazil's circular arguments on excess capacity.[126]

Question 107. To the European Communities.
Please comment on the following elements presented by Brazil in its second oral statement:
(a) the figures contained in Exhibit No. 162 on the number of tyres retreaded in Brazil made from domestic casings, in the years 2001 to 2005, as referred to in paragraph 57 ff. of Brazil's oral statement;
(b) the arguments in paragraph 61 of Brazil's oral statement relating to the proportion of retreads made in Brazil made from domestic casings and the proportion of retreadable used tyres actually being retreaded.

Response of the European Communities

343. The calculations contained in Exhibit BRA-162, to which Brazil refers in paragraphs 57 et seq. of its second oral statement, are based on (i) overall casings imports; (ii) retreader's estimates on the internal destination of imported casings; (iii) ABR's new information on the production of retreads in Brazil in Exhibit BRA-157; and (iv) used tyre arisings in Brazil.

344. Whereas the European Communities does not contest Brazil's numbers as regards the importation of used tyres into Brazil, the European Communities submits that the further assumptions and factors used in the equations are partially incorrect, and partially based on unverifiable assumptions.

345. As regards the internal destination of imported casings, Brazil distinguishes between a "conservative scenario", in which all imported casings are retreadable, and a "realistic scenario", according to which only "approximately two-thirds" of the imported casings are retreaded.[127] As footnote 51 to Brazil's SOS clarifies, this assumption is supposed to be based on the information provided by Brazilian retreaders in Exhibit BRA-94.[128] However, as the European Communities has

[123] Cf. the European Communities' comments on Brazil's answer toquestions 96 and 105.
[124] See, for instance, the video contained in Exhibit EC –73.
[125] European Communities' Closing Statement, para. 22.
[126] See the European Communities' comments on Brazil's response to panel's question No. 96.
[127] Brazil's second oral statement, para. 58.
[128] This information is also part of the Parecer Raupp, which the European Communities submitted as Exhibit EC-22.

already pointed out,[129] Exhibit BRA-94 in no way confirms Brazil's submission that only two thirds of imported casings are retreaded. In fact, of the 11 million casings mentioned in Exhibit BRA-94, only 1 million, i.e. less than 10%, are mentioned as "lost" (presumably due to lacking retreadability), with another million being sold as mid-life tyres. The percentage of imported casings that are retreaded can therefore not be 67 %, but would have to be around 90 %, based on Brazil's own source. This misrepresentation invalidates entirely the calculations in the fourth table of Exhibit BRA-162 and all percentages which Brazil quotes in the context of what it calls the "realistic scenario".

346. As regards the production of retreaded tyres in Brazil, Brazil relies on an "updated version" of a report of the Brazilian retreaders association, which provides production figures for retreaded car and truck tyres.[130] In relation to these figures, it is necessary to point out that these figures are estimates based on unreliable assumptions and unclear methodology. In fact, at the end of para. 2 of the ABR Exhibit BRA-157, it is indicated that the production figures are the result of calculations with:

- the weight of the rubber produced by the rubber industry divided by a weight factor for each tyre kind. First of all, it is not clear what is meant by "weight of the rubber produced by the industry", which specific industry is referred to, and where this industry is located. Second, given the considerable divergences between tyre types, it seems questionable to rely on numbers resulting from calculations with the raw material produced and undisclosed weight factors.

- national production of new tyres in Brazil, multiplied by a "recapability index" for truck and bus tyres, i.e. the number of times which ABR assumes, based on its experience, a truck tyre is retreaded, on average. The numbers which ABR gives are thus based on an assumed rate of retreading. Brazil then uses these ABR numbers to demonstrate the actual rate of retreading and the share of domestic retreads that are made from domestic casings. This is not a proper methodology, because if the input into an equation is an assumption, then the effective reverse calculation cannot return a proven empirical number for the same variable.

- an ABR census. However, there is no information about this census and its quality, notably the size of the sample and the questions and answers, and therefore no possibility to verify the accuracy of the results of this census.

347. As regards the used tyre arisings in Brazil contained in the last two tables of Exhibit BRA-162, Brazil assumes an average life of 5 years, which, as the European Communities has explained in response to the Panel's Question No. 90, may be somewhat too high. Since the overall market for new tyres is slowly expanding, the figures of casings arisings may therefore have been slightly underestimated. The production numbers themselves appear identical to the ones in the LAFIS report,[131] but they seem to omit light trucks/vans ("camionetas"), which are roughly as many as the numbers for truck tyres (3-4 million per year). The calculations on arisings also make a number of

[129] European Communities' second written submission, footnotes 43 and 75.

[130] Brazil's second oral statement, para. 58, referring to Exhibit BRA-157. Contrary to Brazil's claim, the only difference between Exhibit BRA-157 and the earlier report of the Brazilian Retreaders Association ABR (Exhibit BRA-95) is not that the numbers for truck and passenger car retreaded tyres have been disaggregated. Rather, the accompanying text contains marked differences. In addition, it is noted that in Exhibit BRA-157, two paragraphs (paragraphs 7 and 8) seem to be missing.

[131] Exhibit EC-92, p. 4.

assumptions that are questionable, notably that ¾ of Brazilian truck retreads can be retreaded again (Note 4 at the end of Exhibit BRA-162).[132]

348. Overall, with the exception of the number of imported used tyres, the calculations contained in Exhibit BRA-162 are full of inaccuracies and unproven assumptions. For this reason, Exhibit BRA-162 is inadequate for the purpose of establishing the rate of retreading of passenger car and truck tyres as well as the share of domestic casings in retreads manufactured in Brazil.

349. On this basis, the European Communities maintains its view, which is based on the LAFIS report, that the rate of retreading of passenger car tyres in Brazil must be considerably below 9.9%, which is the overall rate of retreading indicated in this report.[133] Brazil has argued that this number was based on a "controversial" IPT study commissioned by the new tyre producers in Brazil which "was so flawed that the author was asked to redo it".[134] Brazil equally indicates that the new study has not yet been completed.[135] The European Communities has not commissioned the study in question, and is not in a position to verify the methodology and input used in the preparation of the study. However, the European Communities notes that the study at issue was prepared independently of the present proceedings, whereas Brazil has presented calculations which were prepared at a late stage in the present proceedings, and specifically for the purposes of the use in dispute settlement. It appears therefore that apart from their general methodological and factual inadequacy, Brazil's numbers cannot claim a higher degree of credibility than those prepared by independent parties in Brazil.

350. Accordingly, Brazil's statement in para. 61 of its SOS that the overall rate of retreading in Brazil is as high as 44% lacks all credibility.[136] Moreover, after announcing its inflated rate of retreading, Brazil triumphantly declares that its rate of retreading is "at least three times the rate of the EC countries".[137] However, this statement, rather than supporting Brazil's case, in fact underlines the lack of credibility of Brazil's calculations. According to the evidence presented by Brazil itself,[138] there is a strong fatigue factor affecting Brazilian casings due to factors in Brazil such as road quality, consumer habits, poor tyre maintenance, and the lack of inspections. Moreover, if Brazil really had so many good domestic casings, one wonders why Brazil continues to import huge quantities of casings for the purposes of retreading, rather than exporting casings.

351. Moreover, it must also be noted that the results presented in Exhibit BRA-162 show a constant decline of the rate of retreading from 2000 to 2005. For instance, even according to Brazil's calculations in the conservative scenario, the rate of retreading for passenger car tyres declined from 21% in 2000 to 9% in 2005, and for truck tyres from 77% to 60%. Brazil has attributed this decline to the importation of casings.[139] However, the importation of casings is itself due to the lack of retreadable casings which comply with the standards imposed by Portaria INMETRO 133, which in turn reflect the requirements for tyre retreading set out in UNECE Regulation 108.[140]

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[132] In note 3 to Exhibit BRA-162, the weight of a new passenger car tyre is indicated as 852,76 kg, which appears to be a further mistake.

[133] European Communities' second written submission, para. 45 and Exhibit EC-92, p. 11.

[134] Brazil's second oral statement, para. 72. It is noted that Brazil provides a study by IPT as Exhibit BRA-159. This study is dated July 2004. In contrast, the LAFIS report refers to a study commissioned by the Brazilian association ANIP in 2005 (Exhibit EC-92, p. 11). It is therefore not clear that the study provided by Brazil is the one to which the LAFIS report refers.

[135] Brazil's second oral statement, para. 24.

[136] In addition, the European Communities notes that it is not very meaningful to calculate an overall retreading rate for truck and car tyres, given the important differences between these two markets.

[137] Brazil's second oral statement, para. 61.

[138] Cf. Exhibit BRA-157, para. 6, and EC Closing Statement, para. 22.

[139] Brazil's second oral statement, para. 5

[140] The European Communities explained these requirements in para. 25 of its first written submission.

352. In other words, the declining rate of retreading reflects the gradual adaptation of the Brazilian retreading industry to the higher standards of Portaria 133. For this reason, higher rates of retreading in earlier years are no longer relevant, because they reflect the use of casings which were not in compliance with the relevant standards, and will therefore not be able to continue in the future. To the extent that retreading of domestic passenger casings continues in small numbers, this reflects the use of sub-standard casings by smaller Brazilian retreaders who are not able to import suitable casings from abroad.[141]

353. As regards the retreading of truck tyres, it is recalled that INMETRO is still working on the adoption of the relevant technical standard.[142] Accordingly, it is likely that the higher – albeit declining – rate of retreading of truck tyres may reflect a high use of sub-standard casings which would not comply with the requirements for tyre retreading under UNECE Regulation 109. In this context, it is noted that retreaded tyres produced with sub-standards casings will not have the same durability and safety as retreaded tyres, which, like retreaded tyres produced in the European Communities, are produced with good-quality casings.[143]

Comments of Brazil

354. The European Communities' entire case depends on its being able to demonstrate that new tyres used in Brazil cannot be retreaded again, and, therefore, present the same health and environmental risks as imported retreads. The European Communities has failed to prove this point. It has offered no evidence to support this unlikely hypothesis, with the exception of some self-serving statements made by Brazilian retreaders.[144] Brazil, on the other hand, has extensively demonstrated that tyres used within its territory (domestic casings) are both suitable for retreading and are, in fact, retreaded. In its Exhibit BRA-162, Brazil presented specific figures showing that a very high number of Brazilian casings are retreadable and are retreaded.

355. To calculate the share of Brazilian retreads made with domestic casings, Brazil deducted imported casings that would have been retreaded from the total number of retreads produced in Brazil. Brazil then divided the number of retreads made from domestic casings by the total used tyre arisings to arrive at the rate of retreading of exclusively domestic casings. The European Communities, in its response to Question 107, did not contest the import numbers.[145] Neither did it actively contest the waste arisings, noting only that they "may [] have been slightly underestimated."[146] The two aspects that the European Communities did challenge were the retread production figures in the ABR report (both the original and the updated versions) and the proportion of imported casings that are, in fact, retreaded.

(i) ABR report and production numbers

356. With respect to the ABR report, the European Communities questions its methodology and also suggests that it is not credible because it was prepared "specifically for the purposes of the use in

[141] In this context, it is noteworthy that Brazil keeps postponing the definitive entry into force of Portaria INMETRO 133/2001. Portaria INMETRO 163 of 3 July 2006 (Exhibit EC-125) postpones the entry into force of Portaria INMETRO 133/2001 to 1 January 2007, which is already the third such postponement (cf. European Communities' first written submission, para. 20).

[142] European Communities' first written submission, para. 22.

[143] In addition, it is also recalled that retreading of truck and aircraft tyres generally occurs without change in ownership (cf. European Communities' closing statement, para. 24). For truck tyres, this is explicitly confirmed in Exhibit BRA-95, para. 6; for aircraft tyres, cf. Exhibit EC-23.

[144] *See* Brazil's second oral statement, at para. 63.

[145] *See* European Communities' answer to panel question No. 107, at para. 22.

[146] *See* European Communities' answer to panel question No. 107, at para. 25.

dispute settlement."[147] The European Communities' criticism of the ABR report in its latest set of responses represents a remarkable reversal of the European Communities' own position in its second written submission and second oral statement, where it enthusiastically endorsed the findings of the ABR report. In paragraph 44 of its second written submission, the European Communities employed the very figures it now challenges to argue that Brazilian passenger casings are not retreadable. It also cited ABR's belief that "the large majority, but not the totality of passenger car casings reformed in Brazil are imported."[148] The European Communities then concluded:

> "This information thus fully confirms the European Communities' view that the retreading of domestic passenger car casings, to the extent it occurs at all, represent only a very small proportion of used car tyres arising in Brazil."[149]

357. In paragraph 29 of its second oral statement, the European Communities again noted, "It is, however, worth recalling that the ABR's report indicates that the large majority of passenger car casings retreaded in Brazil are imported."

358. Having apparently recognized that the ABR report hurts its case more than it helps, the European Communities has now gone from endorsing the report to criticizing it for questionable methodology and bias. However, even in its criticism the European Communities is inconsistent: having just contested the reliability of the ABR report in paragraphs 24 and 27 of its response to Question 107, the European Communities proceeds to cite the report in paragraph 28 in support of its low suitability argument. Instead of explicitly referring to the report, however, the European Communities this time only makes a vague reference to "the evidence presented by Brazil." The exhibit number in the footnote reveals, however, that the evidence the European Communities refers to is none other than the updated ABR report (Exhibit BRA-157). The European Communities also cites the report to support its argument in response to Question 90, at paragraph 4.

359. At the outset, Brazil reminds the Panel that Brazilian retreaders have vigorously opposed the import ban on used and retreaded tyres and clashed with the Government in countless legal disputes. In the present WTO dispute, Brazilian retreaders support the European Communities – not Brazil – and have no reason to help the Government of Brazil make its case in the WTO. Judging by the European Communities' responses to the second set of the Panel's questions, at least one of these retreaders, has assisted the European Communities in this very dispute.

360. With this in mind, Brazil has no reason to suspect that the report's methodology is anything but sound. First, no entity is more familiar with Brazil's retreaded tyre market than the retreaders themselves, and if they have chosen a particular method to calculate production, they must have done so because it is the best available method. Second, the ABR report includes statements that not only contradict Brazil's arguments, but actually support the arguments made by the European Communities. As noted above, the European Communities has actively relied on these statements to build its own case. Had the retreaders indeed sought to present distorted numbers, those numbers would have favoured the European Communities, not Brazil, just as the narrative that accompanies the numbers favours the European Communities. Brazil again points out, however, that the ABR production numbers contradict ABR's assertions of low suitability made in the narrative.

361. For the very same reason, the fact that the ABR report was prepared after the European Communities initiated the present proceeding in no way undermines the reliability of the figures presented in the report. In addition, the production statistics that the European Communities

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[147] European Communities' answer to panel question No. 107, at para. 27.

[148] *See* European Communities' second written submission, at para. 44, citing ABR Report, at para. 6 (Exhibit BRA-95).

[149] European Communities' second written submission, at para. 44.

now challenges have been collected for many years. Only the narrative part of the report was prepared after the establishment of the panel.

362. Brazil would have liked to be able to present retreadability figures from an independent source that were not accompanied by self-serving and unfounded claims. However, Brazil is not aware of another source that provides this kind of data.

363. The LAFIS survey of tyre industry (Exhibit EC-92) – which the European Communities still endorses[150] – supports the ABR numbers. The survey states that some 10.5 million remoulded tyres were made in 2004.[151] According to the 2005 estimate of the destinations of imported casings ("Raupp Opinion," Exhibit EC-22, at 4), of all the casings that were retreaded, about 57 per cent were remoulded and the rest were top-capped or re-capped. If the remoulded tyre production mirrored the utilization of imported casings – that is, if 10.5 million remoulds amounted to 57 per cent of the retread production – then the total retread production would have been 18.4 million. The ABR puts the total at 18.6 million.[152] Applying the proportion of remoulded tyres given in the ABR report would give a slightly higher production figure.[153]

364. The European Communities' dramatic shift of positions on the ABR report illustrates the willingness that the European Communities has exhibited throughout this dispute to make any argument convenient at the moment, even if that argument has no basis in fact and even if it contradicts the European Communities' own prior statements made before this Panel and in other fora. In this dispute, the European Communities has offered studies that it claimed proved that incineration was safe, but as Brazil pointed out in paragraphs 86-92 of its second written submission, if those studies proved anything, it is that incineration is dangerous. The European Communities then pointed to the Stockholm Convention and said that dioxins – dangerous chemicals released during incineration – were not among the 12 persistent organic pollutants that the Convention targeted for elimination, when, in fact, they patently are.[154] The European Communities claimed in its second oral statement that its Exhibit No. 124 demonstrated that tyres had nothing to do with dengue, but that very exhibit said that "[t]he tyre group [] showed very high averages" of dengue-positive larvae at one of the surveyed locations.[155] The European Communities has even stated that it sees no harm in Brazil relying on landfilling, even though the European Communities itself categorically prohibits the practice.[156]

(ii) LAFIS/IPT Report

365. In its responses, the EC continues to argue that the 9.9 per cent figure presented in the LAFIS report is the rate of retreading in Brazil.[157] The LAFIS report explicitly states at page 11 that the source of the 9.9 per cent figure is the IPT study, commissioned by Brazil's National Tyre Manufacturers' Association (ANIP) (Exhibit BRA-159). It is noteworthy that the European Communities chose not to rebut arguments that Brazil made in its SOS about the flaws of the study, despite the fact that the study is the actual source of the 9.9 per cent figure and is the only remaining source that – in the European Communities' interpretation – supports the claims of low suitability.[158]

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[150] *See* European Communities' response to panel question No. 107, para. 27.
[151] *See* LAFIS, Brazil – Car Parts and Vehicles: Tyres 4 (2006) (Exhibit EC-92).
[152] *See* ABR Report, at 1 (Exhibit BRA-95).
[153] *See* ABR Report, at 2 (Exhibit BRA-95).
[154] *See* European Communities' second written submission, para. 117; Brazil's second oral statement, para. 40.
[155] *See* Brazil's response to panel question No. 89, para. 8.
[156] *See* European Communities' second written submission, para. 107.
[157] *See* European Communities' response to panel question No. 107, para. 27.
[158] *See* Brazil's second oral statement, at paras. 24, 72.

366. As Brazil explained in paragraph 24 of its second oral statement, the study accounted for just a half of the used tyres generated in Brazil in that particular year. It surveyed only "retailers and tyre repair shops"[159] and did not account for retreadable tyres that were retained by owners even though they comprise a third of the total waste arisings. Neither did it account for a large part of commercial tyres because these tyres do not typically pass through the retailers or tyre repair shops.

367. The study first concludes – in a direct contradiction to the European Communities' low suitability argument – that some 47 per cent of used tyres in Brazil can be retreaded or even used as part-worns (*i.e.* still usable) (Figure 4). Of these, the study – by design – only accounts for 9.9 per cent – which are those tyres that pass through tyre retailers, repair shops, and ultimately junk yards. The remaining 37 per cent are retained by the owner and are, in most cases, sold to retreaders and retreaded. The very reason owners keep these tyres is because they have value, whether as retreadable casings or part-worns. The study does not specify the share of these tyres that are retreaded because it has no way of documenting it, given that it only surveys tyre repair shops and retailers.

368. The study also leaves out another important group of used tyres – commercial vehicle tyres. As the EC itself pointed out, "retreading of truck and aircraft tyres generally occurs without change in ownership,"[160] that is, companies do not sell used tyres and buy retreads – rather they retread their own tyres. For this reason, most commercial vehicle tyres would not have been captured by the IPT study. This squarely contradicts the European Communities' earlier suggestion, in its second written submission, that "since the retreading of domestic truck tyres occurs to a much higher extent than for car tyres, it must be assumed that the percentage of Brazilian passenger car tyres which are being retreaded is considerably lower than 9.9%, and most likely *de minimis*."[161]

369. This evidence plainly demonstrates that the 9.9 per cent figure does not represent the actual rate of retreading, as the European Communities claims. The actual rate of retreading in Brazil is much higher, as reflected in Exhibit BRA-162.

(iii) Portaria 133

370. The European Communities began this dispute by arguing – with no qualifications – that tyres used in Brazil cannot be retreaded.[162] In response, Brazil pointed out that before 2004 – the first of the two years when high volumes of used tyres were imported – domestic retreaders had no difficulty finding suitable domestic casings and the vast majority of Brazilian retreads were made from domestic casings.[163]

371. To explain away this incontrovertible fact, the European Communities has invented a new argument: it now claims that imports of casings increased in 2004 and 2005 because Portaria INMETRO 133 imposed rigid standards on casings, rendering Brazilian casings *no longer* suitable for retreading. First, Brazil notes that this is the first time that the European Communities has even made this argument. In its first written submission, the European Communities dedicated three paragraphs to the discussion of Portaria INMETRO 133 and its equivalent for commercial vehicles (paragraphs 20-22), but did not once suggest that the *portaria* created a shortage of suitable casings. In its second written submission, the European Communities did not mention the regulation at all. The European Communities' belated invocation of the *portaria*, at the close of the proceedings, should be

[159] *See* IPT Study, Section 3 (Exhibit BRA-159).
[160] European Communities' response to panel question No. 108, at ftn. 24.
[161] European Communities' second written submission, at para. 45.
[162] *See* European Communities' first written submission, at para. 81.
[163] *See* Brazil's second oral statement, at paras. 56-61; *see also* Exhibit BRA-162.

seen for what it is – a last-minute attempt by the European Communities to bolster its faltering argument.

372. Second, Portaria INMETRO 133 is not a recent development. It has been in effect since 2001. Used tyre imports, on the other hand, did not become substantial until 2004 – some three years later. Had the *portaria* in fact had something to do with the suitability of domestic casings, imports of used tyres would have reached the 2004 levels much earlier. Finally, Brazil is not aware of any times when Brazilian retreaders and other opponents of the import ban argued in any court or forum that the *portaria* made finding suitable domestic casings difficult, even though such arguments could, in principle, strengthen the retreaders' case in favour of the imports.

373. In its response to Question 107, the European Communities again repeats its claim that the allegedly poor conditions of Brazilian roads contribute to the allegedly low retreadability rate. However, the European Communities has offered no evidence in support of its argument, with the exception of the INMETRO Technical Note 83, which, as Brazil has explained, merely restated the arguments made by the Brazilian retreaders and did not reflect INMETRO's views.[164] The European Communities also misses an important point: regardless of the road conditions in Brazil's countryside, most tyres – and especially passenger car tyres – are used in urban areas, where the roads are just as good as the roads in wealthier countries.

374. The European Communities argues in its response:

> "To the extent that retreading of domestic passenger casings continues in small numbers, this reflects the use of *sub-standard* casings by smaller Brazilian retreaders who are not able to import suitable casings from abroad.[165]"

375. Evidence already presented by Brazil aptly rebuts this statement. In addition, Brazil points out that European Communities' own exhibits contradict this assertion. According to the LAFIS report, some 10.5 million remoulded tyres were made in 2005.[166] Of this amount, 6.5 million were made with Brazilian casings.[167] Remoulding is a fairly new retreading technology that requires substantial investment and better quality casings. Most small retreaders would not pay for the new equipment and better casings when they can continue re-capping or top-capping tyres with equal success. For this reason, remoulding is typically carried out by more well-established and financially-able companies. This means that in 2005, at least six million Brazilian retreads – a third of the total production – were made by fairly well-established businesses from high-quality casings.

