Brazil – Measures affecting Imports of Retreaded Tyres

(WT/DS332)

Oral Statement
of the
European Communities
at the second substantive meeting
with the Panel

Geneva, 4 September 2006
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Mr. Chairman, Distinguished Members of the Panel,

I. INTRODUCTION

1. The European Communities (EC) welcomes this second opportunity to submit its views orally in this dispute.

2. Though the object of the case is well known, it should be recalled that the present dispute concerns a prohibition imposed by Brazil on the importation of retreaded tyres, as well as certain related measures, including the exemption from the import ban of retreaded tyres imported into Brazil from other Mercosur countries. This dispute is not about the import ban on used tyres also adopted by Brazil.

3. As the EC has shown in its First Written Submission, the measures adopted by Brazil are incompatible with several articles of the GATT. Brazil has not contested this incompatibility. Instead, it has claimed that its measures are justified under the exceptions contained in Articles XX (b), XX (d), and XXIV of the GATT.

4. In accordance with consistent WTO case law, it is Brazil, as the party invoking an exception to its WTO obligations, which bears the burden of proof that the conditions of the exceptions are met. As the EC will show again today, this burden has not been met by Brazil.

5. In its oral statement today, the EC will present arguments concerning the import ban, the fines, the measures adopted by the State of Rio Grande do Sul and the Mercosur exemption. These arguments will primarily concentrate on the rebuttal of Brazil’s Second Written Submission and on recalling certain of the EC’s arguments that have not received a response from Brazil. The EC does not consider it necessary to repeat again all arguments presented in its former submissions, which must be considered hereby maintained.
II. THE BAN ON THE IMPORTATION OF RETREADED TYRES IS NOT JUSTIFIED UNDER ARTICLE XX (b) GATT

6. In relation to Article XX (b) of the GATT, Brazil fails to establish that the import ban was adopted to protect human, animal or plant life or health and that it is necessary to achieve that aim. It equally fails to establish that the requirements of the chapeau are met.

A. The import ban was not adopted and it is not necessary to protect human, animal or plant life or health

1. Introduction

7. In order to be justified under Article XX (b) of the GATT, the measure in question must be designed to protect human, animal or plant life and health and the measure must also be “necessary” to protect those interests. Whether this latter requirement is fulfilled must be evaluated on the basis of a process of weighing and balancing of four factors established by the Appellate Body: 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.

8. The EC considers that, in a case analysed under Article XX (b) of the GATT, the discussion of the objective of the measure, which must always be the protection of human, animal or plant life and health, and the first element of the necessity assessment, the importance of the interest protected, can be dealt with together.

2. The objective of the measure is not to protect human, animal or plant life or health

9. Brazil has claimed that the import ban on retreaded tyres has been established to reduce the risks to human, animal or plant life and health from waste tyres.

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1 Appellate Body Report, Korea – Beef, para. 164.
According to Brazil’s submissions, the specific risks would be certain mosquito-borne diseases, tyre fires and toxic leaching from tyres.

10. The EC 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. The rulings, awards and submissions made by Brazilian and Mercosur authorities confirm this assertion. They have not been contested by Brazil in any of its submissions.

11. It is also worth noting that Portaria No. 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 very reason is that the Brazilian authorities do not consider it a public health measure. This can be easily deduced from the fact that the actions concerning legislation of the National Dengue Control Programme adopted in July 2002 only include monitoring the effective application of CONAMA Resolution No. 258/99. Portaria No. 8 is not mentioned, a silence that confirms that the measure is not intended to protect life and health.

12. It is thus clear that, from a policy point of view, CONAMA Resolution No 258 and the import ban are measures having different objectives and that they are not, contrary to Brazil’s opinion, “the complementary and indivisible foundations of the national strategy for waste tyre management”. In reality, the import ban renders obsolete some of the obligations explicitly imposed by the CONAMA Resolution to collect and dispose of a certain number of waste tyres, namely those relating to the importers of retreaded tyres.

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2 Brazil’s FWS, para. 42, and Brazil’s SWS, paras. 17 and 33.
3 EC’s FWS, paras 130 to 133 and 164 to 166, EC’s Reply to the Panel’s Question No. 34, paras. 47 and 48 and EC’s SWS, para. 178.
4 EC’s FWS, paras. 130 to 133 and EC’s SWS, para. 178.
5 Exhibit EC-26.
6 Exhibit EC-93.
7 Brazil’s FOS, para. 26.
13. In conclusion, the EC considers it established 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.

