Brazil – Measures affecting Imports of Retreaded Tyres

(WT/DS332)

Replies
of the
European Communities
to the Questions of the Panel
after the first substantive meeting

Geneva, 21 July 2006
Table of WTO cases referred to in the replies

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**GLOSSARY**

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<tr>
<th>ABIP</th>
<th>Associação Brasileira da Indústria de Pneus Remoldados (Brazilian Association of the Retreaded Tyre Industry)</th>
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<td>ABR</td>
<td>Associação Brasileira do Segmento de Reforma de Pneus (Brazilian Association of the Retreading Industry)</td>
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<tr>
<td>BIPAVER</td>
<td>Bureau International Permanent des Associations de Vendeurs et Rechapeurs de Pneumatiques</td>
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<td>Commission, EC Commission</td>
<td>Commission of the European Communities</td>
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<td>Acronym</td>
<td>Description</td>
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<tr>
<td>IBAMA</td>
<td>Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis (Brazilian Institute of the Environment and of Renewable Natural Resources)</td>
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<td>INMETRO</td>
<td>Instituto Nacional de Metrologia, Normalização e Qualidade Industrial (National Institute of Metrology, Standardisation and Industrial Quality)</td>
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<tr>
<td>Mercosur</td>
<td>Mercado Común del Sur (Southern Common Market)</td>
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<td>SECEX</td>
<td>Secretaria de Comércio Exterior (Secretariat of Foreign Trade, part of the Ministry of Development, Industry and Foreign Trade)</td>
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<td>Official Journal</td>
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<td>TBR</td>
<td>Trade Barriers Regulation, Council Regulation (EC) No 3286/94</td>
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<td>TPR</td>
<td>Tribunal Permanente de Revisión (Permanent Appeals Tribunal of Mercosur)</td>
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<td>UNECE</td>
<td>United Nations Economic Commission for Europe</td>
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<td>UNECE Vehicles Agreement</td>
<td>Agreement concerning the adoption of uniform technical prescriptions for wheeled vehicles, equipment and parts which can be fitted and/or be used on wheeled vehicles and the conditions for reciprocal recognition of approval granted on the basis of these prescriptions</td>
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<td>WTO</td>
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I. 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) “remolded tyres,”
(g) “used tyre carcasses”
(h) “casings”
(i) “used tyres”

(see e.g. Brazil’s submission ¶ 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?

1. “Retreaded tyres” are the product at issue in the present dispute. As the EC has explained in its FWS, retreaded tyres are new products which are produced by reconditioning used tyres through the addition of new material replacing the worn tread.1

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.2 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

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1 EC FWS, para. 2.

2 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).
materials. Accordingly, the EC 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). The Brazilian technical regulation contained in Portaria 133 of 27 September 2001 mentions the same three methods, namely top-capping (recapagem), recapping (recauchutagem) and remoulding (remoldagem). As the EC has explained in its FWS, there are also different methods for applying the new tread, namely the cold and the hot method. 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 EC notes that the Brazilian legislation does not always appear to use these terms in a consistent manner. In particular, Article 40 of Portaria Secex No. 14 (Exhibit EC-29) bans the importation of “pneus recauchutados e usados”, whereas it exempts from this ban “pneus remoldados” imported from Mercosur countries. The EC 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.

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3 UNECE Regulation 108, para. 2.37 (Exhibit EC-6); UNECE Regulation 109, para. 2.37 (Exhibit EC-7).

4 Exhibit EC-11, para. 3.29 – 3.31. The terms used in the translation of this section provided by the EC should be adjusted as indicated above.

5 EC FWS, para. 28.

6 Exhibit EC-11, point 3.28.
5. As far as the term "remoldado" in Article 40 of Portaria 14 is concerned, the EC 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. In the light of the inconsistent terminology used in the Brazilian legislation, the EC 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 EC 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.

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’ submission ¶¶ 16,40 and 44, and Brazil’s submission ¶ 16).*

8. Yes.

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7 Brazil’s FOS, para. 64.
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' submission ¶ 26 and Brazil's submission ¶ 16).

9. The difference between retreaded tyres for passenger cars, commercial vehicles, and aircraft lies in the different technical standards that apply to their production.8 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.9 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.10

10. 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 EC has confirmed, it challenges the import ban as such, and with respect to all of the retreaded tyres covered by it.11

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 of GATT 1994?