376. Not only is the quoted statement manifestly untrue, but it also illustrates the condescending attitude toward Brazil the European Communities has exhibited throughout this dispute. To the European Communities, everything about Brazil seems to be *sub-standard,* be it Brazil's casings, Brazil's roads, habits of Brazil's drivers, Brazil's regulations, its waste tyre management practices,[168] or its dengue control efforts[169] – all in direct contrast with the ways of the European Communities. In reality, however, it was Brazil – not the European Communities – that first prohibited the landfilling of waste tyres and that achieved some of the highest rates of retreading.

(iv) Conservative vs. realistic scenarios

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[164] *See* Brazil's response to panel question No. 25.
[165] European Communities' response to panel question 107, at para. 30 (emphasis added).
[166] *See* LAFIS, Brazil – Car Parts and Vehicles: Tyres 4 (2006) (Exhibit EC-92).
[167] *See* Raupp Opinion, at 4 (Exhibit EC-22).
[168] *See, e.g.*, European Communities' second written submission, at para. 55.
[169] *See* European Communities' second written submission, at para. 57-59.

377. The European Communities challenges the two-thirds figure that Brazil used to estimate the proportion of the imported casings that were actually retreaded. At the outset, Brazil points out that the European Communities' criticism applies only to the realistic scenario because the conservative scenario assumed that all imported casings were retreaded – precisely to avoid an argument over this particular assumption. The conservative scenario likewise showed that a substantial number of retreads were made from domestic casings. In addition, Brazil has revised the conservative scenario in its second set of responses to account for the European Communities' admission in its second oral statement that at least 15 per cent of imported casings are discarded as technical losses.[170] This means that even under the most conservative estimates, only 85 per cent of the imported casings are retreaded. Brazil included the revised numbers in its table at paragraph 35 of the second set of responses. The revised *conservative* scenario shows that between 2001 and 2005, some 55 per cent of retreads – on average – were made from Brazilian casings. In 2002, that number reached 74 per cent. This alone conclusively demonstrates that Brazilian casings are retreadable and are retreaded.

378. Even the revised conservative scenario, however, is too conservative. First, Brazil pointed out in its response to Question 105 of the Panel that technical losses are common in every market. In the United Kingdom, these losses reach 30 per cent.[171] There is no reason to believe that casings imported into Brazil are any different from casings imported into the United Kingdom. Second, at least for the year 2005, Brazil used hard numbers – not assumptions – to arrive at the number of imported casings that were actually retreaded. This number was the 2005 destination estimate by BS Colway, cited in the "Raupp Opinion," at page 4 (Exhibit EC-22). According to this number, of the 11 million casings that were imported into Brazil in 2005, only 7 million were used to make retreaded tyres in 2005. Therefore, the realistic scenario for 2005 is based exclusively on hard numbers, and contrary to the European Communities' suggestion,[172] at least 50 per cent of passenger car retreads necessarily had to have been made from domestic casings that year. This puts the rate of retreading for the passenger car tyres alone at 25 per cent for 2005 – again, substantially higher than the rate achieved by the European Communities itself. Finally, to recall, in the video that the European Communities submitted as Exhibit No. 72, Brazilian retreaders admit that 60 per cent of tyres retreaded in Brazil are made with domestic casings.

379. To summarize, the evidence establishes that the scenario that applies the 2005 destination figures to previous years best reflects the reality. Nevertheless, even the most conservative scenario – assuming that only 15 per cent of the imported casings are not retreaded – demonstrates that most of the Brazilian retreads are made from domestic casings. For this reason, the European Communities' argument that Brazilian casings are not retreadable is plainly wrong.

(v) Price of casings

380. In its second set of responses to the Panel, the European Communities once again asks rhetorically:

> "[I]f Brazil really had so many good domestic casings, one wonders why Brazil continues to import huge quantities of casings for the purposes of retreading, rather than exporting casings."[173]

381. Brazil has already demonstrated in paragraph 117 of its SWS and in paragraph 63 of its second oral statement that Brazilian retreaders prefer imported casings not because there is a shortage

[170] *See* European Communities' second oral statement, at para. 33.

[171] *See* Used Tyre Working Group (UK), Sixth Report of the Used Tyre Working Group, at para. 14.1 (2003) (Exhibit BRA-55).

[172] *See* European Communities' answer to panel question No. 107, at para. 29.

[173] *See* European Communities' answer to panel question No.107, at para. 28.

of domestic casings, but because the imports are substantially cheaper. In fact, since 2004, imported casings have become even less expensive than domestic casings for a number of reasons: increasingly more stringent – and expensive – waste tyre disposal obligations in the European Communities; exchange rate variations (R$3.9 per US$ 1 in October 2002 to R$ 2.3 per US$ 1 in October 2005); and a higher demand for domestic casings, caused by an opening of a retreading plant in the state of Paraná, Brazil, claimed to be the largest in the world. This is a point the European Communities fails to address.

382. The European Communities ignores the dynamics of the market. Demand for foreign casings is not static. Cheaper imports reduce production costs and, thereby, lower the price of retreads. The lower price, in turn, increases the demand. To produce enough retreads to satisfy the higher demand, some imports may be necessary, which increases the volumes of shorter-lifespan tyres in Brazil. As Brazil has already explained in paragraph 119 of its second written submission, however, the Government's goal is to retread as many used tyres generated in Brazil as possible, not to satisfy the artificially high demand on retreaded tyres at the expense of public health and the environment. The most recent evidence of this commitment to human health and the environment is the presentation by the President of Brazil, on 21 September 2006, of a Supreme Court action that would end imports of used tyres through preliminary injunctions. *See* Exhibit BRA-173.

383. These facts conclusively demonstrate that the data and the assumptions that underlie the retreadability figures in Brazil's Exhibit No. 162 are highly reliable. For this reason, the high rates of retreadability of Brazilian casings demonstrated by the exhibit are fully accurate.

Question 108. To both parties.
Could you please clarify the extent to which new tyres and retreaded tyres compete on the Brazilian market?

Response of Brazil

384. Brazil notes that new and retreaded tyres do not compete in the new car market because retreaded tyres are not fitted on new vehicles. New and retreaded tyres do compete in the replacement market, but the detailed market data necessary to measure the extent of the competition by econometric analysis do not exist. *See* Brazil's second oral statement, at para. 81. As Brazil understands, imported retreaded tyres compete with domestic retreads, and all retreaded tyres (domestic and imported) compete with new tyres in the replacement market. Brazil also understands that if the price of a retreaded tyre is sufficiently low, Brazilian consumers tend to prefer a retread over a new tyre.

Response of the European Communities

385. At the outset, the European Communities would like to note that in Brazil, new tyres and retreaded tyres compete only in the replacement market, since new cars may not be fitted with retreaded tyres.[174]

386. As regards the market for replacement tyres, it is clear that there is a close competitive relationship between new tyres and retreaded tyres given their identical end uses and their comparable quality in terms of durability and safety.[175] However, the relationship between the products will also be affected by other factors, including the difference in price, the price-sensitivity of the consumer, and the perception of the consumer of the product.

[174] Cf. Brazil's first written submission, para. 148.

[175] Cf. already European Communities' second written submission, para. 33. According to Brazil's answer to panel question No. 24, the market share of retreaded tyres in Brazil rose slightly from 39.2 per cent in 2000 to 40.1 per cent in 2005.

387. The European Communities does not have data that would permit to define the competitive relationship between new and retreaded tyres in the Brazilian market in more quantitative terms. The European Communities considers that it would be for Brazil, as the party invoking an exception to its WTO obligations, to establish the relevant facts. However, in its second oral statement, Brazil has already indicated that the relevant economic data for the Brazilian market has not been collected, and that precise calculation of the relevant price elasticities is therefore impossible.[176] However, this information would be required in order to establish the precise contribution Brazil's ban might make to the prevention of waste tyres in Brazil.[177] For this reason also, Brazil has failed to discharge its burden of proof in this regard.

Comments of the European Communities

388. In its reply to the Panel's question, Brazil once again confirms that the precise data to evaluate the competition between new and retreaded tyres in the Brazilian market is not available. As the European Communities has already pointed out, this data would be necessary to evaluate the precise existence and extent of the contribution of the import ban to the reduction of waste tyres in Brazil.[178] Accordingly, this constitutes another reason why Brazil has not discharged its burden of proof in this regard.

Question 109. To the European Communities.
Does the European Communities agree to the translations provided by Brazil of the Brazilian laws and regulations pertinent to this case?

Response of the European Communities

389. Where the European Communities has noted a discrepancy, it has pointed this out.[179] However, the European Communities is not in a position to verify all translations provided by Brazil. Accordingly, the fact that the European Communities has not commented on a specific translation does not mean that the translation is necessarily accurate.

C. IMPORT BAN

Question 110. To the European Communities.
Please comment on the arguments presented by Brazil in it answer to question 35 of the Panel, in relation to animal and plant life or health, and on the arguments contained in the submission by the Humane Society International, submitted by Brazil as Exhibit BRA-98, in respect of risks to animal health or life.

Response of the European Communities

390. The arguments by Brazil in relation to animal and plant health or life refer to two of the risks that Brazil claims it aims at reducing with the import ban (some mosquito-borne diseases and pollution from waste tyre fires) and to two of the existing alternatives to the import ban (co-incineration in cement kilns and construction of artificial reefs). The Humane Society International argues only on the three first issues.

391. Exhibit BRA-98 and Brazil's own submissions to the Panel contain only very general arguments in relation to animal and plant life or health, making it difficult to address them specifically. However, the European Communities will comment on these arguments, while recalling

[176] Brazil's second oral statement, para. 81.
[177] Cf. Exhibit EC-122, para. 22.
[178] European Communities' answer to panel question No. 108, para. 34.
[179] Cf. European Communities' second written submission, footnote 174.

at the same time that the lack of precision of Brazil's arguments must weigh to Brazil's detriment, taking into account that Brazil has the burden of proof in relation to the defence under Article XX(b).

392. Moreover, while Brazil supports its arguments with some documents, which are attached to its submissions, that is not the case of the Humane Society International, which has attached none of the documents that it refers to as evidence.

393. In relation to the mosquito-borne diseases, it is clear that they do not pose any threat to plant life or health. Brazil and the Humane Society seem to acknowledge that the diseases only affect human and animals.[180] However, Brazil does not identify the animal species affected by dengue, yellow fever, malaria and West Nile virus, probably because its first written submission was limited to the consequences of the first three diseases on humans only.[181] The difficulty of that identification is obvious in relation to malaria, which only has humans as hosts. According to the evidence provided by Brazil, "humans are the main amplifying host of the [dengue] virus, although studies have shown that in some parts of the world monkeys may become infected and perhaps serve as a source of virus for uninfected mosquitoes".[182] Similarly, in relation to yellow fever, Brazil's evidence shows that "humans and monkeys are the principal animals to be infected" and that "in tropical rainforests, yellow fever occurs in monkeys that are infected by wild mosquitoes".[183] Brazil has not explained the dispersion of these two diseases among monkeys in Brazil, but, in any case, they seem to be infected in their natural environment, independently of the presence of waste tyres. Brazil has provided no evidence on how the West Nile Virus affects animals.

394. The submission by the Humane Society International also refers generally to the fact that some mosquito-borne diseases affect animal populations.[184] The four studies on which it seems to base its arguments are not attached, making it impossible for the European Communities to respond to them. The submission also refers to *Aedes albopictus* as "an aggressive biter that attacks livestock, amphibians, reptiles and birds",[185] but it does not seem that these bites have negative consequences for the life and health of these species.

395. In relation to hazardous emissions arising from waste tyre fires, neither Brazil nor the Humane Society International explain and, even less, demonstrate, how they affect animal and plant life or health. Their main argument seems to be that, because those emissions are hazardous, they necessarily produce negative consequences on fauna and flora. This inference is wrong and based on no risk assessment of the potential fires,[186] including an analysis of the dimension and location of the site, and on no study of the "critical loads" of the habitats potentially affected or "critical levels" of concentrations of pollutants in the air.[187] It does not take into account either the dispersion in the air

[180] Brazil's answer to panel question No. 35, second sentence, and the Humane Society International submission, paras. 22 to 25.

[181] Brazil's first written submission, section III.A.1. Moreover, Brazil refers to four diseases in its answer to the Panel question, though the West Nile was not mentioned in its first written submission, paras. 22 to 28.

[182] Exhibit BRA-13, p. 1, at the bottom.

[183] Exhibit BRA-22, p. 1, at the bottom, and p. 2, first bullet point.

[184] To the four diseases mentioned by Brazil in its answer to the Panel question, the Humane Society International adds, without further explanation, "filarosis" and "canine heart worm".

[185] The Humane Society International submission, para. 25.

[186] An example of an elementary risk assessment for the seven most important waste tyres sites in the UK may be found in Exhibit BRA-136, at p. 10.

[187] Article 1 of the Protocol to the 1979 Convention on Long-range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-level Ozone, signed in Gothenburg on 30 November 1999 defines "critical load" as the "quantitative estimate of an exposure to one or more pollutants below which significant harmful effects on specified sensitive elements of the environment do not occur, according to present knowledge", and "critical levels" as "concentrations of pollutants in the atmosphere above which direct adverse

of those emissions or the measures that should be implemented, once a fire has occurred, to fight against it and to avoid pollution of surface waters. Moreover, some of the arguments, like those related to soil and groundwater pollution, are not necessarily related to the protection of animal and plant life or health but to the protection of the environment.

396. In relation to co-incineration in cement kilns, Brazil claims that "the same pollutants [as in tyre fires] are released", a statement that does not take into account the huge differences in the level of emissions arising from both activities. The Humane Society International affirms "that the U.S. Environmental Protection Agency found that controlled burns using waste tyres in poorly-designed combustors caused serious concern that air emissions would be more like those from the open burning of tyres rather than a well-designed and managed combustor".[188] This is a question of the technology used and a regulatory question, and the European Communities is not proposing to co-incinerate waste tyres in poorly-designed combustors. Moreover, neither Brazil nor the Humane Society International explain how state-of-the-art combustors co-incinerating waste tyres in compliance with regulatory emission standards would damage fauna and flora more than if they did not burn waste tyres, but only coal or peat coke. As the European Communities has already explained,[189] the evidence presented by Brazil in this respect corresponds to installations using old technology, like the wet cement kilns, or burning other fuels.[190]

397. Finally, Brazil's argument that artificial reefs made of waste tyres produce leachate that harms rainbow trout and other forms of aquatic life has already been answered by the European Communities in paragraph 132 of its second written submission and Exhibit EC-106. The report produced by HR Wallingford Ltd., in March 2005, for the UK Department of Trade and Industry and the Environment Agency concluded that the overall risk of damage to the environment of waste tyres in port, coastal and river engineering is expected to be reduced to near zero. More specifically, the study concluded that, in relation to leachates from waste tyres used for those purposes, "the magnitude of consequences is estimated to be negligible, except where slow or stationary waters are the receptor where it might be estimated to be mild".[191]

Question 111. To Brazil.
Please clarify the current legal status of :

(a) *Portaria DECEX No. 8 in light of the subsequent amendment by Portaria MICT No. 370;*
(b) *Presidential Decree No. 3.179 as amended by Presidential Decrees No. 3.919 and No. 4.592; and*
(c) *Law No. 12.114 of the State of Rio Grande do Sul in light of the subsequent amendment by Law No. 12.381?*

Response of Brazil

398. Portaria DECEX No. 8, as amended by Portaria MICT No. 370/94, is legally in force, with the exception of its Articles 19 to 21 and 29 to 32, which were revoked by Article 55(II) of Portaria SECEX No. 17/03. The parts revoked do not affect trade in used or retreaded tyres.

399. Presidential Decree No. 3.179, as amended by Presidential Decrees No. 3.919 and No. 4.592, is legally in force.

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effects on receptors, such as human beings, plants, ecosystems or materials, may occur, according to present knowledge" (Exhibit EC-126).

[188] The Humane Society International submission, para. 20.
[189] European Communities' second oral statement, para. 84.
[190] European Communities' second written submission, para. 118 and footnote 119.
[191] Exhibit EC-103, section 7.3.2., at p. 105.

400. State Law No. 12.114, as amended by Law No. 12.381, is formally in force, at present. However, as Brazil explained in its responses to Questions 56, 57, and 62 from the Panel, the law has no legal effect because Brazilian states have no authority to regulate interstate or international trade under Brazil's Constitution. State authorities simply cannot authorize or prohibit imports because import licenses are issued by the federal government, not by the states. Neither can state authorities impede sales of imported products. If they attempted to restrict these sales, Brazil's Executive or a private party would have easily obtained an injunction against the state.

401. Finally, the European Communities is flatly wrong to suggest that the state law could affect an import ban because it could be considered a disposal measure.[192] Even if the disposal provisions of the measure were enforceable, the import-related provisions are exclusively within the jurisdiction of the Federal Government and have no effect.

Comments of the European Communities

402. As regards Law No. 12.114 of the State of Rio Grande do Sul, Brazil repeats its earlier claim that this law "has no legal effect". This statement is plainly wrong. In this respect, the European Communities can refer to its earlier submissions.[193]

403. Brazil also claims that the European Communities is wrong to suggest "that the state law could affect an import ban because it could be considered a disposal measure".[194] The European Communities is surprised by this objection, because it has made no such argument. The European Communities has not argued that the state law "affects" the import ban. Rather, the European Communities has argued that to the extent that the ban imposes disposal obligations, these obligations may be considered to fall under the concurrent jurisdiction of the Brazilian states for environmental protection, and therefore not be unconstitutional.[195] The European Communities notes that Brazil has never contested this argument of the European Communities, and even in its reply to the Panel's question has again conceded that the disposal obligations might be enforceable.[196]

404. The European Communities notes that the challenged State law of Rio Grande do Sul is a separate measure from the import ban, which could remain in force even if the ban were removed. In this case, the discriminatory disposal obligations contained in the State Law would still negatively affect, or even make impossible, the marketing of imported retreaded tyres in Rio Grande do Sul. For this reason, the Panel should equally rule on the State measure.

Question 112. To Brazil.
Please confirm whether Portaria DECEX No. 8 and Resolution No. 23 are currently legally in force. If so, does the import prohibition on used tyres as stipulated in Article 4 of Resolution No. 23 also still apply to "retreaded tyres"?

Response of Brazil

405. Portaria DECEX 8/1991 is in force. *See* Brazil's response to Question 111. CONAMA Resolution 23, which is also in force, regulates management and importation of wastes into Brazil. Used tyres – traded under code 4012.20 and expressly referred to in Annex 10 of Resolution 23 – are wastes while retreaded tyres are not. For this reason, there was no nominal reference to retreaded tyres in the resolution. It does not mean, however, that Brazil permitted the importation of retreaded

[192] *See* European Communities' second oral statement, at para. 115.
[193] European Communities' second oral statement, para. 114 et seq.; European Communities' second written submission, para. 198.
[194] Brazil's answer to panel question No. 111, para. 44.
[195] European Communities' second oral statement, para. 115.
[196] Brazil's answer to panel question No. 111, para. 44.

tyres before the adoption of the 2000 import ban or that retreaded tyres do not pose specific environmental risks. According to the Brazilian legislation, retreaded tyres are used goods, imports of which were prohibited by Portaria DECEX 8/1991.

Comments of the European Communities

406. In its reply to this question, Brazil confirms that it considers that retreaded tyres are used goods the importation of which is prohibited by Portaria Decex 8/1991. While the European Communities does not agree that retreaded tyres are used goods, the European Communities considers that the Panel, on the basis of Brazil's interpretation of Brazilian law, should find that Portaria Decex 8/1991 is equally incompatible with Article XI:1, to the extent that it bans the importation of retreads.

Question 113. To Brazil.
Are import licenses required under Portaria SECEX No. 14 for the importation of retreaded tyres? If so, under what provision of Portaria SECEX No. 14 are such import licenses required?

Response of Brazil

407. Import licenses are only issued by the federal government *as provided for* in Portaria SECEX No. 14. Article 40 of the *portaria* explicitly provides that import licenses will not be granted for the importation of retreaded and used tyres, except for remoulded tyres from MERCOSUR countries. Import licenses for used and retreaded tyres have been issued only when ordered by the courts. Had imports of used and retreaded tyres been permitted, import licenses would have been required under Articles 9(II)(e) and 35 of Portaria SECEX No. 14. These provisions provide for "non-automatic licensing" for used goods, which means that import licenses are required to import these products.

Comments of the European Communities

408. The European Communities notes that Brazil's reply confirms the European Communities' understanding of the Brazilian law as set out in paragraph 57 of the European Communities' first written submission.

Question 114. To Brazil.
Could you clarify how exactly the environmental risks that you identify relate to the protection of "human, animal or plant life or health" within the meaning of Article XX(b)? (see statements in e.g. Brazil's first written submission paragraphs. 4, 6, 20, 21 and 22).

Response of Brazil

409. As Brazil explained in more detail in paragraphs 29-35 of its FWS, tyre fires release pyrolytic oil, which contains numerous toxic chemicals and heavy metals. This oil contaminates the ground over which it travels, and destroys the plant life. When the oil contaminates waterways, it harms fish and other life that exists within those waterways (often resulting in fish kills). The pollutants from the pyrolytic oil are also passed on to animals that drink the contaminated water.

410. Tyre fires also emit plumes that contain a number of hazardous substances, including dioxins and furans. Harms from these emissions, including cancer, reproductive problems, and reduced immune function (described in Brazil's FWS, at paragraphs 32-33), are not unique to humans and are equally experienced by animals. See Humane Society Brief, at para. 15 (Exhibit BRA-98).

411. Finally, mosquitoes that breed in waste tyres transmit diseases that affect animals, just as they do humans. See Humane Society Brief, at paras. 22, 24. 50. Brazil notes that this particular response

addresses only the risks to human, animal or plant life or health caused by the accumulation of waste tyres. The risks caused by the disposal of waste tyres are summarized in Brazil's response to Question 115 from the Panel.

Comments of the European Communities

412. Brazil has explained in its first written submission that tyres fires release pyrolytic oil and a number of other hazardous substances, but it has not demonstrated the negative consequences of those substances on animal and plant life or health. The reason for the absence of evidence on these questions is that the main negative consequences of tyre fires normally affect some specific elements of the environment, namely soil, surface water and groundwater, which are not already as such within the scope of Article XX(b).

413. Release of pyrolytic oil will produce environmental pollution if the site is incorrectly designed or if fire-fighters do not contain pyrolytic oil flows. This pollution may have harmful impacts on animal life only if a watercourse or lake with fish life runs or is located close and downhill to the site. The European Communities is not aware of any scientific evidence about cancer, reproductive problems or reduced immune function experienced by animals due to the hazardous substances in tyre fires plumes. Nor has Brazil provided a single piece of evidence in that respect.