14. Moreover, the EC would also like to stress that the arguments and evidence presented by Brazil in relation to life and health, as the interests supposedly protected by the measure, are not clear.

15. The EC will start by explaining that Brazil seems to misunderstand some of the arguments advanced by the EC.

16. Thus, the EC has never questioned the genuineness of the public health risks concerning dengue and two other mosquito-borne diseases (namely, yellow fever and malaria). What the EC has done is to ask Brazil to provide epidemiological studies showing the pattern of the contribution of waste tyres to those diseases. This is a question linked to the contribution issue and will be discussed later in the relevant section.

17. In its Second Written Submission, Brazil has claimed that the EC itself recognised the public health risks of waste tyre accumulation in Brazil in the TBR Report issued by the European Commission. This is incorrect. In that report, the European Commission does not refer to public health risks of waste tyres generally, but to risks arising from tyres that “litter the countryside”. In other words, the European Commission was referring to the risks arising from improperly managed tyres, not to risks arising from waste tyres generally. Moreover, it is the responsibility of Brazil to prevent the littering of its countryside with waste, for instance through the introduction and enforcement of appropriate collection programmes.

18. Finally, Brazil’s delimitation of the interests protected is unclear. The EC already pointed this out in its First Oral Statement in relation to the use of the term

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8 Brazil’s SWS, para. 15.
9 Brazil’s SWS, para. 15.
“environment” in the context of some arguments. 10 Brazil has clarified that, with this term, it refers to the life and health of animals and plants and to nothing more. 11

19. However, 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 never explained the animal species that are in danger of being infected by mosquitoes breeding in waste tyres. Moreover, 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.

20. Therefore, in the absence of further clarifications from Brazil, the EC considers that the interests that Brazil really claims to protect are human life and health, which are indeed fundamental ones. However, these interests can only serve as a justification under Article XX (b) of the GATT if the measure contributes significantly to their protection, taking into consideration the trade impact of the measure and the existence of other available alternatives.

3. **Brazil has not demonstrated that the import ban makes a contribution to the protection of human, animal, or plant life and health**

21. Brazil has also failed to demonstrate that the import ban on retreaded tyres makes a contribution to the protection of human, animal or plant life or health. This is an important failure because the Appellate Body has declared 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’”. 12 For the purposes of this dispute, the EC will qualify this level of contribution as “significant”.

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10 EC FOS, paras. 13 to 16.

11 Brazil’s SWS, footnote 1.

22. The EC has proved that 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. In any event, the contribution is not significant.

(a) Brazil has not demonstrated that the import ban reduces significantly the accumulation of waste tyres in Brazil

23. In order to demonstrate that the import ban reduces public health problems arising from waste tyres, Brazil would first have to prove that the import ban in fact reduces the accumulation of waste tyres in Brazil. As the EC has shown in its Second Written Submission, it is therefore the responsibility of Brazil, as the Member invoking a defence, to quantify and prove, as precisely as possible, the contribution that the import ban makes to the reduction of waste tyres in Brazil.  

24. In this context, it is also necessary to distinguish clearly between retreaded passenger car tyres and retreaded truck and aircraft tyres. This is essential since truck and aircraft tyres, unlike passenger car tyres, can be retreaded several times, and therefore in any event contribute considerably less to the accumulation of waste tyres.

25. As regards passenger car tyres, Brazil has not demonstrated that the import ban on retreaded tyres reduces significantly the accumulation of waste tyres in Brazil. It has mainly claimed 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, this statement could be true only if 100 percent of all new tyres consumed in Brazil were retreaded.

26. This is not the reality in Brazil. The EC has already explained that the standard-setting authority INMETRO has recognised that Brazilian tyres are generally no longer suitable for retreading after use, which explains why Brazilian retreaders

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13 EC SWS, para. 26 et seq.
14 Brazil’s FWS, para. 107.
15 EC FWS, para. 81 and Exhibit EC-45.
have to import foreign tyres as necessary raw material for their business.\(^{16}\) Brazil has attempted to diminish the significance of the INMETRO Technical Note by referring to its subsequent “repudiation” by INMETRO. However, as the EC has explained, a repudiation merely for the purposes of preventing its use in litigation is hardly credible, and therefore in no way diminishes the evidentiary value of the note.\(^{17}\)

27. Despite this evidence, in its Second Written Submission,\(^{18}\) 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.