11. No.

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8 Cf. EC FWS, para. 18, 23.
9 EC FWS, para. 26.
10 EC FWS, para. 26, fn. 18.
11 EC FOS, para. 32.
Question 7

To both parties: Do the Parties agree that retreaded tyres are to be distinguished from used tyres? (see references in European Communities’ submission ¶¶ 17 and 39, and Brazil’s submission ¶ 16) If so, please explain in detail how they differ.

12. Yes. The EC can refer the Panel to its response to Question 1 above.12

Question 9

To the European Communities: In paragraph 45 of your first 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?

13. In the view of the EC, these advantages benefit all countries, including the importing country.

14. 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.

15. Similarly, reductions of emissions in comparison to the production of new tyres will lead to a reduction in air pollution, notably in relation to CO2 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.

16. As further background, the EC 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).

12 Above para. 6 et seq.

13 Exhibit EC - 66.
Question 10

To the European Communities: In paragraph 18 of your first 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?

17. 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.

18. 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.

19. 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. 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.

20. 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.

21. 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

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14 EC FWS, para. 21 – 22.
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.

Question 11

*To the European Communities:* In paragraph 28 of your 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?

22. 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.

23. For instance, the European Retread Manufacturers Association provides the following explanations:

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.

24. The same problem is also highlighted by the UK Environment Agency:

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.

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15 Exhibit EC-67, para. 2.2.5 (emphasis added).

16 Exhibit EC-15, para. 4.2 (emphasis added).
25. In a report prepared of the Department of the Environment of Australia, the following statements can be found:\textsuperscript{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.

26. 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:\textsuperscript{18}

“design/manufacture of most passenger car tires without consideration of the need for retreading;

ready availability of low cost and quality of tyres which are unsuitable for retreading; [...]”

27. In a study of the University of Missouri, the following statements can be found:\textsuperscript{19}

Tire retreading and remanufacturing offers one of the best opportunities to reduce the number of tires requiring disposal. Tire type determines the future life of a tire. Radial passenger tires, unlike the bias tire, are not easily retreaded. New radials require retreaders to retool to state-of-the-art equipment. Generally, low-cost passenger tire imports cannot be retreaded.

28. 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:\textsuperscript{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.

\textsuperscript{17} Exhibit EC-68, Section 8.4.2.

\textsuperscript{18} Exhibit EC-69, p. 12.

\textsuperscript{19} Exhibit EC-70.

\textsuperscript{20} Exhibit EC-71, p. 13.
29. 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 defense 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.

30. 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:

- to which extent new tyres sold in Brazil are of a kind that is suitable for retreading after use;
- to which extent tyres typically are suitable for retreading after use in Brazil;
- and to which extent retreadable casings in Brazil are actually retreaded.

31. 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.

32. 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.

II. Retreading Activities in Brazil

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’ submission ¶¶ 81 and 85, and Brazil's submission ¶¶ 79 and 108)
33. First of all, the EC would like to remark that as regards the conditions of Article XX (b) GATT, 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.

34. This remark notwithstanding, the EC can refer the Panel to the evidence it has already submitted in para. 81 and 82 of its FWS. 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 EC has referred to Brazilian court judgments in which the importation of used casings was authorised as “indispensable primary matter” for domestic retreaders (Exhibit EC-46).

35. In addition, the EC 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 [...]”

36. The EC 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.

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21 Exhibit EC-72, minute 8:35.
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 EC first written submission is entirely attributable to import authorized under the injunctions granted by Brazilian courts?

37. The EC 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 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?

38. According to Brazil’s data base Alice, on which the graph provided in paragraph 79 of the EC’s FWS was based, Brazil still imported, in 2005, 302,435 kg of retreaded tyres from the EC. The extractions from the Brazilian data base are provided as Exhibit EC-73.

39. The EC does not know what is the exact reason for these numbers. To the knowledge of the EC, 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 EC since 2000. The EC suggests asking the question to Brazil as the WTO Member applying the import ban.