414. In relation to mosquitoes, Brazil merely states, relying on the Humane Society Brief, that they transmit diseases that affect animals, without explaining which these animals are.[197] The European Communities has already explained that the evidence presented by Brazil only identifies monkeys as a species capable of being infected with dengue and yellow fever, though they seem to be infected in their natural environment, independently of the presence of waste tyres.[198]

Question 115. To Brazil.
Could you indicate what are the exact risks to animal and plant life and health posed by the different disposal options, including information on possible direct harmful impacts?

Response of Brazil

415. Certain material recycling uses have been reported to harm the animal life. Studies have shown, for example, that artificial reefs made of waste tyres (a civil engineering use) produce toxic leachate that harms rainbow trout and other forms of aquatic life, as described in a report by the British Environment Agency.[199] The report also notes that when waste tyres are used on silage clamps, tyres degrade, at which point the rubber compound breaks down and wires become exposed. According to the agency, "[t]he wire is a direct danger to livestock, and the crumb gets into the silage and, in larger pieces, can also pose a risk to cattle."[200]

416. The most serious risks, however, are caused by toxic pollutants, such as dioxins and heavy metals, that are released when waste tyres are incinerated and when stockpiled tyres catch fire. These risks include cancer, reduced immune function, respiratory problems, miscarriage, and birth defects, among many others. See Humane Society Brief, at para. 15. The Humane Society Brief, at paragraph 16, also explains that particulate matter released during incineration and tyre fires makes water bodies acidic by decreasing their pH balance and changing their nutrient balance, with a consequent negative effect on the animals and plants that live in those water bodies. Emissions of particulate matter also deplete soil of its nutrients, which damages sensitive forests and farm crops, and also negatively affects the diversity of ecosystems.

[197] Brazil's answer to panel question No. 114, para. 49.
[198] European Communities' answer to panel question No. 110, para. 39.
[199] See Environment Agency (UK), Tyres in the Environment, at Section 4.3 (Exhibit BRA-1).
[200] See id.

Comments of the European Communities

417. Once again, Brazil responds to a question with vague explanations unsupported by evidence and without rebutting the evidence provided by the European Communities.

418. In relation to artificial reefs, the European Communities has already explained that the overall risk of damage to the environment of waste tyres in port, coastal and river engineering is nearly zero and has provided a recent report to prove it.[201] Brazil has not rebutted the report and continues to rely on an older report, prepared in 1998, by the England and Wales Environment Agency, which refers to laboratory studies in Canada. The European Communities is also surprised to find that Brazil's only argument relies on the harm produced to the rainbow trout, which is an invasive fish in Brazil and that is only a native species in North America (Exhibit EC-127). Brazil has not provided any information on the possible negative consequences on animals and plants of the civil engineering use of waste tyres in its territory.

419. The European Communities considers that Brazil's comments on the risks of using waste tyres on silage clamps are irrelevant. This is a relatively unimportant alternative, although Brazil has not provided information on its farmers' practices on this matter. Moreover, irrespective of the risks posed to livestock by this use, farmers will certainly continue with this longstanding cheap practice.

420. The general and unsubstantiated comments by Brazil in relation to the risks posed by co-incineration, including the explanations given by the Humane Society Brief on risks from particulate matter, have already been answered in the European Communities' response to Question 110 from the Panel.[202] The European Communities would like to point out that Brazil uses here, again, the incorrect term "incineration".

Question 116. To both parties.
Assuming that there may be situations where risks are identified in relation to both 'human health or life' and 'animal or plant health or life', what would be the implication of the existence of such distinct risks, if any, for the analysis of Article XX(b), including in the "weighing and balancing" of different factors?

Response of Brazil

421. While, in theory, the risks to "animal or plant health or life" and "human health or life" can be distinguished, in reality, environmental degradation and harms to human life or health usually go hand in hand, as is in the case of waste tyres. Contamination of plants affects not only plant life and health, but also the life and health of animals and humans that consume the plants. In a similar manner, both animals and humans breathe the air contaminated by toxic compounds released during incineration or tyre fires. They also drink water contaminated by the pyrolytic oil and toxic leachate. In addition, many pollutants, such as dioxins, also move up the food chain and are ultimately passed on to animals that consume other animals, and to humans that consume animal meat.

422. Thus, the magnitude of the risks involved in the present case and the reality that risks to both human health and the environment are present means that the policy pursued has even more weight in this case and is therefore highly relevant for the Article XX(b) analysis.

[201] Report produced by HR Wallingford Ltd., in March 2005, for the UK Department of Trade and Industry and the Environment, to which the EC has referred in its SWS, para. 132, and attached as Exhibit EC-106. The EC mentioned also this report in its answer to panel question No. 110, para.43.

[202] European Communities' answer to panel question No. 110, para. 42.

Response of the European Communities

423. A precise and specific analysis of the negative consequences on the interests protected arising from the different risks from waste tyres (diseases, tyre fires and leaching) is important to carry out a correct assessment of the contribution that the import ban really makes. The analysis is also important in order to evaluate the different alternatives to the import ban. In both cases, an exact study of the different negative consequences will contribute to a clear explanation of these two factors when weighing and balancing them to verify whether the import ban is "necessary".

424. This should be done by differentiating between human life and health, on one side, and animal and plant life or health, on the other. The main reason for this distinction is that human life and health is generally a more important value, which merits a separate valuation.

425. For the same reason, the risks should also be assessed separately in relation to life or health in both groups. For example, while dengue is related to human life and health, though not to the same extent, there is no evidence on record proving that human life has ever been in danger as a result of waste tyre fires.

Comments of Brazil

426. The European Communities in its response states: "[T]here is no evidence on record proving that human life has ever been in danger as a result of waste tyre fires." This is an example of the flagrant disregard for facts – disregard that the European Communities has demonstrated throughout the proceeding.

427. Brazil has extensively documented the dangers that tyre fires pose to human health in paragraphs 29-37 of its first written submission. To quote from a report by the US Environmental Protection Agency, cited by Brazil in its oral and written statements and submitted as Exhibit BRA-26:

> "Air emissions from open tyre fires have been shown to be more toxic (e.g., mutagenic) than those of a combustor, regardless of the fuel. Open tyre fire emissions include "criteria" pollutants, such as particulates, carbon monoxide (CO), sulfur oxides (SOx), oxides of nitrogen (NOx), and volatile organic compounds (VOCs). They also include "non-criteria" hazardous air pollutants (HAPs), such as polynuclear aromatic hydrocarbons (PAHs), dioxins, furans, hydrogen chloride, benzene, polychlorinated biphenyls (PCBs); and metals such as arsenic, cadmium, nickel, zinc, mercury, chromium, and vanadium. Both criteria and HAP emissions from an open tyre fire can represent *significant acute (short-term) and chronic (long-term) health hazards to firefighters and nearby residents*. Depending on the length and degree of exposure, these health effects could include *irritation of the skin, eyes, and mucous membranes, respiratory effects, central nervous system depression, and cancer.*
>
> Open tyre fire emissions are estimated to be... 13,000 times more mutagenic than coal-fired utility emissions with good combustion efficiency and add-on controls."[203]

428. Brazil has also introduced into evidence reports and statements by the environmental agencies of the European Communities' Member States that recognize the dangers of tyre fires to human health. The British Environment Agency, for example, notes:

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[203] Environmental Protection Agency (US), Air Emissions from Scrap Tyre Combustion (viii)-(ix) (1997) (Exhibit BRA-26).

> "Tyres ... can be a fire risk affecting the air with toxic fumes, and watercourses, which fire quench waters can run into. Some landfill tyre fires have been burning for years."[204]

Comments of the European Communities

429. Brazil's answer to this question is partial and too general. It is partial because, as in other Brazilian responses, the answer does not deal with the negative consequences of mosquito-borne diseases for plants and animals. The European Communities has already explained that neither plants not animals seem to be affected by dengue, yellow fever or malaria.[205]

430. The answer is also too general because, first, it does not take into account the low level of emissions from co-incineration installations complying with regulatory standards or the remedial actions taken in case of waste tyre fires. In this latter context, it is absurd to claim that animals and humans will drink water contaminated by pyrolytic oil. If that pollution takes place, the first initiative adopted by the relevant authorities should be to take all measures necessary to avoid the consumption of polluted water.

431. The answer does not explain either any specific links between the different pollutants and their consequences on plants and animals. As an example, plants are not affected by dioxins, they only serve as deposit to this substance, and the negative consequences of dioxins on animals have only been studied in laboratory animals for the purposes of research in relation to humans.

432. In reality, even if it were considered, for the sake of argument, that the policy pursued by the import ban on retreaded tyres is the protection of human, animal or plant life and health, *quod non*, the interests protected are not as wide as Brazil pretends. Nor is the magnitude of the risks involved in relation to co-incineration and open fires high, contrary to the exaggerated statement made by Brazil in its answer.

Question 117. To Brazil.
Please comment on the following arguments of the European Communities in its second oral statement, in relation to the economic analysis provided by Brazil on the impact of the import ban on the reduction of the number of waste tyres in Brazil:

(a) the assumption of a rate of retreading of domestic casings between 44% and 92% (para. 36 of the second EC oral statement);

(b) the lack of coverage of truck and aircraft tyres (para. 38 of the second EC oral statement).

Response of Brazil

(a)

433. The economic analysis provided by Brazil considered actual data for the period of analysis collected from reliable sources, identified in Table 1 of the report. For the period 2002-2003, the average share of retreaded tyres in the replacement market (what the study refers to as "retreading rate") was 42.4 per cent, which is obtained in the following manner:

> (Retreaded tyres in Brazil, in tonnes) / (New tyres domestic sales, in tonnes + New imported tyres, in tonnes) = (53,642/(97,355+29,045) = 0.424 or 42.4%

[204] Environment Agency (UK), TyreWatch Program (Exhibit BRA-39).
[205] European Communities' answer to panel question No. 110, para. 39.

434. The criticism presented by the European Communities is most probably due to a partial and incomplete understanding of the demonstration presented in the diagrams that depict the hypothetical cases in which imports of retreaded and/or used tyres would be allowed. In addition, as Brazil demonstrates in Exhibit BRA-162, the vast majority of tyres retreaded in Brazil were made from domestic casings.

435. Diagrams 7 to 9, which refer to the scenario "Imports allowed: new+retreaded", should be viewed as a depiction of the immediate impact of a lifting of the ban on imports of retreaded tyres. In that scenario, in a first stage, there would be an oversupply of retreaded tyres (the sum of those retreaded in Brazil and imported), as the volume of retreaded tyres in period t1 – depicted in the diagram – is a function of new tyre sales in year t0. In the following years, and as the market adjusts to a smaller sale of new tyres (our graphical demonstration is not a dynamic model, with multi-period interrelations or adjustments), the total number of retreaded tyres would fall, with a latter corresponding increase in the number of new tyre sales, until a new equilibrium is found.

436. Nonetheless, what is relevant for the Panel to analyze and conclude is that in spite of these intertemporal adjustments, which are expected to occur as any change in policy occurs, the equation of waste volume will hold for the entire period, from the initial phase until the end of the adjustment period:

Waste volume = R+RI+(N-R)

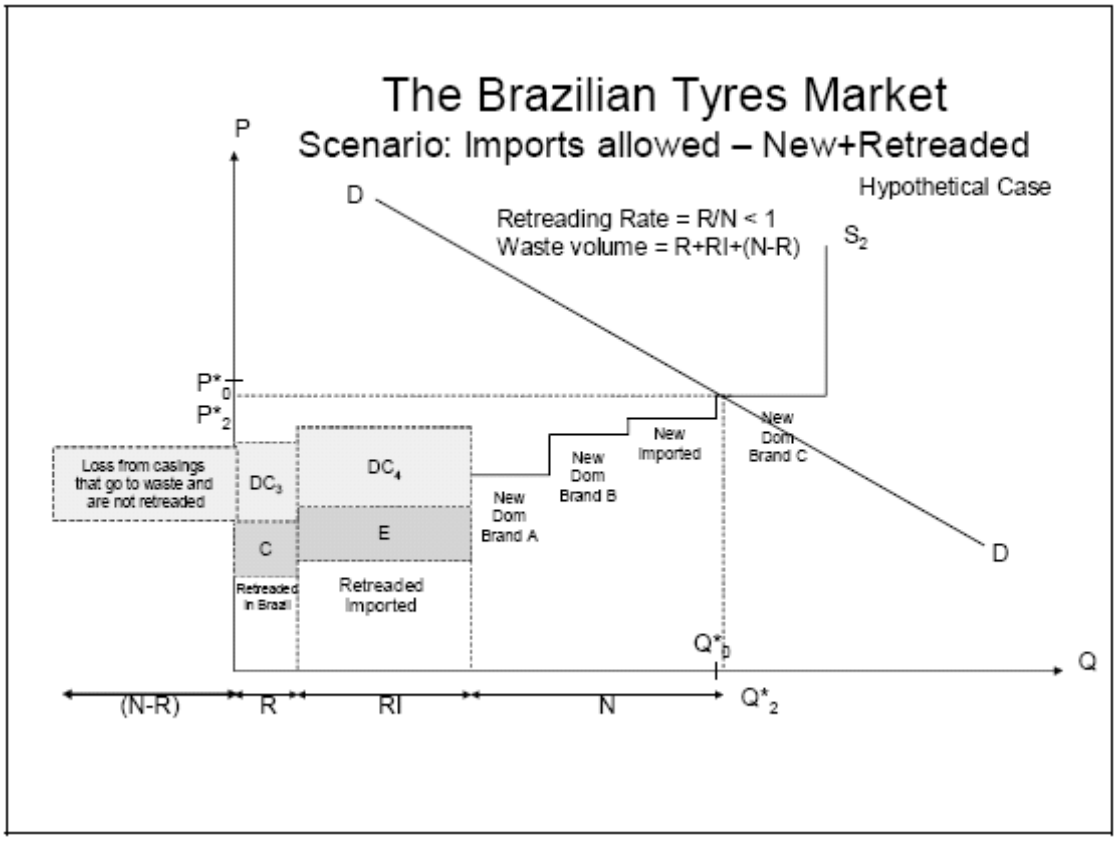
where,

R is the number of tyres retreaded in Brazil,

RI is the number of retreaded tyres imported, and

N is the total number of new tyre sales.

437. Therefore, if the parcel denominated R ends up smaller after the intertemporal adjustments, the parcel (N-R) becomes larger, which is exactly what has been described during the last Panel meeting – as imports of used tyres were allowed temporarily by judicial decision, the rate of retreading from domestic casings reduced, and the waste volume increased. This is explained by the fact that it is much easier, and less costly, for a retreading company to source its raw material (casings) in a concentrated manner, at import delivery ports of entry, than to collect them in a continental size country such as Brazil. After the market adjustments mentioned above had happened, which is the basis of the observation made by the European Communities, Diagram 9 could be depicted in the following way:



438. Thus, it can be observed that allowing for imports of retreaded tyres will increase the total waste volume, as indicated by the equation above, and the impact of additional waste volume can be visualized by the areas indicated in this diagram. The demonstration of how retreaded tyre imports affect 'waste volume' holds for the initial period depicted in the economic analysis, as well as for the end of the adjustment period, as indicated above.

(b)

439. The economic analysis concentrated on passenger car tyres since they represent the majority of imports in the period of analysis (2002-03):

Imports of retreaded tyres (average in units)

Passenger cars	271,587	99.8%
Trucks and lorries	410	0.2%
Aircraft	20	0.0%
Total	272,017	

Source: Aliceweb/MDIC

Comments of the European Communities

440. In its response, Brazil first speaks of "the average share of retreaded tyres in the replacement market (what the study refers to as 'retreading rate')".[206] This is incorrect, because the "study" speaks of the retreading rate as being the R/N ratio between retreads made in Brazil from domestic casings (R) and new tyres sold in Brazil (N).[207] This was a useful rough definition for the concept of "retreading rate" because it expresses, over time, the percentage of formerly new tyres that are retreaded after being used on Brazilian roads.[208] The "share of retreaded tyres in the replacement market" which Brazil now speaks about[209] would be $R/(N+R-N_{\text{fitted on new cars}})$. Brazil however maintains R/N in its calculation[210] and therefore makes two further mistakes if it intends to designate the "share of retreaded tyres in the replacement market": Brazil first overlooks that the entire replacement market, the denominator, has to include sales of retreads. Second, Brazil overlooks those new tyres that are fitted on new cars in Brazil which do not belong to the replacement market.

441. As said, R/N would be roughly correct if Brazil in reality speaks not of the market share but of the ratio between retreads made in Brazil from domestic casings (R) and new tyres sold in Brazil (N), which is what Exhibit BRA-146 consistently does. In that case, too, however, the numbers which Brazil uses and obtains in its calculation, are incorrect, as the European Communities will show in the following explanation.

442. By dividing the tonnage of tyres "retreaded in Brazil" by the total tonnage of new tyres sold in Brazil, as listed in Table 1 of Exhibit BRA-146, Brazil arrives at a ratio of 42.4 %.[211] As the European Communities identified in the analysis on the "study" contained in Exhibit BRA-146, submitted to the Panel as Exhibit EC-122, the question remains whether the quantity of domestic passenger car retreads produced in Brazil in Table 1 (53,642 tonnes in 2002/2003, on average) includes those retreads that are made in Brazil with imported casings (i.e. whether it stands for R or for R+UI, in Exhibit BRA-146). The tonnages for 2002 and 2003 in Table 1 of Exhibit BRA-146 correspond, respectively, to the 7.5 and 9 million passenger car retreads produced in Brazil reported by ABR in Exbihits BRA-95 and BRA-157 (when using the arguably too low conversion factor of 6.5 kg per retreaded tyre). ABR's production numbers, clearly, designate the *totality* of that retread production in Brazil, in other words, it includes the retreads made with imported casings (i.e. R+UI).

443. Therefore, Brazil is fatally mistaken in its calculation that arrives at a result of 42.4 % as the "retreading rate" of Brazilian casings. In its calculation, Brazil thereby effectively misrepresents the large number of *imported* casings as *Brazilian* casings. This turns the facts on their head because casings that are imported into Brazil to be retreaded by definition cannot increase the rate at which *domestic* casings are retreaded.

444. Specifically on Diagrams 7-9 of Exhibit BRA-146, Brazil's new illustration "after market adjustments" seems to accept the European Communities' criticism (in para. 12 of Exhibit EC-122) that Diagrams 7-9 grossly overestimate the total market share of retreads and underestimates the sales of new tyres which directly contribute to the accumulation of waste (which is effectively N+RI).[212] However, Brazil continues to overestimate the number of imports of passenger car retreads and thus the contribution which they could possibly make to waste accumulation. Indeed, Brazil is assuming that imports would take over most of the sales of retreads in Brazil and that the domestic industry

[206] Brazil's answer to panel question No. 117, para. 55.

[207] See para. 5.c on p. 1 of Exhibit BRA-146, as well as "Retreading Rate = R/N" in each of the Diagrams.

[208] If one disregards the imprecision of this equation due to second hand cars that flow on to and away from the Brazilian market with their tyres, as well as dynamic effects such as an expanding fleet or changes in the respective market shares of new and retreaded tyres.

[209] Brazil's answer to panel question No. 117, para. 55.

[210] *Ibid.*

[211] Brazil's reply answer to panel question No. 117, para. 55, *in fine.*

[212] Brazil's answer to panel question No. 117, paras. 57 et seq.

would be marginalised.[213] This is not plausible given that the Brazilian retreading industry appears to be quite competitive.

445. There are further important points on which Brazil's new graphical illustration[214] distorts the picture of the impact which the lifting of the import ban would have. For instance, it is assumed in the graph that the (overestimated) importation of retreads would cause a reduction in the retreading of domestic casings and that this would increase waste accumulation. This overlooks the fact which Brazil even mentions, namely that Brazil presently imports large numbers of casings for its production of retreads. Brazil's presentation is therefore equally incoherent as the legal reality on the ground, where Brazil closed the market for imported retreads, allegedly in order to reduce waste, and at the same time imports large numbers of casings for retreading.

446. On this latter point, Brazil claims that the growing importation of casings led to a reduced rate of retreading of domestic casings,[215] whereas it seems at least as true that the total production of retreads grew considerably in Brazil over the past years, with particular growth in the remoulding industry which produces high-quality retreads from imported casings, already conforming to the Portaria 133 requirements. The European Communities already repeatedly contested Brazil's allegations that it is easier or less costly for domestic retreaders to import the casings rather than to collect them "in a continental size country such as Brazil".[216] The European Communities would recall again that the importation of casings does not free a retreader from collecting casings in Brazil, on the contrary, the prior collection and disposal of domestic used tyres is a pre-requisite to the importation of casings (see Article 12A of CONAMA Resolution 258, as amended by Resolution 301).

447. Thus, Brazil's new graph appears to be another illustration without support in real economic facts. The illustration expresses inaccurate and debatable assumptions and interdependences that are not economically coherent. Many points of criticism explained at length in Exhibit EC-122 remain fully valid in relation to the new graph and need not be repeated.

448. The European Communities would emphasise the very important fact that Brazil in its reply does not at all respond to the Panel's question, which was an explicit invitation to Brazil to comment on the European Communities' argument that Brazil's "study" assumed rates of retreading between 44 % and 92 %. This can only be taken as admission by Brazil that the Exhibit BRA-146 is indeed flawed on these important points. Nor does Brazil respond on the many other weaknesses of Exhibit BRA-146, which the European Communities has explained in Exhibit EC-122.

449. In the absence of a reply by Brazil to the Panel's specific question, and in case this is of interest to the Panel, the European Communities would like to explain how it arrived, in its analysis in Exhibit EC-122, at the percentages of the retreading rate R/N which Exhibit BRA-146 displays. The European Communities took at face value the quantities represented in the graphs and obtained the assumed retreading rates R/N by dividing the width of R in millimetres by the width of N in millimetres in each of the graphs. To take the example of the "roughly 84 %" in Diagrams 13-15, N was measured to be ca. 19.8 mm wide and R ca. 16.8 mm. 168/198 results in 0.8485.

450. In this context, it is worth adding that even in Brazil's "realistic scenario" in Exhibit BRA-162, page 1, the incorrectness of which the European Communities explained in its reply to the Panel's question no. 107, the retreading rate of Brazilian passenger car tyres is between 25 % and

[213] See R and RI in the graph in para. 59 of Brazil's answer to panel question No. 117.
[214] *Ibid.*
[215] Brazil's answer to panel question No. 117, para. 59.
[216] *Ibid.*

32 %, i.e. much lower than the lowest retreading rate assumed, even more wrongly, in Exhibit BRA-146. That "study" therefore remains completely unprobative for the purposes of this dispute.

451. Finally, in relation to the Panel's sub-question b), Brazil does not give a response, other than recalling the fact that most imports of retreads were passenger tyres. This response does not do justice to the European Communities' claims in this dispute, where the European Communities raised "as such" claims of WTO violations in relation to Brazil's import ban on retreads in its entirety. Irrespective of the numbers of past imports, the methodology of any demonstration therefore matters. As the European Communities pointed out in its opening statement at the second substantive meeting,[217] a separate demonstration of the contribution of the import ban on truck and aircraft tyres would be necessary, since such tyres can be retreaded multiple times, and therefore contribute less to the accumulation of waste tyres than passenger car tyres. Also, it seems that Brazil does not retread all of its truck and aircraft tyres.