28. The second argument is irrelevant for our case because the EC 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.

29. Brazil tries to defend its first argument, the supposedly high retreading rate of domestic casings, on two grounds: first, with the data aggregated by Mazola on unusable automobile tyres in Brazil,\(^{19}\) and, second, with the report provided by the Brazilian retreaders (ABR),\(^{20}\) to prove that domestic casings are indeed being retreaded and that the EC overstates the extent to which Brazilian retreaders use imported casings.\(^{21}\) The weaknesses of these two arguments have already been explained by the EC in its Second Written Submission.\(^{22}\) It is, however, worth recalling that the ABR’s report indicates that the large majority of passengers car

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\(^{16}\) EC FWS, para. 82.

\(^{17}\) EC SWS, paras. 37 to 40.

\(^{18}\) Brazil’s SWS, para. 114.

\(^{19}\) Exhibit BRA-93.

\(^{20}\) Exhibit BRA-95.

\(^{21}\) Brazil’s SWS, paras. 116 and 135.

\(^{22}\) EC SWS, paras. 36 and 44, respectively.
casings retreaded in Brazil are imported.\textsuperscript{23} The evidence provided by Brazil thus shows the contrary of what Brazil pretends.

30. Moreover, as the EC already explained in its Second Written Submission,\textsuperscript{24} an overview of the Brazilian tyre market indicates the rate of retreading in Brazil in 2005 as 9.9%. In interpreting this figure, it is important to note that this appears as an aggregate figure which must therefore include both car and truck tyres. 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%.

31. As the EC has explained, the efforts which Brazilian retreaders have made to obtain imported retreadable casings are a further illustration of the unsuitability of Brazilian casings for retreading. Brazil has made an attempt to explain the import of casing on two reasons: first, they are substantially cheaper than the domestic ones,\textsuperscript{25} and, second, the existence of an excess capacity in the Brazilian retreading industry.\textsuperscript{26} 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.\textsuperscript{27}

32. The EC does not agree with these arguments.

33. The first argument, concerning the lower price, is already a step back from the previous statements by Brazil that used tyres have a “negative value” in Europe.\textsuperscript{28} In any case, the imported casing price quoted by Brazil in its Second Written Submission (3 US$) is wrong because it does not reproduce the price reflected in Exhibit BRA-147, which is around 7 US$. This price should be incremented by

\textsuperscript{23} Exhibit BRA-95, para. 6.

\textsuperscript{24} EC’s SWS, para. 45 and \textbf{Exhibit EC-92}.

\textsuperscript{25} Brazil’s SWS, para. 117.

\textsuperscript{26} Brazil’s SWS, para. 119.

\textsuperscript{27} Brazil’s SWS, para. 136 et seq.

\textsuperscript{28} Brazil’s FWS, para. 151; Brazil’s Closing Statement, para 10.
15% (i.e. around 1 US$) to take into account the technical losses in retreading tyres from abroad reflected in that Exhibit, plus the cost for the import retreader to discard these unretreadable casings that have become waste tyres. The final price therefore appears to be higher than the average price of a domestic casing, according to the prices given by Brazil in its Second Written Submission, which are 7 US$ to 9 US$. The EC would also recall the additional costs of obtaining and defending courts injunctions, costs that are connected to the importation of used tyres, but not the use of domestic casings.

34. The second argument, relating to the currently unused capacity of the Brazilian retreading industry, 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. In fact, there is no reason why the unused capacity should increase demand for imported casings, rather than domestic casings, if retrievable domestic casings were available on the Brazilian market.

35. Finally, 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, Prof. Nastari, President of Datagro Limitada. This study concludes that the import ban on retreaded tyres, even with the existing level of used tyres imports through injunctions, reduces waste tyre volumes in Brazil.

36. The Trade Analysis Unit of the European Commission has carried out an assessment of M. Nastari’s study, which is attached as Exhibit EC-122. This assessment shows that the study is weak in terms of economics and full of inconsistencies, because the basic data are used wrongly or wrong assumptions are made. One of the main weaknesses of the study is that it assumes a rate of actual retreading of domestic casings between roughly 44% and 92% in Brazil, which is

29 Brazil’s SWS, para. 117.
30 Exhibit BRA-146.
31 Brazil’s SWS, paras. 120 to 122.
far too high. 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. For reasons of time, the EC will not discuss the entirety of the manifold errors and weaknesses of the study, but instead refers the kind attention of the Panel to its Exhibit EC-122.

37. It is also noted that Datagro is a company that provides consulting and information services in the areas of sugar and alcohol (Exhibit EC-123). Also, Prof. Nastari holds academic degrees in agricultural economics and is a distinguished expert on matters relating to sugar and ethanol, as well as energy and climate. It does not appear that Prof. Nastari or Datagro possess any specific expertise on waste management, waste tyres or in fact the tyre market in general. Accordingly, the study prepared by Prof. Nastari cannot purport to shed any light on the key factual issues relating to the waste implications of retreaded tyres, and in particular the rate of retreading of such tyres in Brazil.