III. 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’ submission footnote 34 to ¶ 59).

40. As regards the prohibition on imports of retreaded tyres, the EC is primarily seeking a ruling in respect of Portaria Secex No. 14, which it understands to constitute the current legal basis of the ban.
41. However, the EC 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

42. As the EC 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 goods24 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.

43. The EC 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 EC 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 31**

*To the European Communities:* In paragraph 56 of your first 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) ?

44. In the translation provided by the EC, the text “retreaded used tyres” should be corrected to read “retreaded and used tyres”, in conformity with the Portuguese original. The EC understands Article 40 of Portaria No. 14 to apply both to used tyres and to retreaded tyres.

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22 EC FWS, para. 71, on Brazil’s defense before the Mercosur Arbitral Tribunal.
23 Brazil’s FOS, para. 26: “used tyres, including retreaded ones”.
24 EC FWS, para. 59, fn. 34.
IV. 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 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)?

45. Waste tyres are considered as inert waste in the Brazilian legislation and they are classified as non-hazardous waste in the EC’s legislation. 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.

46. Besides, in our case, the ban is not related to waste tyres but to retreaded tyres, which, as the EC 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.

47. Finally, as the EC explained in its FWS and its FOS 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 EC FWS.

25 Article 1 (b) and 4 of CONAMA Resolution No 23 of 12 December 1996, Exhibit EC – 33.

48. For all these reasons, the EC 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.

**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.

49. 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, although 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. Waste tyres are not mentioned.

50. This notwithstanding, the EC 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.

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27 Exhibit EC – 53.

28 Exhibit EC - 75.
51. As regards the second part of the question, the EC is not aware of any relevant international standards on the lifecycle of products. In 1994, the EC 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 EC 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.

52. Moreover, the EC would add that the present case concerns the justification of an import ban under Article XX (b) GATT. 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 GATT. The EC does not see that considerations regarding the life-cycle of products, and of tyres in particular, are relevant in this context.

Question 38

To the European Communities: In paragraph 84 of your 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?
53. The EC 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.

54. Paragraph 84 of the EC FOS refers to measures aiming at reducing the accumulation of waste tyres that are mentioned in paragraphs 57 to 67 of the EC 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 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."

55. This passage cited by Brazil in its FWS 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.

56. The recital makes a reference to the first in the hierarchy of policy principles in waste management in the EC: reduce, reuse, recycle and recover. These principles are guidance for the EC and the EC Member States when adopting legislation on those waste streams requiring specific legislation. However, as the EC 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 42

To the European Communities: Please comment on Brazil’s arguments in paragraph 55 of its oral statement, including the conclusions of the report of the British Used Tyre Working group cited by Brazil in that paragraph.

57. Contrary to what Brazil claims in paragraph 55 of its FOS, 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 EC 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 46

To the European Communities: Please comment on Brazil’s comments on the availability of alternative measures at paragraph 54 of its oral statement, especially the existence of a « gap between supply and demand » in respect of certain disposal methods.

58. 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 EC 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 EC 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 EC explained in paragraph 72 of its FOS, 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.

59. Circumstances specific to a country implementing measures that are claimed to be justified under Article XX (b) of the GATT 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.

60. However, the EC 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 €). 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, 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.

29 Exhibit EC – 76.

30 Exhibit EC – 77.

31 The EC has already referred to these programmes in para. 113 of its FWS and in para. 73 of its FOS.
61. 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. 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. 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, and net earnings of 49,675 billion € in 2005. 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).

62. Therefore, the EC believes that there are no technical constraints preventing Brazil from using the different alternatives for the disposal of waste tyres.

63. In relation to the geographical conditions, Brazil has claimed that the huge size of its territory creates difficulties in managing waste tyres. The EC 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. 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. Moreover, these regions will.

32 Exhibit EC – 78.
33 Exhibit EC – 79.
34 Exhibit EC - 80.
35 Exhibit EC - 81.
36 Exhibit EC - 82.
37 Exhibit EC – 83.
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 submission ¶¶ 43 and 122).

64. Incineration of tyres under controlled conditions does not represent a significant risk for health and environment. In the EC, 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 EC 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.

65. 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

\(^{38}\) Exhibit EC – 84.

\(^{39}\) Exhibit EC – 85; at page 44, the report states that “O co-processamento nas fábricas de cimento brasileiras é crescente, tendo aumentado 22% entre 2002 e 2003” (Co-incineration in Brazilian cement kilns is increasing, having grown 22% between 2002 and 2003).