Question 118. To both parties.

(a) In your view, is the measure's contribution to the objective pursued, as envisaged by the Appellate Body in the context of determining the necessity of a measure under Article XX(b), intended to reflect the "actual" contribution of the measure in fact or does it relate rather to the measure's capacity, by design, to contribute to the objective?

(b) In this context, please clarify how the MERCOSUR exemption and the used tyre imports taking place pursuant to court injunctions should be considered by the Panel in the context of its analysis of the contribution of the measure to the objective under Article XX(b).

(c) Please also clarify whether the MERCOSUR exemption and the used tyre imports taking place pursuant to court injunctions should be considered by the Panel in the context of its analysis under paragraph (b) of Article XX, or under the chapeau of that provision, or both?

Response of Brazil

452. The contribution analysis may involve both an evaluation of the measure's capacity, by design, to contribute to the desired objective and an evaluation of the actual contribution of the measure.

453. An effective contribution analysis will require an examination of the design of the measure – that is, whether the measure is capable of making a contribution – and the actual effect of the measure – that is, whether the measure actually contributes to achieving the goal pursued and, if so, to what extent.

454. Brazil explained in paragraph 96 of its second oral statement that while used tyre imports may detract somewhat from the overall contribution made by the import ban, they in no way negate that contribution. Moreover, the used tyre imports through injunctions are not part of the design of the measure. On the contrary, they are an attempt to undermine the measure's design and application.

455. In practice, with the exception of 2004 and 2005, imports of used tyres through preliminary injunctions have not been particularly high, and the vast majority of retreads made in Brazil were made from domestic casings. See Brazil's response to Question 105 from the Panel.

456. In addition, an import ban on retreaded tyres and an import ban on used tyres are functionally separate measures. Less-than-perfect effectiveness of the ban on used tyres does not negate the effectiveness of the ban on retreaded tyres. Without the ban on retreaded tyres, the volumes of waste would have been even higher.

[217] Para. 38.

457. Third, it is relevant that Brazil's measure – by design – prohibits imports of both retreaded and used tyres. The measure, therefore, is designed to achieve the maximum level of waste reduction.

458. The MERCOSUR exemption is properly analyzed under Article XXIV and not under Article XX(b), including the contribution analysis. See Brazil's response to Question 131 from the Panel. Nevertheless, should the Panel consider the exemption in its analysis of the import ban's contribution, Brazil notes that any effect that the MERCOSUR exemption might have on the actual contribution of the import ban is not significant, because the volumes of waste tyres imported from MERCOSUR are very small. In 2005, Brazil imported a meagre 157,473 retreaded tyres from MERCOSUR. To compare, in the years preceding the 2000 import ban, anywhere between 2 million and 3.3 million retreaded tyres were being imported into Brazil – 13 to 21 times the MERCOSUR imports.

459. The MERCOSUR exemption is more relevant for the analysis under the chapeau of Article XX, but even in respect of the chapeau, the exemption does not lead to arbitrary or unjustifiable discrimination. The design of the MERCOSUR exemption is relevant to show that the original ban contained no exemptions and applied erga omnes, and that the MERCOSUR exemption was introduced later to comply with a ruling by a MERCOSUR tribunal. This demonstrates that Brazil's measures do not discriminate between MERCOSUR and non-MERCOSUR countries in a manner that is unjustifiable or arbitrary. It also demonstrates that by complying with the tribunal's ruling, Brazil did not raise trade barriers to third parties, but merely relaxed restrictions for its customs union partners.

Response of the European Communities

(a)

460. The Appellate Body has clarified that one of the aspects to be considered in determining whether a measure is "necessary" is the "extent to which the measure contributes to the *realization* of the end pursued".[218] The reference by the Appellate Body to the "realization" of the end pursued makes it clear that the contribution of the measure cannot be a purely theoretical or potential contribution. Rather, it must be demonstrated that the measure makes a real and verifiable contribution.

461. The design of the measure as such is therefore not sufficient to establish whether a measure makes a contribution. Rather, it must also be verified whether, in the concrete conditions it is applied, and taking into account other possible measures which might apply, the measure can make a real contribution to the end pursued. On the other hand, the design of the measure must of course not be such as to prevent the measure from achieving its stated goal.

(b)

462. Both the MERCOSUR exemption and the used tyre imports taking place pursuant to court injunctions are relevant for the contribution of the measure, and should be considered by the Panel in this context.

463. Both facts are relevant because the contribution of the ban to the reduction of any problems for human life and health resulting from waste tyres depends, at the very first level, on the contribution that the ban is making to the reduction of the number of waste tyres in Brazil. However, as the European Communities has already explained,[219] the ban will make such a contribution only to

[218] Appellate Body Report on *Korea – Beef*, para. 163 (emphasis added).
[219] European Communities' second written submission, para. 32.

the extent that it results in the replacement of an imported retreaded tyre either with a new tyre which will be retreaded or with a retreaded tyre which has been produced from a domestic casing.

464. As regards the MERCOSUR exemption, this exemption is relevant because none of the retreaded tyres imported from MERCOSUR are made with casings imported from Brazil (and most are in fact made with casings imported from the European Communities).[220] Accordingly, to the extent that an imported retreaded tyre from the European Communities would compete with and replace a retreaded tyre imported from MERCOSUR, the import ban has no effect on the reduction of waste tyres in Brazil.

465. The importation of used tyres is equally relevant since the large majority of these tyres are used to produce retreaded tyres made in Brazil.[221] Once again, to the extent that an imported retreaded tyre replaces a domestic retreaded tyre produced with an imported casing, the ban cannot have the effect of reducing the number of waste tyres arising in Brazil.

(c)

466. The MERCOSUR exemption and the used tyre imports taking place pursuant to court injunctions should be taken into account by the Panel both in the context of its analysis under paragraph (b) of Article XX and under the chapeau of that provision.

467. As the European Communities has explained, both factors are relevant for determining whether the ban makes a contribution to the reduction of waste tyres in Brazil. Similarly, as the European Communities has equally explained, banning the importation of used tyres is a reasonable alternative to the import ban on retreaded tyres.[222] Finally, the existence of the MERCOSUR exemption is also relevant under the chapeau of Article XX since it amounts to discrimination between countries where the same countries prevail, namely MERCOSUR countries and other WTO Members.[223] Moreover, the importation of EC casings for the purposes of retreading in Brazil equally amounts to discrimination, in this case between Brazil and other WTO Members, including the European Communities, and is therefore equally incompatible with the chapeau.[224]

Comments of Brazil

468. In its second set of responses Brazil noted that the President's Chief of Staff had directed the Union's Solicitor General to initiate actions for rescission of the injunctions currently in effect. Brazil reports to the Panel that the President of the Republic has signed and the Solicitor General has filed one of these actions in Federal Supreme Court on 21 September 2006. This challenge action, Allegation of Violation of Fundamental Precept, has the power to revoke all the judicial decisions that have allowed the importation of used tyres into Brazil and preclude future judicial decisions permitting new imports. The preliminary injunction requested by the President in this action will be decided in a matter of days. Brazil attaches documents to this proceeding as Exhibit BRA-173 and Exhibit BRA-174.

469. On a separate topic of the Rio Grande do Sul law, Brazil reports that the General Prosecutor of the Republic has presented to the Federal Supreme Court the Unconstitutionality Action recommended by the Chief of Staff Minister (Exhibit BRA-169). The Unconstitutionality Action received the identifying code ADIN3801 in the Federal Supreme Court.

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[220] Cf. European Communities' first written submission, para. 83-84.
[221] Cf. European Communities' second written submission, footnote 43.
[222] European Communities' second written submission, para. et seq.
[223] European Communities' second written submission, para. 151 et seq.
[224] European Communities' second written submission, para. 167 et seq.

Comments of the European Communities

470. In its Reply to the Panel's Question, the European Communities has explained that what is relevant is whether the measure makes a real contribution to the end pursed. The European Communities has equally explained that the MERCOSUR exemption and the imports of used tyres are relevant both for the Panels' analysis under Article XX(b), and under the chapeau of Article XX.

471. As regards the imports of used tyres, Brazil has denied the relevance of these imports because used tyre imports are not "part of the design of the measure".[225] However, as the European Communities has explained, what matters for the contribution analysis is not only the design, but also the practical application and effect of the measure. If an imported retreaded tyre merely replaces a domestic retreaded tyre which is produced with an imported casing, then the ban to this extent makes no contribution to the reduction of the number of waste tyres in Brazil. Accordingly, the relevance of the importation of used tyres cannot be denied.

472. Moreover, Brazil has claimed that "with the exception of 2004 and 2005, imports of used tyres have not been particularly high".[226] In this context, the European Communities would remark that the numbers of imported used tyres for 2000 to 2005 were as follows (from January to July 2006, imports of casings were 4.54 million):[227]

2000	2001	2002	2003	2004	2005
1,407,618	2,396,898	2,659,704	4,240,474	7,564,360	10,478,466

473. The European Communities has stressed on many occasions how much these imports have increased in the recent past. The European Communities, however, does not see on what basis Brazil qualifies these numbers as "not particularly high" for the years other than 2004 and 2005, also against the background that Brazil imported 2-3 million retreaded tyres per year before it imposed the import ban. In addition, the European Communities has already remarked that the rising numbers of imports are a reflection of the adaptation by Brazilian industry to the higher standards of Portaria INMETRO 133. The earlier higher utilisation of domestic casings is therefore no longer representative for the current situation. Finally, Brazil's measure must be evaluated as of the time of the Panel's establishment. The most relevant figure is therefore the one for the last calendar year before the Panel's establishment, namely 2005, and in that year, Brazil imported 10.5 million used tyres.

474. As regards the MERCOSUR exemption, Brazil argues that this exemption is properly analyzed under Article XXIV and not under Article XX.[228] The European Communities disagrees with this statement. As the European Communities has shown, the MERCOSUR exemption is first of all relevant as regards the contribution analysis, since, to the extent that an imported retreaded tyre replaces a retreaded tyre imported from MERCOSUR which is not produced from a casing originating in Brazil, the ban does not contribute to the reduction of waste tyres in Brazil.[229]

475. Brazil also has doubted the relevance of the MERCOSUR exemption for the contribution analysis by arguing that in 2005, Brazil imported "a meagre 157,573 retreaded tyres" from MERCOSUR. The European Communities finds this reference to 157,573 tyres as "meagre"

[225] Brazil's answer to panel question No. 118, para. 64.
[226] Brazil's answer to panel question No. 118, para. 65.
[227] According to Brazilian official ALICE statistics, which Brazil has also submitted in this dispute.
[228] Brazil's answer to panel question No. 118, para. 68.
[229] European Communities' answer to panel question No. 118, para. 51.

surprising considering that at the same time, Brazil has argued that even 500 additional waste tyre would justify the imposition of the import ban on retreaded tyres.[230]

476. The point is also one of legal principle and of the design of Brazil's measure, given that imports of retreads from MERCOSUR are permitted without any quantitative limitation. The fact that they are currently fewer than imports from the European Communities have been before the import ban rather seems to be due to supply, not demand constraints, or to questions of competitiveness of the Uruguayan and Paraguayan retreaders, as compared to Brazilian retreaders. Other than that, it is absolutely possible that MERCOSUR imports of retreads will increase in the future. Uruguay's more recent challenge of Argentina's import ban suggests that its industry has the willingness and capability to increase its production and exportation.

477. Moreover, it should be noted that the MERCOSUR tyres are only one factor, and in fact the smallest, which reduces the effectiveness of the ban. The bigger factors are in fact the large number of retreaded tyres produced in Brazil with imported casings, plus the fact that the overwhelming majority of domestic passenger car casings in Brazil are not retreaded after their first use. Due to these factors seen in combination, the contribution of the ban to the reduction of waste passenger car tyres is in fact minimal at best.

478. Brazil concedes that the MERCOSUR exemption is "more relevant" under the chapeau, but repeats its statement that the "original design" of the measure did not include the exemption, and that this exemption was only introduced to comply with a MERCOSUR arbitral tribunal.[231] As regards the argument that the exemption was only introduced in 2002, i.e. two years after the ban was adopted, the European Communities fails to see the relevance of this argument. The European Communities is not challenging the ban as in force in 2000, but as in force at the time of establishment of the Panel. At that date, the MERCOSUR exemption was in force and therefore needs to equally be taken into account by the Panel. As regards the argument that the compliance with the MERCOSUR arbitral tribunal means that the measure does not constitute arbitrary and unjustifiable discrimination, the European Communities has already rebutted this argument in its earlier submissions, to which it hereby refers.[232]

Question 119. To both parties.
Please elaborate on the manner in which the "weighing and balancing" under Article XX(b) is to be conducted. Specifically, what considerations should guide the Panel in assessing the relative weight to be given to the different factors in this process?

Response of Brazil

479. The weighing and balancing exercise requires that the relative strength or weakness to be given to the factors be informed by the circumstances of the case and, in particular, by the value pursued by the impugned measure. Indeed, the consideration of the interest protected by the import ban must be given prominence in the weighing and balancing exercise. This factor – listed first among the four factors by the Appellate Body – provides context for the weighing and balancing of the other factors. Thus, a measure that seeks to safeguard government revenue, for example, is likely to carry less weight than a measure that seeks to protect human health and the environment – values that the Appellate Body has called "vital and important *in the highest degree*."[233] What this means in practical terms is that when a measure protects a less important interest, the panel will be more

[230] Brazil's second oral statement, para. 78.
[231] Brazil's answer to panel question No. 118, para. 69.
[232] Cf. European Communities' second oral statement, para. 92 et seq.; European Communities' second written submission, para. 156 et seq.
[233] Appellate Body Report on *EC – Asbestos*, at para. 172 (emphasis added).

exacting in its examination of the remaining factors. Conversely, when a measure protects an interest that is "vital and important in the highest degree" – such as protection of human health and the environment – the panel should ascribe more weight to that factor and relatively less weight to the remaining factors, such that the measure is more likely to be found to be "necessary" within the meaning of Article XX(b) even if the trade impact is higher, or the degree of "necessity" is closer to the pole of making a contribution than to the pole of indispensable.

480. The Appellate Body has reliably adhered to this principle. It held in European Communities – Asbestos that "the more vital or important the common interests or values pursued, the easier it would be to accept as 'necessary' measures designed to achieve those ends."[234] In *Korea – Various Measures on Beef*, the Appellate Body issued a similar holding within the context of Article XX(d).[235]

481. Availability of less restrictive alternatives is another factor that provides context to the weighing and balancing analysis. Where less restrictive alternatives are available, a more exacting scrutiny is appropriate with respect to the remaining factors. However, where no such alternatives are reasonably available – as is the case in the present dispute – a panel should exercise great caution to avoid finding against the only measure available, thereby leaving the WTO Member with no tools at its disposal to counter the threat to public health and the environment.

482. The two remaining factors are contribution and trade impact. With respect to the contribution, the Appellate Body has rightly said that "[t]he greater the contribution, the more easily a measure might be considered to be 'necessary.'"[236] This means that the strength of this particular factor – contribution – may offset the relative weakness of other factors, just as the strength of another factor would have offset the relative weakness of contribution. The contribution needs not be absolute or infallible. On the contrary, the Appellate Body has explained that the measures must "contribute, *at least to some extent,* to addressing these concerns."[237] This sensible standard ensures that a panel will not find a measure unnecessary because of its failure to achieve a level of contribution that is unattainable in the real life.

483. Finally, with respect to the trade impact of the measure, a less restrictive impact may favor a finding of necessity[238], but a more restrictive impact would not preclude such a finding. The European Communities incorrectly argues that it would: "[The highest negative impact of the import ban] *makes it impossible* to consider as 'necessary' the measure challenged in this case."[239] The European Communities would have been correct only if the trade impact were the sole determinative factor of the measure's necessity. However, the Appellate Body has made it abundantly clear that trade impact is but one of several factors that must be weighed and balanced.[240] Not only does the European Communities' argument have no basis in the WTO jurisprudence, but it also represents a complete about-face from the European Communities' position in *EC – Asbestos*, in which the European Communities argued that the French total import ban on asbestos was, in fact, necessary.

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[234] *See* Appellate Body Report on *EC – Asbestos*, at para. 172.
[235] *See* Appellate Body Report on *Korea – Various Measures on Beef*, at para. 162.
[236] Appellate Body Report on *Korea – Various Measures on Beef*, at para. 49.
[237] Appellate Body Report on *US – Gambling*, at para. 6.494 (emphasis added).
[238] *See* Appellate Body Report on *Korea – Various Measures on Beef*, at para. 163.
[239] *See* European Communities' first written submission, at para. 115 (emphasis added).
[240] *See* Appellate Body Report on *Korea – Various Measures on Beef*, at para. 164; Appellate Body Report on *EC – Asbestos*, at para. 172; Panel Report on *Canada – Wheat Exports and Grain Imports*, at para. 6.223; Appellate Body Report on *US – Gambling*, at paras. 306, 307; Appellate Body Report on *Dominican Republic – Cigarettes*, at para. 69.

Response of the European Communities

484. "Weighing and balancing" of the four factors that the Appellate Body has identified to assess the "necessity" requirement in Article XX(b) should start by verifying the importance of each of the factors individually in the context of the case at issue. In this respect, an important weight should be given to the fact that the risks Brazil pretends to eliminate or reduce are linked not to retreaded tyres, which is the product affected by Brazil's import ban, but to improperly managed waste tyres from all origins.

485. The European Communities would recommend that this process be carried out in the order followed by Brazil in its first written submission:[241] the interest protected by the import ban, the contribution of the import ban to the protection of that interest, trade impact of the import ban and alternatives to it, in order to move from the factors that are more closely linked to measure to those that are more separated from it.

486. All factors have a relative weight, in the sense that no single one of them can generally be decisive by itself to determine whether the measure is necessary or not to achieve the aims that Brazil is claiming to achieve. However, a measure, like the import ban before the Panel, that is not closely linked to life and health protection, that plays no significant role in that protection, that has an extremely severe impact on import trade, and for which alternatives are available, cannot merit being considered as "necessary" for the purposes of Article XX(b).

Comments of Brazil

487. In its response to the Panel's question, the EC again asserts that "the risks Brazil pretends to eliminate or reduce are linked not to retreaded tyres, which is the product affected by Brazil's import ban, but to improperly managed waste tyres from all origins."[242] As Brazil has extensively demonstrated throughout these proceedings, retreaded tyres are shorter-lifespan products that increase the volumes of tyres waste that accumulate and must be disposed of in Brazil. Certain health and environmental risks inherent to waste tyre accumulation and disposal – specifically, those arising from transportation, temporary stockpiling, and incineration – cannot be eliminated through "proper management." It is, therefore, necessary to reduce the waste tyre volumes to reduce these risks.

488. The fact that the risks posed by retreaded tyres may be indirect does not make these risks less significant or the measures taken to reduce these risks less legitimate. Neither the GATT nor the WTO jurisprudence have required a direct link between the product and the health and environmental risks it causes for a measure designed to address these risks to be justified under Article XX(b).

Comments of the European Communities

489. At the outset, the European Communities would point out that Brazil's Answer to the Question from the Panel changes the order in which the different elements of the "weighing and balancing" under Article XX(b) were analysed by the Appellate Body in *Korea – Various Measures on Beef*: interests protected, contribution, trade effects and alternatives,[243] which was followed by Brazil in its first written submission.[244] Brazil now places the alternative assessment before the contribution, separating in that way the three elements of the "weighing and balancing" that are closely linked to the measure and giving a more prominent place to the analysis of alternatives, which should only be initiated once the analysis of the different facets of the measure is completed.

[241] Brazil's first written submission, para. 97.
[242] *See* European Communities' answer to panel question No. 119, at para. 55.
[243] Appellate Body Report on *Korea – Various Measures on Beef*, paras. 162 to 166.
[244] Brazil's first written submission, para. 97 and paras. 99 to 129.

490. For the rest, the European Communities and Brazil do not agree on the assessment of each of the four elements in this case. The European Communities considers that the interests protected by the import ban are not human, animal and plant life or health but the Brazilian tyre industry.[245] The European Communities would highlight that Brazil has not once in this dispute even tried to rebut certain evidence in this respect, notably the statements by Brazil's Advocacia-Geral, including that "SECEX Portaria No 08/2000 prohibits the importation of 'retreaded' tyres not for the defence of public health and the environment, but to protect national trade and industry."[246] The European Communities is also of the view that Brazil has not demonstrated that the ban has significantly contributed to protect life and health.[247] The European Communities has proved that the import ban is the most restrictive trade measure that a WTO Member can take and that the comparison that Brazil makes of the case before the Panel and *EC – Asbestos* is completely misleading.[248] Finally, the existence of reasonably available alternatives, which would solve the eventual risks not only arising from imported retreaded tyres but also from tyres of all origins, has been sufficiently explained by the European Communities.[249]

Question 120. To the European Communities.
In paragraphs 21 and 49 of your oral statement, you referred to the notion of "significant" contribution, with reference to the Korea – Beef case. Could you please clarify this notion and the role that it should play, in your view, in the Panel's assessment?

Response of the European Communities

491. In *Korea – Beef*, the Appellate Body clarified that the process of weighing and balancing in order to establish whether a measure is necessary "prominently" includes the contribution of the measure to the end pursued.[250] Moreover, the Appellate Body also held that in order to be necessary, a measure had to be "located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'".[251] On this basis, it is clear that a measure which makes no significant contribution to the end pursued cannot be regarded as necessary within the meaning of Article XX (b).

492. Brazil's argument in the present case has been that waste tyres present risks for human life and health, and that the importation of retreaded tyres increases the number of waste tyres in Brazil, and thereby the health risks resulting from such tyres. At the same time, however, Brazil has claimed that it is "immaterial whether there are five hundred fewer tyres or five million".[252]

493. In a situation where Brazil itself acknowledges that it has over 100 million improperly managed waste tyres littering the countryside,[253] it is not reasonable for Brazil to claim that an additional amount of 500 tyres will make any difference from the point of view of human life and health. This is why the European Communities has insisted that as a first step in the contribution

[245] See, *inter alia*, the European Communities' comment to Brazil's answer to panel question No. 129.
[246] See para. 164 of the European Communities' first written submission.
[247] See, *inter alia*, the European Communities' comment to the Brazil's answer to panel question No. 12.
[248] European Communities' first written submission, paras. 114 to 115, European Communities' first oral statement, paras. 49 to 52, European Communities' second written submission, paras. 63 to 65, and European Communities' second oral statement, paras. 51 to 58.
[249] European Communities' first written submission, paras. 110 to 113, European Communities' first oral statement, paras. 53 to 82, European Communities' second written submission, paras. 66 to 143, and European Communities' second oral statement, paras. 59 to 89.
[250] Appellate Body Report on *Korea – Beef*, para. 164.
[251] Appellate Body Report on *Korea – Beef*, para. 161.
[252] Brazil's second oral statement, para. 78.
[253] Brazil's first written submission, para. 17.

analysis, Brazil must quantify the contribution, in terms of reduction of waste tyres, made by its import ban on retreaded tyres.[254] Only once this contribution has been established is it then possible to determine what kind of contribution the ban might make to the prevention of problems for human life and health, and whether this contribution is likely to be significant.