38. Moreover, the EC notes 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. In particular, the study prepared by Prof. Nastari only concerns passenger car tyres, not truck or aircraft tyres. However, 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, as the EC has explained, less to the accumulation of waste tyres than passenger car tyres. Finally, it seems that Brazil does not retread all of its truck and aircraft tyres.

39. The EC concludes that Brazil fails to demonstrate that the importation of retreaded passenger, truck and aircraft tyres would lead to any increase in the accumulation of waste tyres in Brazil.
(b) Brazil has not demonstrated that the import ban contributes significantly to the prevention of life and health problems in Brazil

40. Secondly, 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, 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”. Brazil cannot simply evoke the existence of such health problems in order to justify the need for the import ban on retreaded tyres.

41. In its Second Written Submission, 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. But these studies consider that waste tyres are not the only reason of the current epidemiological situation related to these two diseases in Brazil. There is even scientific evidence, attached to Brazil’s submissions, demonstrating the importance of several other breeding sites. For example the study attached by Brazil as Exhibit BRA-115 shows that wells and cisterns are the most important breeding sites. Another recent study concerning the presence of *Aedes aegypti* in two Manaus neighbourhoods shows that the most frequented outdoor containers by mosquitoes, regardless of rain or dry period, were bottles, flasks and storage, and that, indoors, the most frequented containers were fixed, flowerpots and buckets (Exhibit EC-124).

42. Moreover, according to Brazil’s own Exhibit BRA-84, cited in paragraph 128 of its Second Written Submission, 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. This demonstrates that a reduction in waste tyres would not necessary

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32 Brazil’s SWS, paras. 17 and 33.
33 Brazil’s SWS, paras. 19 to 26.
34 Exhibit BRA-115, table 3, at page 60.
reduce the dengue cases, which is the disease mainly discussed in Brazil’s submissions.

43. The EC notes that, in its Second Written Submission, Brazil does not develop any argument on the contribution of the import ban to the protection of life and health in relation to tyre fires and toxic leaching. Brazil deals with those two issues in a single paragraph, by making an indirect reference, in relation to tyre fires, to its First Written Submission, and in relation to leaching, to a footnote of its Second Written Submission.

44. In relation to fires, there has never been any explanation or evidence on where and to what extent these risks exist in Brazil. Brazil made some unsubstantiated statements in its First Written Submission. When the EC asked Brazil to provide some information on tyre fires in its territory, Brazil responded that it had no statistics, but that tyre fires are a genuine threat in Brazil as they are elsewhere in the world.

45. The EC would like to recall that, as the Appellate Body declared in *US – Wool Shirts and Blouses*, the mere assertion of a claim cannot amount to proof.

46. In our case, risks from waste tyre fires depend very much on the location, dimension, distribution, and existence of fire prevention and extinction measures. Brazil has explained what happened in some past instances in the United States and in the United Kingdom. On the contrary, no specific explanations and evidence have been provided by Brazil on tyre fires or tyre fires risks in its territory.

47. In respect to leaching of hazardous substances from tyres, the study attached as Exhibit BRA-132 shows the results of the leaching behaviour under extreme

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35 Brazil’s SWS, para. 132.
36 Brazil’s FWS, para. 36.
37 Brazil’s Response to the EC’s Question No. 13.
39 Brazil’s FWS, paras. 34 and 35.
conditions not corresponding to field trials. In any case, 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. As to the second report (Exhibit BRA-133), the very general observations in relation to field trials show that groundwater quality was not deteriorated. Moreover, Brazil has provided no explanations and evidence on leachate from waste tyres in its territory.

48. Finally, the EC argued that waste tyres management problems are not attributable to the importation of retreaded tyres because imports of retreaded tyres were banned in 2000 and the health problems continue, notably concerning dengue.  

49. 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”. 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.

50. Therefore, Brazil has not demonstrated that the ban on the importation of retreaded tyres contributes to the protection of human, animal or plant life or health.

4. **The impact of the measure on the import trade is extremely severe**

51. The severity of the impact of the measure on the import trade is the third step when assessing the necessity of the measure, and the EC has constantly insisted that an import ban has the highest negative impact on international trade.