\(^{40}\) Exhibit EC – 86.
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.\footnote{Exhibit EC - 87.} This study also concludes that, for lead, nickel, chromium and cadmium, exactly the same result is obtained as for the fossil energy use.

**Question 51**

*To the European Communities*: Please clarify how exports of used tyres "to other MERCOSUR countries" (see your 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?

66. 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 EC and other WTO Members exporters from the Brazilian market.

67. The continuing import of used tyres into Brazil from the EC (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.

68. 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 EC, but they can be imported from other Mercosur countries. The export of used tyres from the EC 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 53**

*To the European Communities:* Please comment on Brazil’s argument, at paragraph 64 of its oral statement, that the application of the exemption for MERCOSUR imports is not arbitrary because it is included in the measure itself.

69. The EC considers that what matters in interpreting the chapeau of Article XX of the GATT 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.

**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?

70. No. Justification under Article XXIV and the assessment of an unjustifiable discrimination under the chapeau of Article XX of the GATT are separate exercises. The assessment of the chapeau is only related to the specific interests protected in letters a) to j) in Article XX of the GATT. Because Articles XX and XXIV are self-standing exceptions, the fulfilment of one cannot be a sufficient or necessary requirement for satisfying the other.

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\(^{42}\) Appelate Body Report, *US – Shrimps*, para. 158, already mentioned in EC FWS, para. 144.
V. Measures at state level

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 EC's submission ¶ 63)

Could you please clarify whether you meant "ten" used tyres?

71. 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 EC’s FWS should be corrected accordingly.

Question 64

To the European Communities: In paragraph 187 of your first submission, you refer to the requirement of having to dispose of ten « retreaded tyres ». could you please clarify whether you meant « used tyres » ?

72. Yes, in paragraph 187, the reference should be to “used tyres” instead of “retreaded tyres”.

VI. 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 of GATT 1994 ?

73. As the EC has set out in its FWS, the fines on the marketing, transportation, storage, keeping or warehousing of imported retreaded tyres aim to complement

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43 EC FWS, para. 174.
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 GATT.

74. 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 EC submits that Presidential Decree No 3919 to this extent is incompatible with Article III:4 GATT. 44

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 submission ¶ 174 and Brazil's submission ¶ 157)

75. 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 EC refers the Panel to paragraphs 102 to 106 of its FOS.

VII. MERCOSUR Exemptions

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?

76. Yes.

44 EC FWS, para. 175 et seq.
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?

77. 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 ***.

78. 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”.

79. 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 76

To the European Communities: Please comment on Brazil’s argument, in paragraph 70 of its 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?

80. The EC has not contested that Mercosur, in accordance with Article 1 of the Treaty of Asuncion, involves the establishment of a customs union. The EC would also like to confirm that it is supportive of efforts of regional integration worldwide, including of Mercosur.

45 Exhibit EC-43, para. 101.

46 Cf. EC FWS, para. 84.
81. 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) GATT. As the EC has remarked, it is for Brazil, as the party invoking Article XXIV GATT, to demonstrate that these conditions are met.47

82. The negotiations between the EC and Mercosur are of no relevance in this context. Since 2000, the EC and Mercosur have been in the process of negotiating a bi-regional association agreement. This regional approach reflects \textit{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 GATT.

\textbf{Question 77}

\textit{To the European Communities: How do you reconcile the statement you made in paragraphs 121 and 122 of your oral statement with the ruling in the US - Line Pipe case that you cited in footnote 106 of your submission?}

83. In \textit{US – Line Pipe}, the Panel expressed doubt as to whether the necessity test formulated by the Appellate Body in \textit{Turkey – Textiles} should also apply in circumstances other than \textit{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

84. The EC does not share these doubts. In the view of the EC, there is no indication that the necessity test applied in \textit{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 EC defended before the Appellate Body in \textit{US – Line Pipe}.50

47 EC FOS, para. 118.
49 Cf. EC FOS, para. 121-122.
85. 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 GATT, 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 GATT to be “moot and having no legal effect”.\(^{53}\)

86. Finally, it is worth mentioning that safeguards are addressed in Article XIX of the GATT, an exception which, unlike Article XX, is not mentioned in the list of exceptions in Article XXIV:8(a)(i) GATT. 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.