Comments of Brazil

494. In its response to Question 120 the European Communities continues to assert that the measure's contribution must be "significant" for a measure to be necessary within the meaning of Article XX. As a factual matter, Brazil has demonstrated that the contribution is indeed significant.[255] As a legal matter, however, Brazil has pointed out in its response to Question 121 that neither the text of the WTO Agreements nor the WTO jurisprudence establish a requirement that the contribution of a measure be "significant."

495. The European Communities argues that it is "not reasonable" for Brazil to claim that even a small reduction in the waste tyre volumes contributes to protecting human health when some waste tyres remain in the environment. First, the problem of tyres being dumped in the environment is not unique to Brazil – EC member States face the same problem.[256] Second, the European Communities completely ignores the fact that Brazil has already made substantial progress in collecting waste tyres scattered in the environment. Brazil's collection and disposal initiatives, such as *ecopontos*, Paraná Rodando Limpo, and CONAMA Resolution 258, ensure that tyres that are already in the environment will be collected and tyres that reach their end of life will be disposed of properly. The resolution's goal of reducing the historic accumulation – in addition to the new arisings – is evident in its requirement to collect and dispose of more tyres than produced. To recall, Brazil's chosen level of protection requires Brazil to do everything possible to reduce the waste tyre risks. For this reason, Brazil must continue to collect the waste tyres already in the environment and must also reduce the overall waste tyre volumes. As Brazil has demonstrated, it is doing both.

496. Finally, Brazil emphasizes that the challenged measures protect human life and health – undoubtedly the most important interest that a government measure can protect. The European Communities' insistence on quantifying the ban's contribution would effectively require Brazil to demonstrate that a sufficiently high number of lives were saved and cases of disease prevented for the ban to be justified. This requirement would be plainly at odds with the WTO Members' right to choose a level of protection they consider appropriate. If a reduction in waste tyre volumes saves lives, regardless of the number, Brazil has the right under the WTO to take measures to achieve that reduction. The European Communities, however, seems to believe that there is a threshold below which the right of its exporters to ship retreaded tyres to Brazil matters more than the lives of Brazil's citizens. Brazil refuses to put a price tag on the lives of its citizens.

[254] European Communities' second written submission, para. 26 et seq.

[255] *See* Brazil's answer to panel question No. 121, at para. 77.

[256] European Tyre & Rubber Manufacturers' Association, End-of-life Tyres: A Valuable Resource with a Wealth of Potential 4 (2006) (Exhibit EC-84) (Exhibit BRA-126).

Question 121. To Brazil.
In paragraph 11 of your second oral statement, you indicate that the ban makes a "significant contribution". Could you please clarify whether you agree with the view that the contribution made by the measure to the objective should be "significant" (see above the question to the European Communities)? Please elaborate on your position in light of your arguments in your second oral statement that "...it is immaterial whether there are five hundred fewer tyres or five million. ..." (paragraph 78) and "[S]o long as Brazil continues to retread some of the tyres it consumes rather than import them, the ban contributes to the goal of reducing the tyre waste to be disposed of" (paragraph 96).

Response of Brazil

497. The European Communities' argument that Brazil must demonstrate a "significant contribution" incorrectly assumes that necessity is a static concept. It is not. Rather, inherent in the notion of weighing and balancing is the flexibility necessary to take into account the specific facts and circumstances. Indeed, the Appellate Body in *Korea – Various Measures on Beef* pointed out that there is "*a range of degrees of necessity*" that lie on a continuum between "making a contribution" and being "indispensable."[257] The Appellate Body explained that "[t]he more vital or important those common interests or values are, the easier it would be to accept [the measure] as 'necessary.'"[258] Thus, when a measure pursues an important objective, the necessity is closer to the "making a contribution" pole.

498. Neither the text of the WTO Agreements nor the WTO jurisprudence establish a requirement that the contribution of a measure be "significant," as the European Communities claims. As Brazil explained in its Response to Question 119 from the Panel, a measure will satisfy the contribution requirement if it contributes "*to some extent*."[259] The WTO Contracting Parties – undoubtedly well aware of the fact that government measures seldom achieve perfect efficiency – did not require a significant contribution. To require such a showing could have the effect of finding against legitimate measures that the WTO Members intended to permit.

499. In any event, Brazil has demonstrated that the import ban in fact makes a significant contribution to reducing the risks of waste tyre accumulation and disposal in Brazil. While it is impossible to precisely quantify the waste reduction achieved by the import ban[260], Brazil has noted in its response to Question 40 from the Panel that imports of the shorter-lifespan retreads have shrunk to just one-tenth of the pre-ban levels. Without the import ban, increasingly higher volumes of retreaded tyres would have been imported into Brazil.

500. Throughout the dispute, the European Communities has argued – incorrectly – that Brazil must quantify the contribution made by the import ban. Brazil included the statement cited ("it is immaterial whether there are five hundred fewer tyres or five million") merely to illustrate that such quantification is unnecessary. This is so because Brazil's chosen level of protection requires Brazil to reduce the volumes of tyre waste to the maximum extent possible, in the same way that France decided to reduce the risks caused by asbestos to the maximum extent possible. The Appellate Body[261] – and indeed the European Communities itself[262] – have recognized that when it comes to selecting the level of protection, a WTO Member can set that level as low or as high as it finds appropriate. Every additional waste tyre that Brazil could have avoided increases the number of

[257] See Appellate Body Report on *Korea – Various Measures on Beef*, at para. 161 (emphasis added).
[258] See Appellate Body Report on *Korea – Various Measures on Beef*, at para. 162.
[259] Appellate Body Report on *US – Gambling*, at para. 6.494 (emphasis added).
[260] See Brazil's second oral statement, at para. 81.
[261] See Appellate Body Report on *US – Gambling*, at para. 308; Appellate Body Report on *EC – Asbestos*, at para. 174.
[262] See European Communities' second written submission, at para. 12.

waste tyres that will have to be temporarily stockpiled, transported, and ultimately incinerated in Brazil. Because each of these activities presents well-recognized risks to human health and the environment, even as few as five hundred waste tyres would increase the risk. This increase would "involve a continuation of the very risk" that Brazil seeks to reduce, even if that risk is low[263] – and thus prevent Brazil from achieving its chosen level of protection because as long as there are some waste tyres that could have been avoided, there is also a risk that could have been avoided. To require Brazil to demonstrate a particular level of waste reduction would effectively amount to choosing, for Brazil, the level of protection that the Brazilian public should be afforded. This choice belongs to Brazil, not to the European Communities.

501. Notwithstanding the validity of the illustration, the actual waste reduction achieved by the import ban is in millions of waste tyres, not in hundreds, as Brazil explained above.

502. The second part of the cited statement ("So long as Brazil continues...") merely refers to the fact that Brazil must retread tyres it consumes for the ban to make a contribution to waste reduction. On this, Brazil and the European Communities agree.[264] Brazil has demonstrated that it retreads a high number of tyres that it uses. Therefore, the ban makes a significant contribution to the goal of protecting Brazil's population from the risks of waste tyre accumulation and disposal.

Comments of the European Communities

503. With its peculiar interpretation of the contribution element within the necessity analysis Brazil departs from the Appellate Body in *Korea – Various Measures on Beef*, where it was clearly stated that "a 'necessary' measure is […] located significantly closer to the pole of 'indispensable' than to the opposite pole of simply "making a contribution to" (emphasis added).[265] It was on the basis of this wording that the European Communities has referred to this element, in a short way, as requiring a "significant contribution", i.e.: a contribution that is significantly closer to the pole of indispensable than to the opposite pole of simply making a contribution to.

504. On the contrary, Brazil pretends that, when a measure pursues an important objective, the necessity is closer to the "making a contribution" pole and that a measure will satisfy the contribution requirement if it contributes "to some extent". With that interpretation Brazil does not take into account that the Appellate Body explained in *Korea – Various Measures on Beef* that the "necessity" requirement found in Article XX(d) is less flexible textually than Article XX(g), which requires a measure "relating to the conservation of exhaustible natural resources". Brazil interpretation of the "necessity" requirement in Article XX(d) blurs this difference with Article XX(g) and virtually merges two requirements that are expressed in different Treaty language: a measure that contributes "to some extent" to achieve a certain objective is, in fact, a measure that is "related to" the achievement of that objective. Both ideas are the two sides of a same coin, and that is not what Article XX pretends when it uses different terms in (b) [and (a) and (d)] and (g).

505. Finally, the European Communities would recall that, contrary to what Brazil claims, the import ban does not make a significant contribution to reducing the risks arising from waste tyres. It is not even clear *if* it makes a contribution. Brazil has never quantified the contribution made by the import ban and has used the excuse that it pertains to Brazil to choose the level of protection. This argument does not take into account that a minimal contribution of the import ban to the reduction of the number of waste tyres in Brazil would also imply that the import ban would be disproportionate.

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[263] Appellate Body Report on *EC – Asbestos*, at para. 174.
[264] *See* European Communities' second written submission, at para. 34.
[265] Appellate Body Report on *Korea – Various Measures on Beef*, para. 164.

For further explanations, the European Communities refers to its previous submissions on these issues, where its arguments were developed at greater length.[266]

Question 122. To Brazil:
Please comment on the European Communities' statement at paragraph 69 of its oral statement of 4 September 2006. Please clarify, in this context, what potential role you see, as a matter of principle, for non-generation, management and disposal options respectively, as alternatives to the import ban.

Response of Brazil

506. The European Communities' statement at paragraph 69 addresses the risks of waste tyre accumulation – not the risks of disposal. As Brazil explained throughout this dispute, waste tyre collection in fact reduces the accumulation risks, but the collected tyres must then be disposed of and, at present, it is impossible to dispose of the existing volumes without harming human health and the environment.[267]

507. Contrary to what the European Communities suggests, Brazil's objectives are not only to reduce mosquito-borne diseases, tyre fires, and leaching, but also to reduce the risks of waste tyre transportation and, especially, the risks of dangerous emissions that occur when waste tyres are incinerated. Brazil has extensively demonstrated that only reduction of the overall waste tyre volumes can achieve these objectives. Essentially, the more tyre waste there is, the more tyre waste must be incinerated – and incineration is harmful. A comparable solution would, therefore, have to reduce the waste tyre volumes (e.g., by improving rates of retreading or reducing the overall use of tyres by encouraging public transportation) and not only help collect or dispose of waste tyres.

508. Brazil has chosen to reduce the waste tyre risks to the maximum extent possible. Because the risks of waste tyre accumulation and disposal increase with waste tyre volumes, Brazil seeks to reduce these risks by reducing the waste tyre volumes by as much as possible. To do that, Brazil must avoid the generation of every tyre that can be avoided. As Brazil explained in paragraph 51 of its second oral statement, the non-generation solutions proposed by the European Communities could be alternatives only if Brazil sought to reduce waste tyre volumes by a particular amount, and these solutions allowed Brazil to achieve that specific reduction. However, the chosen level of protection requires Brazil to reduce waste tyre volumes to the maximum extent possible. Other non-generation options proposed by the European Communities do not allow Brazil to attain this objective. They are, therefore, not alternatives within the meaning of Article XX(b) because without the import ban, some tyre waste that could have been prevented would not, in fact, be prevented. They are additional measures and, as Brazil explained in paragraph 104 of its secnd written submission, it has already implemented a number of measures that promote non-generation.

Comments of the European Communities

509. The European Communities would like to clarify that its statement at paragraph 69 of its second oral statement is not limited to "waste tyre accumulation", as Brazil has misinterpreted, but to all alternatives where waste tyres are managed, including those consisting in recycling and energy recovery.

510. Brazil states in its answer to this question that it "has extensively demonstrated that only reduction of the overall waste tyres volume can achieve these objectives", which are the reduction of

[266] European Communities' first written submission, paras. 107 to 109 and 127 to 128, European Communities' first oral statement, paras. 21 to 48, European Communities' second written submission, paras. 17 to 62, European Communities' second oral statement, paras. 21 to 50 .

[267] See Brazil's first written submission, at para. 120; Brazil's second written submission, at para. 40.

mosquito-borne diseases, tyres fires, leaching and emissions from co-incineration (once again wrongly referred to as "incineration").

511. The European Communities has explained several times, and will continue to explain in its comment to Brazil's Reply to Question No. 123, that co-incineration of waste tyres does not increase emissions to the air of hazardous substances.

512. Leaching from waste tyres, either stockpiled or landfilled, does not pose a risk for life and health because it occurs in very limited quantities and, in any case, it is harmless for the environment. Brazil did not prove the contrary with the two documents attached to its second written submission[268], as the European Communities explained in its second oral statement.[269] Here, again, the European Communities has to recall that Brazil has provided no evidence on leachates from waste tyres in its territory.

513. For the rest, it is quite difficult to understand Brazil's argumentation. If the reduction of waste tyres by means of the import ban on retreaded tyres aims at reducing these problems (mosquito-borne diseases and tyre fires), how is it possible that, six years after the adoption of the import ban, Brazil has not been capable of attaining those reductions? The occurrence of dengue cases (and tyre fires, it seems) continues irrespective of the adoption and enforcement of the import ban on retreaded tyres. It suffices to have a look to the table of dengue cases attached by Brazil to one of its answers to the questions posed by the European Communities.[270] This shows that the Brazilian policy, which seems to be limited to non-generation measures, is not capable to solve the problems that Brazil claims to be fighting. Brazil should try again to have recourse to waste tyre recycling and energy recovery. In other words, Brazil should have maintained in application the obligations imposed to importers of retreaded tyres by Resolution CONAMA No. 258/99 to collect and dispose of a certain number of waste tyres. This would have been more coherent with Principle 16 of the Rio Declaration on Environment and Development, as the European Communities already explained in its first written submission.[271]

Question 123. To Brazil.
Please comment on the European Communities' arguments in paragraph 84 of its oral statement of 4 September 2006. Please address specifically co-incineration, as referred to by the European Communities.

Response of Brazil

514. First, the incineration was not safe ten years ago, and it still is not safe today. The studies provided by Brazil are the most recent studies available on the subject. The European Communities has only been able to provide one study that is more recent, which specifically addresses the safety of waste tyre incineration (Exhibit EC-86). That very study, as Brazil pointed out in paragraphs 86-89 of its second written submission, reported significant increases in dioxin emissions during the incineration of waste tyres. In addition, as Brazil pointed out in paragraph 35 of its second oral statement, a British report, dated 2002, prepared with the British Government's participation, observed that "public and regulatory concern over emissions makes consents [to incinerate tyres] difficult to

[268] Brazil's second written submission, para. 61.
[269] European Communities' second oral statement, para. 47.
[270] Brazil's answer to the EC question No. 11, a).
[271] European Communities' first written submission, paras. 138 and 139, and Exhibit EC-53.

obtain."[272] Finally, the European Communities' own Environment Agency declared just five years ago, that waste tyres should be incinerated only "*if no other outlet is possible*."[273]

515. Second, it is naïve – if not outright misleading – for the European Communities to suggest that a single EC directive[274] would turn incineration into a benign, environmentally-friendly disposal method overnight, and would, thereby, solve the waste tyre disposal problem that the rest of the world continues to grapple with. In reality, the directive has not done this. To begin, the directive's stricter atmospheric emission standards will not become mandatory until 2008.[275] Further, contrary to the European Communities' suggestion, even the new kilns will typically have to be fitted with the necessary equipment "to use end-oflife tyres as supplementary fuel, and still be in compliance with the atmospheric emission standards due to come into force in 2008."[276]

516. Third, as Brazil explained in paragraph 93 of its second written submission and in paragraph 14 of its concluding statement at the Second Panel Meeting, stricter emission standards may reduce harmful emissions from waste tyre incineration, but cannot eliminate it. The stricter the standards, the fewer incinerators will agree to burn tyres. Until there is a safer disposal option that can handle the existing waste tyre volumes, as Brazil has noted in its response to Question 97 of the Panel, governments simply cannot set emission standards at so high a level that incineration becomes economically unviable.

517. Finally, Brazil has provided the list of companies authorized to process waste in Brazil as Exhibit BRA-166.

Comments of the European Communities

518. Brazil's insistence in considering co-incineration (not "incineration", as Brazil refers to) as an unsafe practice that is based on a handful of old documents produced by various sources. Moreover, Brazil has misrepresented the study by SINTEF presented by the European Communities so that an isolated study in relation to the rank of emissions of different substitute fuels is elevated to a general rule,[277] omitting to quote what the SINTEF study says in the lines that followed directly thereafter:

> Many other and more recent studies have concluded that the use of alternative fuels and raw materials doesn't influence or affect the emissions of PCDD/Fs (see chapter 6). In general, it seems that the ranges of PCDD/Fs emission concentration resulting from the use of conventional fuels such as coal and petcoke overlap with the ranges obtained with the use of secondary fuel, <u>regardless of the type of secondary fuel</u> (emphasis added).[278]

[272] A. B. Hird et al., Tyre Waste and Resource Management: A Mass Balance Approach 3 (2002) (Exhibit BRA-56).

[273] European Environment Agency, Waste from Road Vehicles 2 (2001) (Exhibit BRA-108) (emphasis added).

[274] Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the Incineration of Waste (Exhibit BRA-34)

[275] *See id.* at II.1.

[276] European Tyre & Rubber Manufacturers' Association, End-of-life Tyres: A Valuable Resource with a Wealth of Potential 4 (2006) (Exhibit EC-84) (Exhibit BRA-126).

[277] Brazil's second written submission, para. 88.

[278] Formation and Release of POPs in the Cement Industry, 23 January 2006, Exhibit EC-86, at p. 97.

519. The following paragraph at the same page of the SINTEF study is also revealing:

> The UNEP Standardized Toolkit for Identification and Quantification of Dioxin (2003) and Furan releases gives the following summary about the effect of waste feeding:
>
> "[…] *It should be noted that the higher emissions measured in the USA were from wet kilns whereas the lower emissions (several hundred measurements) from European cement kilns were obtained from plants using the dry process*".

520. This paragraph is sufficient evidence to show that those reports from the USA that Brazil attached to its first and second written submissions are not studies on the current state of the cement industry,[279] which now prefers to use the dry process because of its far lower fuel consumption.[280]

521. Moreover, the SINTEF study concludes that:[281]

> The PCDD/F data presented in this report shows that:
>
> • Most cements kilns can meet an emission level of 0.1 ng TEQ/Nm³ if primary measures are applied;
>
> • Co-processing of alternative fuels and raw materials, fed to the main burner, kiln inlet or the precalciner does not seem to influence or change the emissions of POPs;
>
> • Data from dry preheater cement kilns in developing countries presented in this report show very low emission levels, much lower than 0.1 ng TEQ/Nm³.

522. Finally, Brazil refers again in its answer to a British report and to a declaration by the European Environment Agency taking them out of context. Thus the British report, prepared by a consultant in 2000/01 with 1998 as the base year for the study, does not reflect the current situation of co-incineration in the United Kingdom. The statement from the European Environment Agency is just a reflection of the hierarchy in the waste management principles and not a rejection of co-incineration as an unsafe alternative.

523. The European Communities comments on paragraphs 86 and 87 of Brazil's response to question no. 123 are integrated in the European Communities' comments to the answer provided by Brazil to Question 97 from the Panel.

524. Finally, the European Communities does not understand the reference that Brazil makes to the European Communities Waste Incineration Directive in its answer to the Question from the Panel, because the Directive is not mentioned in paragraph 84 of the European Communities' second oral statement, to which the Panel's Question refers. In any case, the European Communities would like to clarify that the emission standards laid down by the Directive applied for new plants as from 28 December 2002 and for existing plants as from 28 December 2005.[282] The date mentioned by the

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[279] Those studies are attached by Brazil as Exhibits BRA-26, BRA-48, BRA-49, BRA-50, BRA-51, BRA-141 and BRA-142.

[280] The different technological processes in cement production are explained in the SINTEF Study, Exhibit EC-86, at pp. 33 to 41.

[281] Exhibit EC-86, at p. 179.

[282] Article 20 of Directive 2000/76/EC (Exhibit BRA-34).

European Tyre & Rubber Association in its publication is, therefore, incorrect. Neither is correct the reference made by Brazil to this publication, which does not declare that "even the new kilns will typically have to be fitted with the necessary equipments", as Brazil writes, but instead states that "new kilns are increasingly equipped to use end-of-life tyres as supplementary fuel". This is another example of the multiple distortions that Brazil has committed in its submissions and on which the European Communities already alerted the Panel in its Closing Statement at the second meeting.[283]

Question 124. To Brazil.
Please comment on the European Communities' observations in paragraph 74 of its second oral statement in relation to the 100% recycle and recovery rate achieved in 6 EC member States.

Response of Brazil

525. The European Communities' admission that only six of its 25 member States have achieved full recycling-recovery of their waste tyres forcefully reinforces the point made by Brazil throughout this dispute – that there is no good way to safely dispose of the existing volumes of waste tyres. If more than three-fourths of the European Communities states, with the wealth of resources and technology available to them, have not been able to achieve full recovery, how can the European Communities expect Brazil, a developing country, to achieve it? In addition, out of the six member states that have achieved full recovery, only two – Denmark and Finland – have accomplished this without a substantial reliance on incineration. These two countries, together, account for just 2.3 per cent of the European Communities' population, and presumably for 2.3 per cent of the European Communities' waste tyre arisings. Overall, nearly a third of used tyres in the European Communities continues to be incinerated.[284]

526. The European Communities also claims in paragraph 74 that "it is not true that, as today, some 20% of waste tyres are still being landfilled," and asserts that it was "the situation in 2004." However, the very report the European Communities relies on and Brazil cites (Exhibit EC-84), published in 2006, states, "*At present*, landfilling still accounts for 20%."[285]

Comments of the European Communities

527. The European Communities has already stated several times during this proceeding that its measures are not within the scope of the case before the Panel. This case is about the import ban on retreaded tyres adopted by Brazil and not about the waste tyre management policy of the European Communities or its 25 Member States.

528. In any case, as the European Communities already explained in its second written submission, neither the European Communities nor any of its 25 member States have adopted an import ban on retreaded tyres.[286] Therefore, the European Communities and its members States remain free to decide on the different management alternatives concerning waste tyres and they are under no obligation to achieve full recycling and recovery of waste tyres. Thus, to use the situation in the 25 member States, as Brazil does to prove that full recovery is not possible, does not take into account that not all the member States have declared waste tyre recovery as one of the first priorities in their waste management policies. Most of the EC member States have given preference to the correct management of those waste tyres streams for which there is a EC compulsory regulatory framework, like waste oils, batteries, sewage sludge, packaging, vehicles, and electric and electronic equipment.

[283] European Communities' closing statement, para. 4.
[284] *Id*. at Annex II.
[285] *See id*. at 6 (emphasis added).
[286] European Communities' second oral statement, para. 74.

529. Finally, the European Communities does not share Brazil's rejection of co-incineration as one of the recycling and recovery alternatives.[287] This position of Brazil contradicts the explanation given in its response to the Panel's question No. 43, where it declared that the disposal methods to be used under CONAMA Resolution 258 "are licensed by state environmental authorities according to their assessment of the best disposal alternatives available" and that "[t]he disposal methods usually approved by these authorities are: co-processing in cement kilns […]". This latter answer corresponds to the consideration of energy recovery as an "environmentally appropriate disposal of unusable tyres", which is enshrined in Article 1, sole paragraph, letter c) of the IBAMA Ruling No 8 of 15 May 2002 (Exhibit EC – 48).

Question 125. To the European Communities.
In paragraph 74 of your second oral statement, you indicate that 6 EC member States "already recycle and recover 100% of their waste tyres". Could you please clarify what you mean by "recycle and recover"?

Response of the European Communities

530. By "recover" the European Communities means "energy recovery", which is the waste disposal method where waste tyres replace a percentage (around 15% to 20%) of the ordinary fuel in some industrial installations (cement kilns, steel furnaces and paper mils are the installations to which the European Communities has referred in this case). This process is also called "co-incineration" and must be differentiated from "incineration", where waste is burnt not as a fuel but just to reduce its volume or to eliminate or reduce its content in hazardous substances. Waste being incinerated pertains normally to the categories of municipal/household or hospital and other clinical wastes.

531. "Recycle" is the term used by the European Communities in the context of paragraph 74 of its second oral statement to describe some other waste tyres management methods, notably retreading and material recycling (including civil engineering applications). "Landfilling" does not belong to this category.

Comments of Brazil

532. Because the definition and the scope of the terms "recycle" and "recover" sometimes vary, depending on the source, an analysis of specific disposal options offers a more meaningful picture of waste tyre disposal in a given country. The statistics included in Annex I and II of the Exhibit EC-84 (also introduced as Exhibit BRA-126) provide detailed data on waste tyre disposal within the EC member States. Brazil has already pointed out that according to these statistics, only two EC members – Denmark and Finland – have been able to achieve full recycling/recovery without substantial reliance on incineration.[288] At the same time, several EC members continue to landfill waste tyres and the majority continue to incinerate waste tyres. Spain, for example, recycled 42 kilotonnes of its waste tyres, incinerated 52 kilotonnes, and landfilled 144 kilotonnes. Poland recycled 10 kilotonnes, incinerated 56 kilotonnes, and landfilled 57 kilotonnes. Some member States landfilled *all* of their waste tyres. This reinforces Brazil's point that there is no good way to safely dispose of the existing volumes of tyre waste. For this very reason, Brazil prohibits imports of the shorter-lifespan retreads.

[287] Once again, in its answer to panel question No. 124, Brazil uses the term "incineration" instead of the correct one, which is "co-incineration".

[288] *See* Brazil's answer to panel question No. 124, at paragraph 88.

Question 126. To Brazil.
In response to the Panel's question 54, you had indicated that the consistency of the MERCOSUR exemptions under Article XXIV was not a relevant consideration for the purposes of assessing whether an "arbitrary or unjustifiable discrimination" exists under the chapeau of Article XX. In paragraph 107 of your second oral statement, you indicated that "Brazil's different treatment of its MERCOSUR partners is explicitly authorized under Article XXIV and, therefore, cannot be arbitrary and unjustifiable" (emphasis added). Could you please clarify whether you now consider that the measure's status under Article XXIV is a relevant or necessary consideration in the analysis of the import ban under the chapeau of Article XX?

Response of Brazil

533. There is no inconsistency between Brazil's response to Question 54 from the Panel and its position in paragraph 107 of its second oral statement. In its response to the Panel's question, Brazil's point was that a measure's compliance with the chapeau does not depend on the measure's justification under Article XXIV. The European Communities agreed. A measure that does not meet Article XXIV requirements can nevertheless meet the requirements of the chapeau if it is neither "arbitrary or unjustifiable" nor a "disguised restriction on international trade." However, when a measure does fulfil the requirements of Article XXIV, all else being equal, it is necessarily consistent with the chapeau because a measure expressly permitted under the WTO agreements cannot be "arbitrary or unjustifiable" or a "disguised restriction." This is the point that Brazil made in paragraph 107 of its second oral statement.

Comments of the European Communities

534. In response to the Panel's Question, Brazil argues that "when a measure does fulfil the requirements of Article XXIV, all else being equal, it is necessarily consistent with the chapeau because a measure expressly permitted under the WTO agreements cannot be "arbitrary or unjustifiable" or a "disguised restriction".[289]

535. This response is incorrect. As Brazil has itself recognised, Articles XX and XXIV are independent exceptions, and the fulfilment of the conditions of one does not depend on the fulfilment of the conditions of the other. Accordingly, there is no basis for assuming that a measure which is compatible with Article XXIV would for that reason also be compatible with Article XX.

536. Moreover, it is also recalled that, as the European Communities has shown[290], the MERCOSUR exemption is not justified under Article XXIV. One of the reason why the exemption is not justified is precisely that Article XXIV:8 does not require elimination of internal trade restrictions which are justified under Article XX. In other words, if the measure were justified under Article XX, it could not at the same time be justified under Article XXIV. Brazil is thus turning the logical relationship between the two provisions on its head.

537. Accordingly, Article XXIV is of no relevance to the analysis under the chapeau of Article XX. This means at the same time that if Brazil's analysis were correct, and the compliance with an international agreement were sufficient to exclude arbitrary or unjustifiable discrimination under the chapeau of Article XX, this would have to apply to all international agreements, not just to those justified under Article XXIV. As the European Communities has already remarked,[291] Brazil's interpretation would therefore result in a considerable weakening of the chapeau of Article XX.

[289] Brazil's answer to panel question No. 126, para. 90.
[290] European Communities' second oral statement, para. 127 et seq.; European Communities' second written submission, para. 216 et seq.
[291] European Communities' second written submission, para. 157.

Question 127. To both parties.
In your view, what role do the intent and the effect of a measure play in assessing whether it is applied in a manner which would constitute a disguised restriction on international trade?

Response of Brazil

538. The Appellate Body observed in *Japan – Alcoholic Beverages* that the aim of a measure may not be easily ascertained.[292] Brazil agrees with the Appellate Body and does not believe that there exists a ready formula to help determine whether a measure is applied in a manner which would constitute a disguised restriction on international trade.

539. Both the intent and the effect of a measure can play a valuable role in the analysis under the chapeau of Article XX. The Appellate Body in *US – Shrimp* held that "the chapeau of Article XX is, in fact, but one expression of the principle of good faith."[293] The examination of the measure's language – without reference to the broader context – will often be insufficient to determine whether a Member is acting in good faith. The measure's intent and effect provide that valuable context and permit a panel to gain a better understanding of what the Member seeks to achieve through the challenged measure.

540. The relative value of the intent of the measure, on the one hand, and its effect, on the other, depends on the nature of the specific measure at issue. The intent frequently provides valuable insight into the purpose behind the measure, which, in turn, allows a greater understanding of the manner in which the measure is applied. When it is abundantly clear that there is no intent to protect an industry or restrict trade to the benefit of national sectors, then there can be no doubt that the measure is applied in good faith and is not a disguised restriction. In other cases, the measure's effect may provide more valuable insight. Therefore, the specific facts of the case should determine factors that are most relevant to the "disguised restriction" analysis under the chapeau.

541. In the present case, the intent of the measure proves especially valuable to understanding why Brazil exempts MERCOSUR countries from the import ban. The instrument that presently contains the import ban – Portaria SECEX 14/2004 – does not explain the reasons behind the MERCOSUR exemption. However, the initial regulations that implemented the exemption – Portaria SECEX 2/2002 and Presidential Decree No. 4.592/2003 – clear that the exemption was introduced to comply with the ruling by the MERCOSUR Ad Hoc Tribunal.

Response of the European Communities

542. Both elements, intent and effect, should be taken into account to assess whether a measure is applied in a manner which would constitute a disguised restriction on international trade. As the Appellate Body explained in *US – Shrimp*, the "chapeau" of Article XX is an expression of the principle of good faith in international law.[294] This requires that all aspects of the relevant measure have to be considered in order to prevent the abuse of the exceptions of Article XX. Thus, the conclusion that a measure is applied in a manner which constitutes a disguised restriction on international trade can be drawn because of a measure's intent, and it can also be drawn from the effects of the way in which a measure is applied. In the present dispute, the European Communities has submitted that both are the case.

[292] *See* Appellate Body Report on *Japan – Alcoholic Beverages*, at 30.
[293] See Appellate Body Report on *US – Shrimp*, at para. 158.
[294] Appellate Body Report on *US – Shrimp*, para. 158.

Comments of the European Communities

543. The European Communities does not agree with Brazil on the special value that it gives to the intent of the measure, which is driven by Brazil's peculiar understanding of the case.

544. As the European Communities will explain again in its comments to Brazil's answer to Question No. 129 from the Panel, the import ban has the intent to protect the Brazilian tyre industry through a measure that eliminates exports of retreaded tyres from the European Communities and other WTO members to Brazil. The fact that Brazil is constantly trying to dress up the protective measure as an initiative to protect life and health only confirms that the restriction is disguised.

545. In the same way, the intent of the MERCOSUR exemption from the import ban cannot make the exemption compatible with the chapeau of Article XX. A correct application of the good faith principle in this case would have implied that, following the MERCOSUR award, Brazil would have lifted the import ban on retreaded tyres for all WTO Members.

Question 128. To the European Communities.
The European Communities referred, in its second oral statement (para. 102), to the "distortion of international trade" in the context of assessing the existence of a disguised restriction to international trade under the chapeau of Article XX. Could you please clarify this notion and how it relates to the notion of "disguised restriction on international trade"?

Response of the European Communities

546. As explained to the Panel at the second meeting, the European Communities used the term "distortion" only to avoid repetition of the word "restriction". To avoid confusion, the GATT term "restriction" has been used in the final version of the European Communities second oral statement.

547. Among other things, the European Communities has identified a "disguised restriction on international trade" in the fact that the effect of Brazil's measures is the replacement of imported retreads from the European Communities with retreads made in Brazil (predominantly with imported casings) or imported from Uruguay (where they are predominantly made with imported casings), as well as with new tyres (most of which are made in Brazil).[295]

Question 129. To Brazil.
In paragraph 110 of your second oral statement, you submit that "[a statement by a trade official on the major objective of Brazil's 1991 broader ban on all used goods] was not about the 2000 import ban on used and retreaded tyres and contained no mention of retreaded tyres." Please elaborate on your argument in light of your answer to panel question 29 that "Brazil has banned imports of <u>used and retreaded tyres</u> since Portaria DECEX No. 8 of 10 May 1991. ... To safeguard the integrity of the prohibition, Brazil adopted Portaria SECEX 8/2000, which explicitly prohibited imports of retreaded and used tyres, whether imported as part -worn tyres or raw material for retreading.

Response of Brazil

548. Brazil has, in fact, banned imports of used and retreaded tyres since 1991. This original ban was effected through a measure that applied to all used goods and did not single out used and retreaded tyres, or any other type of good (Portaria DECEX 8/1991). The European Communities argues that the statement "clearly" demonstrated that Brazil banned used and retreaded tyre imports to protect national industries.[296] This could not be further from the truth. In its SOS, Brazil called the

[295] European Communities' second written submission, para. 172 et seq.; European Communities' second oral statement, para. 100 et seq.

[296] *See* European Communities' second written submission, at para. 178.

attention of the panel to the fact that the statement presented by the European Communities dealt exclusively with the 1991 ban on *all* used goods and made no specific mention of used or retreaded tyres.

549. Regardless of any statement that may have been made by a trade official before the Brazilian National Congress, and wrongly used by the European Communities in these proceedings, what is relevant in this case is that Brazil clearly demonstrated that there is a legitimate environmental and health rationale behind the import ban. As the International Court of Justice affirmed in *Namibia (Legal Consequences)*, in a statement cited by the Appellate Body in *US – Shrimp*, at paragraph 130, ftn. 109: "[a legal] instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation." Today, there can be no question that the purpose behind the import ban is to protect public health and the environment from harms caused by waste tyre accumulation and disposal.

Comments of the European Communities

550. Brazil's explanation that the statement presented by the European Communities in paragraph 178 of its SWS dealt exclusively with the 1991 ban on all used goods and made no specific mention of used or retreaded tyres is immaterial. In making that general reference to used goods the official of the Ministry of Development, Industry and Foreign Trade was also covering and referring to retreaded tyres, whose importation, as Brazil has acknowledged, was banned in 1991 because they were considered by Brazil as used goods. Indeed, Brazil has always insisted that the 2000 import ban on used and retreaded tyres merely served to clarify the prohibition already contained in the 1991 ban.[297]

551. Moreover, the European Communities has already explained that the Advocate-General of the Union also declared that "[…] SECEX Portaria 8/2000 prohibits the importation of 'retreaded' tyres not for the defence of public health and the environment, but to protect national trade and industry".[298] It is worth noting that, to this date, Brazil has not once even commented on this and other statements by its own Advocacia-Geral. Other statements and documents, which are referred to in paragraph 10 of the European Communities SOS, also make clear that the real aim of the import ban on retreaded tyres is not the protection of life and health but the protection of Brazil's domestic industry.

552. Finally, as the European Communities has manifested in several occasions, this protectionist objective can be detected not only through the statements of different officials but also in the structure of the Brazilian legislation.[299]

553. Against that background, the European Communities cannot share Brazil optimistic statement that "[t]oday there can be no question that the purpose behind the import ban is to protect public health and the environment from harms caused by waste tyre accumulation and disposal".[300] What the European Communities can understand is Brazil's desire, for reasons of litigation tactics, to present the facts as though this were the case. The historic facts, however, clearly show that the opposite is true.

[297] Brazil's first written submission, paras. 65 and 77.

[298] European Communities' first written submission, para. 164, and European Communities' second written submission, para. 178. The document were this declaration is made is Exhibit EC-52, para. 51.

[299] See European Communities' first written submission, para. 162, and European Communities' second oral statement, paras. 11 and 12.

[300] Brazil's answer to panel question No. 129, para. 96, *in fine*.

D. STATE MEASURES

Question 130. To Brazil.
Law No. 12.114 and Law No. 12.381 of Rio Grande do Sul use the term "carcass". Please clarify the meaning of "carcass" as used in these laws. For example, Article 1, Sole paragraph II of Law No. 12.114 refers to "the carcass of a used tyre recycled by retread, remoulding or recapping processes abroad and imported in that condition". (underline added) What is the scope of the product encompassed by this provision, retreaded tyres or used tyre carcasses in the sense of "the structural part of a used tyre" as defined by Brazil in its response to the Panel's question 1?

Response of Brazil

554. The word carcass refers to the structural part of a used tyre. This is the sense of Article 1, paragraphs I, II and III of Law 12.114. Nevertheless, paragraph II refers to carcass of a used tyre that has been 'recycled' by means of remoulding, retreading or recapping. The carcass of a used tyre that has been remoulded, retreaded or recapped is a retreaded tyre.

E. EXEMPTIONS

Question 131. To both parties.
Brazil submits in its second submission that the exemption is a separate measure because it was introduced at a later time than the import ban due to an arbitral award issued by an international tribunal and is justified under different GATT provisions than the import ban. The European Communities, for its part, makes separate claims in respect of the import ban and the exemption. In light of these elements, could you please clarify what is the relevance, if any, of the fact that the import ban and the exemption are contained in the same legal instrument (i.e. Article 40 of Portaria 14)? In answering this question, please address the impact this factors should have, in your view, on:

(a) the Panel's assessment of the justification of the import ban under Article XX;
(b) the Panel's examination of the European Communities' separate claim in relation to the exemption.

Response of Brazil

555. The import ban and the MERCOSUR exemption are distinct legal instruments that should be analyzed separately. As Brazil has explained, the import ban is properly examined under Article XX(b), while the MERCOSUR exemption is examined under Articles XXIV and XX(d). The fact that a finding against the exemption under Article XXIV does not affect the analysis of the import ban under Article XX, as Brazil explained in its response to Question 54, by itself demonstrates that the two are separate instruments.

556. While the import ban and the limited MERCOSUR exemption are presently contained in the same measure – Portaria 14/2004 – functionally, they are separate legal instruments, adopted at different times and for different reasons. The ban in its current form was enacted in 2000. The exemption was implemented two years later through two new measures – Portaria SECEX 2/2002 and Presidential Decree No. 4.592/2003. However, even if the two were adopted through the same measure, it would be formalistic to focus on that irrelevant fact to access the consistency of these two distinct legal instruments. Portaria SECEX 14/2004 – the current measure that contains both the import ban and the exemption – merely consolidated the thenexisting import regulations, as Brazil explained in paragraph 77 of its first written submission.

557. The European Communities agrees that the MERCOSUR exemption is a distinct legal instrument that requires an independent analysis. In its panel request, the European Communities

challenged separately "Brazil's exemption of retreaded tyres imported from other MERCOSUR countries from the import ban by means of Portaria No. 14 of 17 November 2004... and from the above-mentioned financial penalties by virtue of Presidential Decree No. 4592 of 11 February 2003, in response to the ruling of a MERCOSUR panel established at the request of Uruguay."[301] The fact that the European Communities lists the MERCOSUR exemption separately is an implicit admission by the European Communities that it is relevant that the exemption is a separate legal instrument and that it should be analyzed separately under different provisions. Finally, the European Communities has also treated the exemption as a distinct legal instrument in both its first and second written submissions, arguing that neither Article XXIV nor Article XX(d) justified the exemption.

Response of the European Communities

558. As the European Communities has explained in Reply to the Panel's Question No. 118, the MERCOSUR exemption is a relevant fact for the Panel's assessment under Article XX(b), both in terms of the necessity of the measure and in terms of the measure's compliance with the chapeau. The European Communities does not consider that the fact that the import ban and the exemption are now contained in the same measure, namely Article 40 of Portaria No. 14, is of any relevance to the Panel's analysis in the present context.[302]

559. Similarly, the European Communities does not consider the fact that the ban and the exemption are contained in the same instrument to be relevant for the Panel's examination of the European Communities' separate claim in relation to the exemption. The same measure, or aspects thereof, may violate several obligations of the covered agreements. In the present case, Article 40 of Portaria No. 14 violates, on the one hand, Article XI:1, and, on the other, Articles XIII:1 and I:1, and the European Communities has challenged each of these violations with a separate claim, as is normal litigation practice. The European Communities does not see what further relevance should be attached to whether the ban and the exemption are contained in the same measure, or, as used to be the case before the entry into force of Portaria Secex No. 17 of 1 December 2003,[303] in two separate measures.

Comments of the European Communities

560. In its reply to the Panel's Question, Brazil appears to suggest that the MERCOSUR exemption should be examined under Articles XXIV and XX(d). While the European Communities agrees that the MERCOSUR exemption is the subject of separate claims under Articles XIII:1 and I:1, the European Communities would like to emphasise that this does not mean that the MERCOSUR exemption should not also be taken into account in the Panel's analysis under Article XX. In this respect, the European Communities can refer to its reply to the Panel's Question No. 118, as well as to its comments on Brazil's reply to the same question.

[301] *See Brazil – Measures Affecting Imports of Retreaded Tyres*, Request for the Establishment of a Panel by the European Communities, WT/DS332/4, 18 November 2005, at 1-2.

[302] As regards Brazil's argument that Portaria 40 was not "applied" in a discriminatory fashion because it itself contained the discrimination, the EC refers to its SWS, para. 153 et seq.

[303] Cf. European Communities' first written submission, para. 73.

Question 132. To Brazil.
Please comment on the European Communities' arguments in relation to the compliance of MERCOSUR with the conditions of Articles XXIV:5 and 8. In addressing this question, please address specifically:

(a) the comments in paragraph 136 of the European Communities' oral statement concerning the coverage of "substantially all" the intra-MERCOSUR trade; and

(b) the comments in paragraph 139 of the European Communities' oral statement on the adoption of non-tariff measures affecting extra-MERCOSUR imports and exports.

Response of Brazil

561. Brazil demonstrated in paragraphs 166 of its FWS and 169-175 of its second written submission that MERCOSUR meets the requirements of Article XXIV:5 and 8. As Brazil explained in its second written submission, the Committee on Regional Trade Agreements (CRTA) has completed its factual inquiry on MERCOSUR.[304] During the April 2006 meeting of the CRTA, the Committee Chairman noted that the Committee "seemed to have exhausted its factual inquiry," that the Secretariat would begin drafting the report on the examination of MERCOSUR, and that the examination would soon be concluded.[305] In meetings of the CRTA, the European Communities has asked Brazil about how certain aspects of the customs union operate, but has not made any substantive objections.

562. In the context of this dispute, however, the European Communities argues that sugar and automotive sectors have not been fully liberalized. Nevertheless, as Argentina, acting as MERCOSUR's president pro tempore, pointed out at the April meeting, sugar's share of the intra-MERCOSUR trade is minimal – 0.001 per cent of the total. Argentina also explained that MERCOSUR members are in the process of liberalizing the intra-MERCOSUR trade in the automotive sector under the MERCOSUR Automobile Policy.[306] The bilateral agreements between MERCOSUR members have already led, in practice, to duty-free trade in almost one hundred per cent of the commerce in the auto sector.

563. With respect to measures that affect extra-MERCOSUR imports and exports, Argentina, in its role as MERCOSUR's president pro tempore, submitted evidence to the CRTA indicating that MERCOSUR applies common external tariff to products in over 90 per cent of the tariff lines and has a specific timetable in place to cover the remaining categories of products by 2008.[307] It can hardly be disputed that harmonizing external tariffs and regulations affecting more than 90 per cent of tariff lines amounts to application of "substantially the same duties and other regulations" under Article XXIV:8. Brazil also notes that extra-regional trade has increased by 239 per cent since the founding of MERCOSUR.[308]

564. The European Communities also argues that MERCOSUR parties maintain "non-tariff barriers." The "non-tariff barrier" presented by the European Communities is the import ban on retreaded tyres, which is the subject to this dispute. We note again that the ban was initially applied erga omnes, that it was not imposed on non-members as one step in the formation of MERCOSUR, and that it is justified by Article XX(b).

[304] *See* Brazil's second written submission, at paras. 174-175.
[305] See WT/COMTD/1/Add.16, at para. 14 (Exhibit BRA-170).
[306] See WT/COMTD/1/Add.17, at 2 (Exhibit EC-121). See also Exhibit BRA-171 and Exhibit BRA-172.
[307] See WT/COMTD/1/Add.17, at 2 (Exhibit EC-121).
[308] See WT/COMTD/1/Add.16 (Exhibit BRA-170).

565. Brazil is puzzled why the European Communities is making these arguments now before this Panel rather than before the CRTA – the very body tasked with reviewing the customs union, and also the body that has meticulously examined countless documents in the course of its inquiry into MERCOSUR and developed an in-depth understanding of the relevant issues. At the time of the April 2006 meeting, the Chairman of the CRTA gave WTO Members until 28 April 2006 to submit any additional questions concerning the examination of MERCOSUR. This gave the European Communities and other WTO Members yet another opportunity to request more information or challenge MERCOSUR's consistency with Article XXIV. However, the European Communities has only asked MERCOSUR parties to clarify operation of certain aspects of the customs union, and has not substantively objected to the custom union's consistency with Article XXIV. Not only has the European Communities not challenged MERCOSUR's consistency before the CRTA, it began negotiations of a bi-regional free trade agreement with MERCOSUR. It is not clear how the European Communities expects to conclude a bi-regional free trade agreement with what it now claims not to be a properly-constituted customs union. The fact of the matter is that the European Communities' actions in Brussels and before the CRTA belie the arguments of the European Communities' litigation team in the context of this dispute.