**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?

87. The EC 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 GATT.

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\(^{52}\) Appellate Body Report, *US – Line Pipe*, para. 198.


\(^{54}\) On this question, cf. also footnote 1 to Article 2 of the Agreements on Safeguards.
88. In the view of the EC, the formation of a customs union may also be, and typically is, a gradual process. This is recognised in Article XXIV:5 (c) GATT, 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 EC, 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.\(^{56}\)

89. However, as the EC has remarked in its FOS,\(^{57}\) 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”.

**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) of GATT 1994 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?

90. 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 GATT.\(^{58}\)

\(^{55}\) 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, *Argentina – Footwear (EC)*, para. 8.98.

\(^{57}\) EC FOS, para. 129.

\(^{58}\) Cf. also Panel Report, *Argentina – Footwear (EC)*, para. 8.96.
91. Of course, this does not mean that Article XXIV:8 (a) GATT 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) GATT. However, where restrictive regulations are not necessary for the purposes of Article XX GATT, 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.

92. In conclusion, the discriminatory application of a measure justified under Article XX GATT cannot be justified as necessary for the formation of a customs union.

Question 83

To the European Communities: Is your argument in paragraph 137 of your 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?

93. No. In order to successfully invoke Article XX (d) GATT, 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.

94. The argument made by the EC in para. 137 relates to the second of these conditions. As the EC 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. 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) GATT.

Question 84

To the European Communities: In light of your observations, at paragraph 137 of your 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

59 EC FOS, para. 135.
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".  

95. At the outset, the EC 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) GATT.

96. As regards the meaning of the term “laws and regulations”, the EC 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.

97. 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 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) GATT.

98. 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) GATT. Accordingly, Article XX (d) GATT cannot be invoked when a Member, rather than enforcing an international agreement in its internal order, simply complies with its international obligations.


61 Before the Panel in Mexico – Soft Drinks, the EC expressed its views as follows (Panel Report, 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.
LIST OF EXHIBITS

Exhibit EC - 65 Communication from the United States, Negotiating NTBs Related to Remanufacturing and Refurbishing, TN/MA/W/18/Add.11

Exhibit EC - 66 Kyoto Protocol to the United National Framework Convention on Climate Change

Exhibit EC - 67 Retread Manufacturers Association, Selection and Manufacturing

Exhibit EC - 68 Australian Department of the Environment and Heritage, A National Approach to Waste Tyres, Chapter 8.4


Exhibit EC - 70 University of Missouri, Hot Wheels: Scrap Tire Recycling

Exhibit EC - 71 Retreading Special, June 2006

Exhibit EC - 72 DVD, Senhor Parlamentar, Legendado Ingles

Exhibit EC - 73 Extractions from Brazilian Trade Data Base Alice, Import of retreaded and used tyres from the EU in kg

Exhibit EC - 74 Commission Decision 2000/532/EC of 3 May 2000 establishing a list of wastes

Exhibit EC - 75 Agenda 21, Chapter 21

Exhibit EC - 76 Brazil’s Gross National Product

Exhibit EC - 77 Presentation by Mr Marco Antonio Borzino of the Solid Waste Programme in Brazil

Exhibit EC - 78 2004 Report by the “Sindicato Nacional da Indústria do Cimento”, excerpts


Exhibit EC - 80 Capitalisation of “Petróleo Brasileiro S.A.” (Petrobras)

Exhibit EC - 81 Net earnings of Petrobras

Exhibit EC - 82 Data on Brazil’s population

Exhibit EC - 83 Maps from the Brazilian Institute for Geography and Statistics

Exhibit EC - 84 2006 Report by the European Tyre & Rubber Manufacturers’ Association
Exhibit EC - 85  2004 Report by the “Sindicato Nacional da Indústria do Cimento”, page 44
Exhibit EC - 86  Formation and Release of POPs in the Cement Industry
Exhibit EC - 87  Study by IVL Swedish Environmental Research Institute Ltd
Exhibit EC - 88  Economia, 13 July 2006, Argentina desconoce laudo de Tribunal de Olivos y prohíbe entrada de neumáticos uruguayos