566. In its Second Written Submission[309], Brazil respectfully pointed the Panel to documents submitted by the MERCOSUR parties to the CRTA, which provide additional details on the MERCOSUR integration. The Panel can rely on the information contained in these documents, just as the panel in *US – Line Pipe* relied on the information submitted by the parties to the North American Free Trade Agreement (NAFTA) to conclude that the United States had established a prima facie case that NAFTA is in conformity with Article XXIV:5(b) and (c), and with Article XXIV:8(b).[310] The panel in *US – Line Pipe* also noted that the fact that the CRTA had not yet issued a final decision that NAFTA is in compliance with Article XXIV:8 was not sufficient to rebut the prima facie case established by the United States.[311]

567. Brazil has met its burden and adduced sufficient evidence to establish a prima facie case that MERCOSUR meets the requirements contained in Articles XXIV:5(a) and 8(b). The European Communities has not rebutted the presumption of conformity that Brazil has established.[312]

Comments of the European Communities

568. In its reply to the Panel's Question, Brazil first notes that the Chairman of the CRTA concluded, during the April meeting of the Committee, that the Committee "seemed to have exhausted its factual inquiry" of MERCOSUR, and that the Secretariat would now begin drafting the report on the examination.[313] With these remarks, Brazils appears to want to suggest that this examination has resulted in a finding of compatibility of MERCOSUR with Article XXIV, which the Panel should not further question.

569. This suggestion is far removed from reality. First of all, the CRTA merely conducted a factual analysis of MERCOSUR, not a "substantive", legal analysis. Second, the CRTA did not reach any conclusions as regards the compatibility of MERCOSUR with Article XXIV, and is not likely to reach any such conclusions in the near future. As all WTO Members know, the CRTA's contrary suggestion notwithstanding, the Secretariat does not draft any reports on the examination of regional

[309] See Brazil's second written submission, at para. 173.
[310] Panel Report on *US – Line Pipe*, at paras. 7.142-144.
[311] Panel Report on *US – Line Pipe*, at paras. 7.144.
[312] See Appellate Body Report on *US – Wool Shirts and Blouses*, at 13; more recently, Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, at para. 66.
[313] Brazil's answer to panel question No. 132, para. 101.

trade agreements, whose factual examination is concluded.[314] Therefore, the factual examination of MERCOSUR in the CRTA is of no relevance for the assessment of the fulfilment of the conditions of Article XXIV by the Panel in the present dispute.

570. Brazil also claims that the European Communities, in the meetings of the CRTA, did not make any "substantive objections" against MERCOSUR.[315] With this remark, Brazil appears to want to suggest that the European Communities has conceded in the CRTA that MERCOSUR is compatible with Article XXIV. This allegation is entirely unsubstantiated. Throughout the many years that MERCOSUR was discussed in the CRTA, the European Communities and other WTO Members raised numerous factual questions that were related to the compatibility of MERCOSUR with Article XXIV. At no point did the European Communities recognise that MERCOSUR was compatible with Article XXIV. The fact that the European Communities and other WTO Members, after more than 10 years of inconclusive discussions in the CRTA, allowed the factual examination of MERCOSUR to end does not mean that the European Communities and other WTO Members accepted the compliance of MERCOSUR with Article XXIV. Accordingly, the attempt of Brazil to prevent an assessment of MERCOSUR by the present Panel with reference to the discussions in the CRTA must fail.

571. Brazil has also repeated its earlier argument that by negotiating a bi-regional free trade agreement with MERCOSUR, the European Communities has recognised that MERCOSUR is in compliance with Article XXIV.[316] The European Communities has already shown that this argument is unfounded.[317] The European Communities would add that in the context of the negotiations, which are not yet completed, the European Communities has encouraged MERCOSUR to further accelerate and develop its internal integration, for instance through the completion of its customs union. Accordingly, the European Communities does not see in which way the bi-regional negotiations have a bearing on the question whether MERCOSUR is in compliance with Article XXIV or not.

572. In its reply, Brazil has also suggested that "the EC's actions in Brussels and before the CRTA belie the arguments of the EC's litigation team in the context of the present dispute".[318] The European Communities considers that this remark is entirely inappropriate. Apart from the fact that there is no contradiction between European Communities policy and the European Communities' submissions in the present dispute, it should be recalled that the European Commission, which is the European Communities institution responsible for representing the European Communities in the WTO, has decided to bring the present case against Brazil.[319] The European Commission has equally decided to appoint the agents which are representing it in the present case. It is therefore inadmissible for Brazil to suggest that the submissions of the European Communities before the Panel might not reflect the position of the European Communities.

573. As regards specifically the requirement that MERCOSUR must liberalise "substantially all" intra-MERCOSUR trade, Brazil has responded that MERCOSUR Members "are in the process of liberalizing the intra-MERCOSUR trade in the automotive sector", and has claimed that bilateral

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[314] The last annual report of the CRTA confirms this: it says that for "49 RTAs the factual examination has concluded (see Attachment 2); no progress was made, however, on the completion of the corresponding examination reports" (WT/REG/15, of 3 November 2005, para. 5).

[315] Brazil's answer to panel question No. 132, para. 101.

[316] Brazil's answer to panel question No. 132, para. 105.

[317] European Communities' second written submission, para. 219.

[318] Brazil's answer to panel question No. 132, para. 106.

[319] Cf. European Communities' first written submission, para. 7 and Exhibit EC-3. It is equally noted that the TBR Report (Exhibit EC-2), on which the Commission's decision was based, stated on p. 30 that "it would be for Brazil to demonstrate that MERCOSUR is in compliance with paragraphs 5 and 8 of Article XXIV".

agreements between MERCOSUR Members have led to duty-free trade in almost 100% per cent of the commerce in the auto sector.[320]

574. In this regard, the European Communities first notes that it is not clear why MERCOSUR countries, more than 10 years after the formation of MERCOSUR, are still "in the process of liberalising trade in the automotive sectors". As the European Communities has explained, and Brazil has not contested, MERCOSUR can no longer claim to be entitled to a transition period leading to the formation of a customs union.[321] Accordingly, the process of liberalisation should already have been concluded.

575. As regards the bilateral agreements to which Brazil refers, the European Communities notes that Brazil has not provided copies of these agreements, nor explained how and to which extent they liberalise trade. In fact, it does not appear that the agreements in question have the affect of fully liberalising trade. As an example, the European Communities submits the recent automobile agreement between Argentina and Brazil, which was signed in June 2006 (Exhibit EC-128). Since 1 July 2006, Brazil and Argentina are allowed to export duty-free up to USD 2.1 per dollar imported, a value which will be further decreased to USD 1.95 per dollar imported form 1 July 2007 to 30 June 2008.[322] Trade exceeding these values will be subject to the existing preferential tariffs: 70 % of the common external tariff (CET) for automobiles and 75 % of the CET for auto parts.[323] In other words, the agreement establishes a form of managed trade in automobiles and imposes quantitative limitations on duty-free trade, which cannot be regarded as a full liberalisation of trade in this sector.

576. As regards the other sector not currently liberalised, namely sugar, Brazil argues that sugar's share in intra-MERCOSUR trade is minimal.[324] However, this very fact is due to, and in fact illustrates, the absence of full liberalisation in MERCOSUR. It should not be forgotten that Brazil is a major and very competitive producer of sugar. However, it currently does not export significant amounts to its MERCOSUR countries due to high tariff rates. It appears likely that if trade in sugar were liberalised within MERCOSUR, the share of sugar in intra-MERCOSUR trade would be far higher than what it is today.

577. As regards the requirement in Article XXIV:8 (a) (ii) to apply substantially the same duties and other regulations of commerce to trade with other countries, Brazil argues that the application of the same duties to 90% of the tariff lines is sufficient for complying with this requirement.[325] In addition to the fact that Brazil has not supported its 90 % allegation in any fashion, the European Communities does not see on what precedent such a 90-per cent rule would be based. In this context, it is recalled that the Appellate Body in *Turkey – Textiles* held that the flexibility in Article XXIV:8 (a) (ii) was limited, and that this provision requires "something closely approximating 'sameness'".[326]

578. Moreover, it is also recalled that Article XXIV:8 (a) (ii) requires application of the "same regulations of commerce". The Appellate Body has clarified that "comparable trade regulations having similar effects" do not meet this standard, but that a higher degree of 'sameness' is required.[327] In the present case, Brazil has not even alleged, let alone demonstrated, that MERCOSUR countries

[320] Brazil's answer to panel question No. 132, para. 102.
[321] European Communities' second oral statement, para. 138.
[322] Cf. Article 12 of the Agreement (Exhibit EC-128).
[323] Cf. Article 14 of the Agreement (Exhibit EC-128).
[324] Brazil's answer to panel question No. 132, para. 102.
[325] Brazil's answer to panel question No. 132, para. 103.
[326] Appellate Body Report on *Turkey – Textiles*, para. 50.
[327] Appellate Body Report on *Turkey – Textiles*, para. 50.

apply the same regulations of commerce to trade with third countries, as clearly illustrated clearly by the import ban on retreaded tyres at issue in the present dispute.[328]

579. Also, Brazil has not provided any response whatsoever to the European Communities' arguments on the "not on the whole higher" requirement in Article XXIV:5(a) in relation to other regulations of commerce (for both exports and imports). The European Communities is also not aware of any response to its argument regarding the internal liberalisation in relation to export duties and other restrictive regulations of commerce (on exports and imports). [329]

580. Finally, Brazil has also again referred vaguely to its submissions to the CRTA, and has asked to the Panel adopt the same approach as the Panel in *US – Line Pipe* and conclude that Brazil has made a prima facie case that MERCOSUR is compatible with Article XXIV.[330] As the European Communities has already explained[331], this blanket reference to unspecified documents submitted to the CRTA is not a sufficient way of discharging Brazil's burden of proof. Moreover, the situation in the current dispute is not comparable to *US – Line Pipe*. In *US – Line Pipe*, Korea had argued that NAFTA could not be considered as compatible with Article XXIV because the CRTA had not yet issued a final decision to this effect.[332] In contrast, Korea had not contested that NAFTA was compatible with Article XXIV. This contrasts strongly with the present case, where the European Communities has repeatedly insisted that Brazil has not demonstrated compliance with the requirements of Article XXIV, and in addition has identified a number of specific open questions regarding the compatibility of MERCOSUR with Article XXIV.

581. The European Communities would also like to recall that the Appellate Body has clarified that, when examining a measure to be justified under Article XXIV, a Panel is expected to require the party invoking Article XXIV to establish that all of the conditions of this provision are fulfilled.[333] The Panel should therefore reject Brazil's attempts to escape its burden of proof, and find that Brazil has not demonstrated that the MERCOSUR exemption is compatible with Article XXIV.

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[328] In Brazil's answer to panel question No. 132, para. 103, Brazil notes that the import ban was initially applied "erga omnes". However, apart form the fact that this is no longer the case, this is entirely irrelevant for the purposes of Article XXIV:8 (a) (ii) GATT. What matters is that at least two Members of MERCOSUR, namely Uruguay and Paraguay, are not applying a similar ban to trade with third countries.

[329] Cf. European Communities' second oral statement, para. 139; European Communities' second written submission, para. 221.

[330] Brazil's answer to panel question No. 132, para. 106.

[331] European Communities' second oral statement, para. 132.

[332] Panel Report on *US – Line Pipe*, para. 7.143.

[333] Appellate Body Report on *Turkey – Textiles*, para. 59.

ANNEX 2
RESPONSES OF BRAZIL TO QUESTIONS FROM THE EUROPEAN COMMUNITIES FOLLOWING THE FIRST SUBSTANTIVE MEETING

Question 1.

In paragraph 9 of its first oral statement, Brazil explains the rationale of its import ban as follows: "However, retreaded tyres are products that will become waste sooner than new tyres because they have a shorter remaining lifespan". Does Brazil consider that the same rationale could also justify import bans or marketing restrictions against other types of new products which produce waste which is difficult to dispose of, if it can be demonstrated that they have a shorter lifespan than other new goods for which they are substitutable (e.g. low-quality electronic consumer goods which have a shorter lifespan than comparable high-quality goods)?

1. Tyre waste differs from other waste streams in several important aspects. *See* Brazil's first oral statement, at paras. 80-82. These unique characteristics of tyre waste are what makes the import ban necessary in this specific factual situation. While Brazil cannot hypothesize on whether import bans on other products would conform to the WTO requirements, it notes that, unlike most products, retreads have a measurable and predictable difference in their remaining lifespan.

Question 2.

Does Brazil submit that all new tyres can be retreaded? Does Brazil agree that there are certain types of new tyres which are typically not suitable for retreading after use? If yes, has Brazil taken measures to restrict the importation and/or marketing of such tyres?

2. Information available indicates that between 10 and 30 per cent of new tyres are retreadable after the first use in countries such as the United Kingdom, France, the United States, Australia and Brazil. *See* Brazil's first written submission, para. 79 and ftn. 125. Whether a tyre is retreadable after its first use depends on the condition of that use. Because it is impossible to predict whether a new tyre will be retreadable at the end of its first lifecycle, restricting importation of the potentially non-retreadable new tyres would require an import ban on *all* new tyres. This would be unduly restrictive. Retreaded tyres, on the other hand, require no conjecture or speculation about the potential retreadability: passenger car retreads will not be suitable for further retreading, and commercial vehicle retreads will have fewer remaining lifecycles. For this reason, Brazil places no restrictions on imports of new tyres, but prohibits imports of retreaded tyres.

Question 3.

What is the average market price in Brazil of a <u>retreadable</u> casing for a) a passenger car tyre; b) a truck tyre?

3. Brazil does not collect average market prices for retreadable or non-retreadable passenger car and truck casings.

Question 4.

What has been the market share of retreaded tyres in the market for passenger car replacement tyres in Brazil over the last ten years?

4. There are no official statistics on the market share of retreaded tyres in the market for passenger car replacement tyres in Brazil over the last ten years.

Question 5.

It appears that Brazilian government has recently withdrawn a bill (6.136/05) which would have codified the import ban on used and retreaded tyres in an act of the Brazilian parliament. Can Brazil explain the reasons for this withdrawal?

5. The Presidency of the Republic submitted to the National Congress a bill on the environmental management of tyres (see Exhibit EC-30) under a special legislative procedure denominated "constitutional urgency" (Brazil's Constitution, Art. 64, para. 1). The referred bill would consolidate in a norm of superior hierarchy the disciplines on waste tyre management in Brazil, which are currently dispersed in rules of low hierarchy (*portarias*, resolutions and decrees).

6. The Brazilian importers of used tyres, however, managed to convince some congressmen to request the annexation of the referred bill to another draft law on management of solid wastes, which is under debate in the Parliament since 1991. Because such procedural manoeuvre would create unexpected obstacles to the approval of the cited bill, the Government decided to withdraw its proposal. The Executive is now evaluating the appropriate legal instrument to resubmit the draft law to the National Congress.

Question 6.

Recently, the Social Affairs Committee of the Brazilian Senate approved a bill (216/03) which would authorise the importation of both used and retreaded tyres into Brazil. Similarly, the Special Commission on National Waste Policy has approved a bill (203/1991) which equally implies that the importation of used and retreaded tyres is permissible, subject to the fulfilment of certain disposal obligations. How do these legislative developments relate to Brazil's statements that

(a) the import ban on retreaded tyres is an essential element of its waste management policy (e.g. Brazil's FWS, para. 18)?

(b) that the ban on used tyres is an essential element of Brazil's waste tyre management program, which will be enforced without exception in the future (Brazil's FWS, para. 154)?

7. The "legislative developments" referred to have not changed Brazilian law and do not relate to Brazil's statements concerning the ban and its enforcement.

Question 7.

In paragraph 79, Brazil claims that its retreaders "process about 18 million used tyres, equivalent to a substantial part of the tyres consumed in Brazil each year". Can Brazil, with adequate proof, provide the following information:

a) that 18 million is the total number of retreaded tyres produced at present in Brazil per year?

b) how many of these used tyres are imported, how many are domestic? how many of these tyres are passenger car tyres, how many are commercial vehicle or aircraft tyres?

8. The information available to Brazil is present in Exhibit BRA-94. *See also* Brazil's Response to Panel's Questions 16 and 20.

Question 8.

In para. 82 of its FWS, Brazil states that the National Code of Traffic has "increased the frequency of tyre replacement". Could Brazil explain, with adequate evidence, what is the average frequency, in kilometers, of tyre replacement in Brazil for passenger vehicles, how this has evolved over the past and how these developments are related to the National Code of Traffic?

9. According to the Brazilian Code of Traffic (Law No. 9503 of 23 September 1997), the owner of a vehicle in Brazil must obtain an approval at the safety inspection, to be carried out by the competent state authorities, in order to obtain the mandatory annual licensing certificate (Article 130). Bill No. 5979/2001, currently before the National Congress, establishes general rules to be applied by the States in such activities and provides for mandatory biannual inspections for vehicles used in the transport of students and annual inspections for the others. ABNT (The Brazilian Association on Technical Rules) has already approved rules to be applied at the technical automotive inspection, among which is the NBR 14.040-1998 (Vehicular Safety Inspection – Light and Heavy Vehicles).

10. Although the general rules to be complied with by the States in the annual inspections are still under examination by the National Congress, the State of Rio de Janeiro – with a fleet of around 3.2 million vehicles – anticipated the implementation of the regular inspections foreseen by the Code of Traffic. Because these automotive inspections are an important instrument to increase the number of retreadable casings in the country, the step taken by one of the most populated States of the Federation has certainly contributed to an increased frequency of tyre replacement in the country. The same is expected to happen all over the country as soon as the National Congress approves the general rules necessary to implement annual automotive inspections in all States.

11. Moreover, the adoption of the Code of Traffic in 1997 permitted the approval by Brazil of a MERCOSUR regulation (GMC Resolution 75/1997) that aims to harmonize the regimes of automotive inspections for heavy vehicles in the international transport of cargo and passengers. This MERCOSUR regulation was introduced in the Brazilian legal system by means of Deliberation CONTRAN nº 35, of 4 June 2002. The strict compliance with the MERCOSUR and Brazilian regulations relating to inspections on heavy vehicles has also contributed to the increased frequency of tyre replacement in the country.

12. Brazil does not maintain the requested information on a kilometre by kilometre basis, nor is Brazil aware of any government that does so.

Question 9.

In para. 82 of its FWS, Brazil refers to a Bill before congress (No. 5.979/2001) which will replace state-specific vehicle safety requirements with national standards.

(a) Can Brazil provide copy of this Bill?
(b) How will this bill improve the suitability of domestic used tyres for retreading?
(c) Why has this bill, which dates from 2001, not yet been adopted?
(d) Can Brazil explain what standards are currently applicable to vehicle inspections as regards tyres?

13. Brazil will provide a copy of the bill.

14. According to the Brazilian Code of Traffic (Law No. 9503 of 23 September 1997), the jurisdiction to verify and inspect vehicles regarding their safety conditions (including tyres) remains with the state's traffic authorities. Bill 5.979 sets the general rules needed to implement the annual technical automotive inspection in all Brazilian States. In Brazil's view, the annual technical

automotive inspection, when fully implemented, will increase the number of retreadable casings in the national territory because owners will need to replace tyres more frequently than they do now and keep them in a better condition.

15. The Bill has not been approved until now because congressmen have not yet agreed on some important aspects of the proposal as, for example, the level of gradualism that must be observed in the implementation of the mandatory annual inspections.

16. Because the general rules to be applied by the Brazilian States are still under consideration of the National Congress, the States are applying their own technical guidelines in mandatory inspections, which occur when a vehicle is first licensed or when the ownership of a vehicle changes.

Question 10.

In its first written submission and first oral statement Brazil qualifies waste tyres as dangerous waste (see, for example, paragraphs 20 of the first written submission and 6 of the first oral statement) or as hazardous waste (paragraph 44 of the first written submission: "burning tyres and other hazardous wastes"). Could Brazil explain how this qualification matches with the classification of waste tyres as "inert waste" and not as "hazardous waste" in Article 4 in relation to Article 1 of CONAMA Resolution No 23 of 12 December 1996 (Exhibit EC-33) and with the fact that waste tyres destined to recovery, recycling and reclamation are not considered as hazardous waste in Annex IX, number B3140, to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal?

17. Waste tyres are not "hazardous waste" within the meaning of the Basel Convention or Brazil's internal regulations, such as CONAMA 23/1996. Rather, waste tyres are a dangerous waste. Brazil uses the term "dangerous" in reference to the dangerous effects of waste tyre accumulation and disposal, such as those described in the *Tyres in the Environment* report by the British Environment Agency (Exhibit BRA-1).

Question 11.

In paragraphs 24 and 26 of its first written submission, Brazil gives data on the reported cases in Brazil due to dengue until 2002 and declares that dengue cases increased in Brazil in the late 90's.

(a) Can Brazil provide more recent data (i.e..: from 2003 onward) concerning the number of reported cases in Brazil due to dengue, and

(b) Can Brazil explain why the increased imports of retreaded tyres in 1998 had an incidence in the higher number of dengue cases in the same year, as Brazil states in the last sentence of paragraph 26 of its first written submission?

(c) Can Brazil explain the relationship between dengue occurrence and the importation of retreaded tyres in light of the results of the programme Paraná rodando limpo?

18. a)

1992	1993	1994	1995	1996	1997	1998
1,658	7,388	56,584	137,317	187,762	249,239	528,388

1999	2000	2001	2002	2003	2004	2005
209,668	239,870	428,117	794,000	346,118	107,168	214,171

19. b) Paragraph 26 reads:

> "During the 1990s, the disease's rapid proliferation in Brazil seemed to coincide with increased used and retreaded tyre imports. In 1992, Brazil imported 5,862 tonnes of used and retreaded tyres and had 1,658 reported cases of dengue. As the imports increased six-fold by 1998, the dengue incidence skyrocketed to 528,388 cases".

20. The paragraph does not suggest that retreaded tyre imports during 1998 produced an increase in the dengue cases in the *same* year. Rather, the paragraph describes a trend of the growing dengue numbers that followed increased imports of used and retreaded tyres throughout the 1990s.

21. c) The programme *Paraná Rodando Limpo* is a private-sector program that complements Brazil's comprehensive effort to stamp out dengue by reducing the accumulation of waste tyres and eliminating other sources of mosquitoes, such as open water containers. Brazil described this effort in paragraphs 70-73 of its First Written Submission, and again, in its Oral Statement. The campaign has contributed to reducing the sources of mosquitoes and the incidence of dengue in the state of Paraná.

Question 12.

Are there any epidemiological studies showing that dengue or malaria cases in Brazil are linked to the presence of waste tyres in the relevant areas of dispersion of these two diseases? To what extent have former retreaded tyres, which have become waste, contributed in the past to the accumulation of waste in those areas? Please, provide any supporting evidence, notably studies.

22. The studies referred to by the European Communities do exist and Brazil is selecting the most relevant and translating them into English, in order to present before the Panel as soon as possible.

Question 13.

In paragraph 36 of its first written submission, Brazil gives some figures on tyre fires in Brazil. Could Brazil provide detailed information on the location, origin/causes, dimension and duration of those fires and other tyre fires in the last ten years?

23. Brazil does not have statistics for the past ten years that set forth the detailed information requested. Brazil provided that information in paragraph 36 of its first written submission to make clear that tyre fires are a genuine threat in Brazil as they are elsewhere in the world, including the European Communities. *See* Brazil's first written submission, para. 34; *see also* Exhibit BRA-10, at 8.

Question 14.

Are there any studies assessing the real negative consequences on human health and flora and fauna of waste tyres fires which have occurred in the past in Brazil? Please, provide them.

24. All of the health information available to Brazil, including information from the World Health Organization and member States of the European Communities, has made clear that there indeed are "real negative consequences" – indeed, potentially deadly consequences – "on human health and flora and fauna of waste tyre fires" in the areas in which they occur. Brazil is surprised that the European Communities would seem to doubt that this is the case.

Question 15.

Are waste tyres stockpiling installations subject in Brazil to compulsory environmental impact assessment (EIA), in any case? If not, please, provide the criteria for deciding when an EIA is requested in Brazil. In both cases, please provide the relevant domestic legislation.

25. Brazil has presented exhaustive evidence on the health and environmental risks that flow from the stockpiling of waste tyres. Stockpiling is a dangerous disposal method, as Basel Tyre Guidelines, as well as the European Communities' own reports recognize. Brazil is surprised that the European Communities would advise Brazil to stockpile waste tyres, while doing its best to divert its own tyres away from stockpiles.

Question 16.

Does the Brazilian legislation lay down emission limits for dioxins in relation to cement kilns, other kilns or waste incinerators? Please, provide those emission limits and a copy of the specific legal provisions on this issue.

26. *See* Exhibit BRA-104.

Question 17.

In paragraph 74 of its first written submission, Brazil declares that it "has licensed some 46 companies to process waste tyres". Could Brazil provide information on the following:

(a) list of these companies, specifying the processing operations they carry out in relation to waste tyres and the location of the installations where these processing operations take place, and
(b) number of waste tyres processed by each of these companies in the last ten years, disaggregated by installations and year by year?

27. Brazil believes that the information requested is not relevant to the issues before the Panel and that its production in the limited time available to answer these questions is unduly burdensome. If the Panel requests this information, however, Brazil will do its best to supply it.

Question 18.

With reference to 137 and 164 of Brazil's first written submission, why did Brazil, before the MERCOSUR Arbitral Tribunal in the dispute settlement proceedings instituted by Uruguay against the import ban on retreaded tyres, not invoke Article 50 (d) of the Treaty of Montevideo, which allows the application of measures regarding the protection of human, animal and plant life and health? Were there any legal impediments that prevented the invocation by Brazil of this provision, and if so, what were they?

28. As Brazil explained in paragraphs 77 and 137 of its First Written Submission, the dispositive question in the case was whether Portaria 8/2000 was a new import restriction, in violation of the Decision CMC 22/2000. While there was no legal impediment to the invocation of Article 50(d) of the Treaty of Montevideo, reliance on the article did not seem necessary at the time because this was a straight-forward question of legislative history. Brazil's attorneys believed that they needed only to show that the import prohibition had been in effect since 1991, and the 2000 regulation merely clarified the scope of that prohibition.

Question 19.

In para. 177 of its first written submission, Brazil refers to MERCOSUR as a "properly-notified customs union within the meaning of Article XXIV". Which document constitutes the notification within the meaning of Article XXIV:7(a)?

29. Brazil and its MERCOSUR partners notified the customs union to the GATT with document L/6985. Brazil is not aware of any notification requirements in Article XXIV with which the MERCOSUR parties did not comply nor, in the more than ten years since that notification, has any such requirement been brought to their attention.

Question 20.

In para. 187 of its first written submission, Brazil claims that to the extent the State law of Rio Grande do Sul conflicts with the federal measure, the federal measure will prevail and trump the measure.

(a) Could Brazil explain whether, and to which extent, it believes that the State law of Rio Grande do Sul conflicts with Brazilian federal law?
(b) If there is a conflict, could Brazil explain what are the consequences, in Brazilian law, of this conflict? Has the Brazilian government taken any action to prevent application of the State law?
(c) If the federal ban on the importation of retreaded tyres were removed, what consequences would this have for the application of the State law?
(d) How does Article 1 of the State law, which seems to prohibit the marketing of imported retreaded tyres, relate to Article 2 of the same law, which seems to authorise this marketing subject to certain disposal conditions?

30. See Brazil's responses to the Panel's Questions 55-62.

ANNEX 3[1]
RESPONSES OF THIRD PARTIES TO QUESTIONS FROM THE PANEL FOLLOWING THE FIRST SUBTANTIVE MEETING

Question 1. To the United States.

In paragraph 10 of your third party submission, you argue that the Understanding on the Interpretation of Article XXIV "makes clear that satisfaction of the notification requirement contained in Article XXIV:7(a) is a prerequisite to demonstrating that a regional arrangement is a customs union or free-trade area consistent with Article XXIV". Could you please clarify:

(a) on what legal basis you claim that the legal consequence of a failure to notify an interim arrangement under Article XXIV:7(a) is to prevent a customs union member to demonstrate in a panel proceeding that the customs union in question is compatible with Article XXIV:5?
(b) what is, in your view, the relevance of the fact that WTO Members agreed, as expressed in the terms of reference adopted for the examination of MERCOSUR, to examine MERCOSUR under Article XXIV (as well as the Enabling Clause), and that the examination of MERCOSUR has in fact been conducted under that provision?
(c) what is the relevance of the fact that MERCOSUR parties did notify the agreement, although under a separate provision?
(d) can the fact that MERCOSUR is subject to examination before the CRTA be considered as satisfying the notification requirement?

Response of the United States

a)
1. The United States would like to note at the outset that it agrees with Chinese Taipei that, if the Panel concludes that the import ban and fines are not consistent with the provisions of the GATT 1994 identified by the European Communities, and further concludes that these measures are not permissible under Article XX(b), the Panel may exercise judicial economy with respect to Brazil's argument regarding Article XXIV.

2. With regard to the Panel's question, paragraph 1 of the *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994* ("Understanding") provides that "[c]ustoms unions, free-trade areas, and interim agreements leading to the formation of a customs union or free-trade area, to be consistent with Article XXIV, must satisfy, *inter alia,* the provisions of paragraphs 5, 6, 7 and 8 of that Article." Therefore, in order to be consistent with Article XXIV, a customs union must satisfy the provisions of paragraph 7 of that article, which contains the notification obligation. Failure to notify in accordance with paragraph 7 does not merely render a customs union inconsistent with that paragraph; rather, under paragraph 1 of the Understanding, such a customs union is not "consistent with Article XXIV" as a whole. Thus, the special provisions applicable to customs unions under Article XXIV, including paragraph 5, are not available to it.

3. The text of Article XXIV and the Understanding both reflect the fact that, as an institutional matter, notification obligations are important components of the WTO agreements. Notification of a customs union under paragraph 7 triggers a comprehensive review process described in Article XXIV as well as the Understanding. Members that opt not to subject a customs union of which they are a part to the procedures contained in Article XXIV and the Understanding through the formal

[1] Footnotes in this section are those of third parties.

notification process are not entitled to invoke that provision as a waiver of the WTO obligations it addresses.

b)
4. While the MERCOSUR countries have consented to, and MERCOSUR is currently the subject of, a form of review in the Committee on Regional Trade Agreements, this process does not constitute notification consistent with paragraph 7 of Article XXIV. In the compromise reached between Members to initiate the review, Members, including Brazil, did not agree that such review was pursuant to the terms of paragraph 7.

5. Paragraph 7 of Article XXIV and the Understanding contain several requirements for Members notifying under that provision not specified in the terms of reference in the MERCOSUR review. For example, paragraph 7 includes the obligation to provide information to Members so that they may make reports and recommendations "as they may deem appropriate", and the obligation not to maintain or put into force a customs union agreement if the parties "are not prepared to modify it in accordance with" such recommendations. Article XXIV:7. Likewise, the Understanding contains several additional provisions governing reviews of notifications made pursuant to paragraph 7, none of which are specified in the MERCOSUR terms of reference.

6. Thus, it would be inappropriate to view the MERCOSUR review as sufficient to satisfy the notification requirement contained in paragraph 7 of Article XXIV.

c)
7. The fact that MERCOSUR parties notified the agreement pursuant to the Enabling Clause is irrelevant for purposes of determining whether MERCOSUR is a customs union consistent with Article XXIV. Nothing in the text of Article XXIV or the Understanding supports the conclusion that notification under the Enabling Clause satisfies the requirement to notify under paragraph 7 of Article XXIV.

d)
8. No. As noted above, in the compromise reached between Members, Members did not agree that such review was pursuant to the terms of paragraph 7, and that review is being conducted under terms of reference that are not the same as the text of Article XXIV and the Understanding.

Question 2. To Japan.

In paragraph 27 of Japan's third party submission, it calls for the Panel to "examine the applicability of Article XX(b) taking full account of a risk analysis based on a great deal of scientific evidence issued by credible international bodies and experts." Could you identify some examples of individuals or organizations who in your opinion could be considered as "credible international bodies and experts" on the matters of this dispute?

Response of Japan

9. While Brazil bears the burden to prove, with sufficient data including credible international bodies' or experts' risk assessment data, its assertion that all the methods for disposal of waste tyres, including energy recovery through incineration, are not safe, adequate or cost-effective, Japan's opinion is that credible international organizations include the World Health Organization and the United Nations Environmental Program, both of which deal with the issue of toxic air pollutants among others.

Question 3. To Australia.

In paragraph 8 of your oral statement, you state that "Australia encourages to evaluate carefully the factual evidence before it, including by drawing on expert opinion as necessary." On what specific issues does Australia consider that the Panel needs to seek expert views?

Response of Australia

10. Australia's remark was intended to be general in nature, underscoring the complex nature of the issues before the Panel related to determining the application of Article XX to the measures at issue.

11. We see expert opinion as being of potential value to the Panel in determining whether the Brazilian ban on retreaded tyre imports is necessary to protect human health, including in relation to the following questions:

(a) What is the impact of the disposal of retreaded tyres on human health?

(b) Does the import ban actually reduce the total number of tyres to be disposed of in Brazil? This goes to the question of the capacity of the import ban to achieve the policy objective cited by Brazil, and the extent to which it is necessary to achieve that objective.

(c) Do any health risks related to the waste disposal of retreaded tyres increase in proportion to the volume of tyres disposed of?

12. Possible assessment by experts may also be relevant to any consideration by the Panel of whether alternative measures are available to Brazil to protect human health which would have less trade restrictive effects.

Question 4. To China.

In paragraph 18 of its third party submission and in paragraph 7 of its oral statement, China asks the Panel to consider that Brazil is a developing country. Could you please elaborate on the context in which the Panel should consider that Brazil is a developing country in relating to the issues presented in this case?

Response of China

13. It might be said that favorable differentiation toward developing counties is one of the fundamental policies of the multilateral trading system. With respect to environmental protection, the preamble of Marrakesh Agreement especially states that WTO should "seeking both to protect and preserve the environment and sustainable development and to *enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development*."(Emphasis added)

14. The guideline is relevant in particular when conducting the necessity test of Article XX(b). It is fair to argue that developed countries might have adequate technological and financial resources to recycle waste products, and therefore it might not be "necessary" for them to restrict the trade of waste or retreaded products to dealing with the environmental problems. But for developing countries lacking such advantages, certain rigorous measure with trade restrictive effect might be needed to achieve the same goal.

Question 5. To Korea.

Korea states in paragraph 38 of its written submission that "[T]he Article XX exceptions of the GATT 1994 can justify those measures that are inconsistent with the other provisions of the GATT 1994 and make them excusable, not consistent." What is the legal basis for the position that a GATT inconsistent measure that is 'excused' under Article XX cannot qualify as "laws or regulations which are not inconsistent with the provisions of [GATT 1994]".

Response of Korea

15. The legal basis for Korea's above position can be found in the textual interpretation of Article XX(d). Article 31 of the Vienna Convention on the Law of Treaties provides for interpretation in accordance with the ordinary meaning of the terms of the treaty in their context and in the light of its object and purpose.

16. The chapeau of Article XX provides that "nothing in *[GATT 1994]* shall be construed to prevent the adoption or enforcement by any contracting party of measures…" and Article XX(d) continues to state "…necessary to secure compliance with laws or regulations which are not inconsistent with the *provisions of [GATT 1994]* [emphasis added]." Looking at the ordinary meaning of such terms of Article XX(d), Korea considers that the scope of "[GATT 1994]" in the chapeau of Article XX and Article XX(d) would be the same.

17. Considering the context, object and purpose of Article XX which provides for "general exceptions" to the GATT 1994, "[GATT 1994]" in the chapeau of Article XX would refer to the substantive provisions of the GATT 1994, excluding Article XX grounds for excuses. Thus, the "provisions in [GATT 1994]" of Article XX(d) must also refer to the same, meaning that the "laws and regulations" in Article XX(d) must be consistent with the substantive provisions of the GATT 1994. However, Article XX presupposes a measure's inconsistency with such substantive provisions of the GATT and does not make such GATT inconsistent measures consistent.

18. Therefore, Korea considers that the textual interpretation of Article XX(d) leads to the conclusion that GATT inconsistent measures justified under Article XX cannot qualify as "laws or regulations that are not inconsistent with the provisions of [GATT 1994]."

Response of the United States

19. Without taking a position on whether the measure at issue satisfies the criteria in Article XX, the United States offers the following observations. The chapeau to Article XX provides that "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of" the type of measures listed there. Thus, if a measure satisfies the criteria of Article XX, it may be adopted and enforced. In other words, there is no inconsistency with the GATT 1994. The question under the covered agreements is whether a measure is consistent or inconsistent. Nowhere does the GATT 1994 or the covered agreements refer to a measure as being "excused." There is no textual basis for establishing a third category of "excused" measures.

20. If Korea's position were accurate, then a number of consequences would flow which would appear to be difficult to reconcile with the plain text of Article XX, and the fact that Members may adopt and enforce measures meeting Article XX's criteria. For example, under Article 19.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*, a panel or the Appellate Body would be required to find that the measure, even though it satisfies the requirements of Article XX, is "inconsistent" with a covered agreement and therefore recommend that it be brought into conformity with the covered agreement. If a Member may maintain the measure, then how could it be required to bring it into conformity?

Question 6. To Japan.

In paragraph 18 of its oral statement, Japan states "Brazil made serious efforts to convince MERCOSUR countries in the course of the Ad Hoc Tribunal proceeding…" What is the basis of this statement?

Response of Japan

21. In the course of the MERCOSUR Tribunal case in question, Brazil tried to justify its import ban to be consistent with its obligation under MERCOSUR agreement. This Brazilian justification of, or defense for, its measure during the trial itself should be deemed as "serious effort" in terms of the Appellate Body Report in *US – Shrimp*.[2]

22. It was desirable for Brazil to have consulted with major retreaded-tyre exporting countries that are not MERCOSUR countries when Brazil lifted the import ban for MERCOSUR countries in accordance with the Ad Hoc Tribunal in 2002. By that time, Brazil had exhausted the discussion concerning the import ban in question with MERCOSUR countries and, at the same time, it should have been fully aware of the necessity to justify the import ban under Article XX in the light of its obligation under the WTO Agreements. However, Brazil did not exploit its opportunity to seek consultations with non-MERCOSUR countries.

Question 7. To Japan.

How do you define "recycling"?

Response of Japan

23. Recycling" is generally to make an effective use of a used product, with or without additional processing to it, in a way usually different from its original use.

24. Specifically, (i) thermal recycling and (ii) material recycling are the two typical ways of recycling waste tyres in Japan.

25. Thermal recycling accounts for the most part of recycling of waste tyres in Japan. Under this method, tyres are utilized as fuels for producing cement, steel and paper.

26. Under the material recycling method, tyres are utilized as materials for road paving, retreaded tyre, and reclaimed rubber, etc.

Question 8. To Japan.

In paragraph 36 of its written submission, Japan states "Other example is recycling used retreaded tyres. In Japan, most of used tyres are recycled in various ways, about half of them are for fuels." Can this be attributable to the fact that Japan is an advanced country and thus more likely to have most of used tyres recycled?

Response of Japan

27. In Japan, nearly 90% of waste tyres are recycled. In order to achieve such a relatively high recycling rate, it is indispensable to establish systems ensuring appropriate collection and disposal of waste tyres. We believe that such systems can be introduced in many countries including Brazil, regardless of whether they are advanced countries or not, for the following reasons.

[2] Appellate Body Report on *United States – Shrimp*, para. 171.

28. An appropriate collection system is particularly important in recycling because collecting is the first step of recycling. In Japan, waste tyres are legally required to be collected through particular routes prescribed by law. When individual users wish to dispose of waste tyres, they must bring them to "designated dealers", such as tyre retailers, service stations, car dealers, car repair shops, automobile parts retailers. Then "designated dealers" shall transfer tyres they received to "waste tyre colletors". When relevant companies, such as transportation companies, wish to dispose of waste tyres, they shall bring them to "waste tyre collectors" directly. "Waste tyre collectors" shall then transport those tyres to "interim disposal contractors", who send them to "final disposal contractors" after having finished a half-way disposal process on the tyres they received.

29. Thus, waste tyres are required to be collected in the end at the places of disposal contractors under law. Introducing such a collection system does not require any particular advanced technology or cost.

30. The above-mentioned collection system works in collaboration with a system for ensuring appropriate disposal. Specifically, Japan adopts a "manifest system", under which the origin of a waste tyre and each process of its disposal can be tracked by referring to slips called "manifests". Under the system, each one who participates in the process of disposal, such as a transportation company, a waste tyre collector and a disposal contractor mentioned in paragraph 9 above, is required to keep a corresponding slip of a manifest coupon which contains necessary disposal information. When the final stage of disposal is completed, a "final slip" is delivered back to the person who originally disposed of tyres (a transportation company, for example), in order to confirm that the tyres have been appropriately disposed of. This system is designed to prevent illegal disposal of waste tyres and to promote their appropriate disposal. This kind of system does not require particular technology or cost, either.

31. Regarding a disposal method itself, thermal recycling is mainly employed in Japan. As stated in paragraph 6 in the answer to Question 7 above, under the thermal recycling method, waste tyres are utilized as fuels for burning in kilns to manufacture products such as cement, steel and paper. Japan considers that kilns are not expensive facilities for industrial manufacturers and are often found installed in factories in many countries to produce products such as cement, and that burning waste tyres as fuels in kilns does not require advanced technique.

32. Concerning the safety of incinerating tyres in kilns, Brazil argues in paragraph 122 of its first written submission that "… the inevitable consequence of [incineration for energy recovery] is dangerous, harmful emissions, even under its most controlled conditions".

33. Setting aside the question whether Brazil has provided enough data showing that incineration for energy recovery results in "dangerous and harmful" emissions "even under its most controlled conditions" or whether Brazilian industrial manufacturers cannot afford such incineration facilities, in the light of the composition of tyre material, we do not believe that incineration of waste tyres necessarily generates dangerous and harmful emissions. According to the Japan Automobile Tyre Manufacturers Association (JATMA), which consists of domestic major tyre manufacturing companies and also deals with the issue of waste tyre disposal including hazardous emissions, raw material weight composition of an average tyre is as follows:

Material	Ratio
Rubber	50.2%
Carbon Black	25.7%
Tyre cord	13.5%
Compounding ingredients	5.9%
Bead wire	4.7%

34. The JATMA has experimental data regarding the emissions resulting from burning compounding ingredients of above-mentioned average tyres. In their experiment, they have incinerated waste tyres in a kiln and analyzed gas generated from such incineration. The result of the analysis shows that the quantity of dangerous and harmful emission from the incineration is very subtle and far below a safety standard for human health.[3]

35. Therefore, we believe that incineration is an efficient and safe recycling method available not only for Japan but also for Brazil.

Question 9. To Chinese Taipei.

In paragraph 7 of its written submission, Chinese Taipei states "[i]f the import ban and the fines are determined by the Panel to be inconsistent with provisions of the GATT, the exemption could not stand on its own as a separate measure. In this event, the Panel should exercise judicial economy on Brazil's Article XXIV defence for the exemption." Could you please elaborate on this statement.

Response of Chinese Taipei

36. The Appellate Body in *Australia – Salmon* clarified that,

> "[t]he principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. This aim is to resolve the matter at issue and 'to secure a positive solution to a dispute.'[176] To provide only a partial resolution of the matter at issue would be false judicial economy. A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members.'[177]" [4]
>
> [176]DSU, Article 3.7.
>
> [177]DSU, Article 21.1.

37. Furthermore, in *United States – Shirts and Blouses*, the Appellate Body stated,

> "[n]othing in [Article 11 of DSU] or in previous GATT practice requires a panel to examine all legal claims made by the complaining party…Given the explicit aim of dispute settlement that permeates the DSU, we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to "make law" by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute."[5] (underline original)

38. The Appellate Body thus makes it clear that while the Panel may indeed address every claim and defense raised by the complainant and the respondent, the Panel has the discretion to only examine those claims and defenses necessary to assist the DSB in making recommendations and rulings that ensure prompt compliance and effective resolution of the dispute.

[3] For example, as to dioxin emissions, the standard is set at 5 ng/m^3 for waste incinerators with burning capacity of less than 2,000 kg under a relevant Japanese law.

[4] Appellate Body Report on *Australia – Salmon*, para. 223.

[5] Appellate Body Report on *United States – Wool Shirts and Blouses*, pp. 18-19.

39. In the present case, the complainant, the European Communities, has chosen to base its complaint on four separate measures of Brazil. One of the measures is an exemption for retreaded tyres from MERCOSUR countries from the application of import ban and fines that Brazil has imposed on retreaded tyres from other countries. The verb "to exempt", from which the noun exemption derives its meaning, is defined as to "[g]rant immunity…*from* a liability to which other are subject."[6] (emphasis original) An exemption, by this definition, is tied to a liability, which in this case are the import ban and the fines, measures from which the exemption exempts. Without the import ban and the fines, the exemption is meaningless and cannot stand on its own as an independent measure.

40. If the Panel finds the import ban and the fines to be inconsistent with provisions of GATT and the conditions under Article XX have not been met, it would not be helpful to the resolution of the dispute for the Panel then to decide on the WTO consistency of the exemption, because the measures from which the exemption derive its existence have themselves already been found to be inconsistent. Under such a circumstance, the Panel would be justified in exercising judicial economy.

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[6] Shorter Oxford English Dictionary, Fifth Edition, Volume 1, 2002, p. 886.