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40  EC FOS, para. 47.  
41  Brazil’s SWS, para. 131.  
43  EC FWS, para. 115.
52. Brazil persists in claiming that its framework places an equally substantial burden on the domestic industry.44 This is an unrelated issue in the analysis of this step, as the EC, supported by the US, 45 has already explained.46 But it is also untrue because importers of retreads must also dispose of Brazilian casings, in even higher amounts than the domestic industry.47

53. In its Second Written Submission, Brazil admits that the general exceptions of Article XX of the GATT should not be abused.48 But this is again an unrelated issue, an argument pertaining to the analysis of the “chapeau”, not to the specific exceptions in letters a) to j), though Brazil insists in giving to this section the heading “the import ban does not restrict trade unfairly or inequitably”, an idea that is repeated at the last sentence in paragraph 108 of Brazil’s Second Written Submission.

54. The reason given by Brazil for this presentation is that, according to its Second Written Submission, the facts of this case are unique, because “tyres differ from most other waste streams”.49 This idea was already advanced by Brazil in its FOS to conclude that “there is no risk, therefore, that the finding could serve as a basis for other Members to invoke Article XX to justify an import ban”.50

55. The EC does not agree with this conclusion. 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. 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) of the GATT.

44 Brazil’s FWS, para. 110, and SWS, para. 110.

45 US, Third Party Submission, para. 5.

46 EC FOS, para. 51.

47 Article 2(IV)(b) of CONAMA Resolution 258 (Exhibit EC-47).

48 Brazil’s SWS, para. 108.

49 Brazil’s SWS, para. 108.
56. Brazil might claim that those cases are not similar to our case because those
merchandises do not have a predictable life-span as tyres have. However, 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
life span: for instance, WTO Members could decide to ban the importation of
beverages bottled in plastic bottles rather than reusable glass bottles taking into
account that plastic bottles are also used by mosquitoes as breeding places and, if
they burn, the smoke plume also contains hazardous substances.

57. As for commercial and airplane tyres, Brazil’s argument is entirely untrue since
these products do not have a predictable life span. Accordingly, if Brazil is
allowed to ban imported truck and aircraft tyres, there is no reason why other
members could not also ban low quality electronic goods on the basis that these
are likely to have a shorter life span than high-quality ones.

58. To conclude, the EC insists that the severe impact of the measure on the import
trade of retreaded tyres must be taken into account by the Panel.

5. Brazil has other alternatives for preventing the health risks of
waste tyres

59. Both parties have explained to the Panel their respective arguments on whether
there are other alternatives to the import ban on retreaded tyres for preventing
health risks of waste tyres. As the EC has demonstrated in its Second Written
Submission, Brazil has the burden of proof that these alternatives are not
available to it.

60. Brazil has met this burden in relation to neither measures reducing the number of
waste tyres in Brazil nor measures improving the management of waste tyres.

50 Brazil’s FOS, para. 82.

51 EC SWS, paras. 69 to 72.
(a) **Brazil has not taken all measures to reduce the number of waste tyres accumulating in Brazil**

61. Brazil has not done all it could to reduce the number of waste tyres accumulating in its territory. Its Second Written Submission confirms this gap. Neither has Brazil established a system to ensure regular inspections of automobiles, nor has it adopted other measures, like public procurement rules on the use of retreaded tyres or campaigns on better driving habits and promotion of public transport.  

62. In addition, Brazil has not taken effective measures to put an end to the constant and growing flow of used tyres in Brazil. In its Second Written Submission, 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.

63. However, as the EC has shown, the reality is that injunctions are in force and remain in force under which Brazilian retreaders continue to import casings for the purposes of retreading in Brazil. In 2005 alone, Brazil imported a total of 10.5 million tyres from third countries, including the EC, and in the first seven months of 2006, according to possibly still incomplete figures, another 4.5 million casings have been imported. 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 and purely speculative. Accordingly, they cannot be the basis for the objective assessment of facts to which the present Panel must proceed.

64. The EC also has reasons to doubt Brazil's statement that all 2006 decisions in the High Court upheld the government's position. In fact, the EC already has in para. 90 of its Second Written Submission, reported about the 20 March 2006 decision of the Special Court of the Superior Tribunal of Justice. In this unanimous decision, the Special Court rejected one of IBAMA’s remedies against the decision.

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52 Brazil SWS, para. 104.
53 Brazil’s SWS, para. 136 et seq.
54 EC SWS, para. 85 et seq.
55 Exhibit EC-96.
by the President of the Superior Tribunal of Justice, Nilson Naves, of 12 December 2003.\textsuperscript{56}

65. Although Brazil stresses its judicial victories over several importers of used tyres, it remains that the biggest retreaders of the country, BS Colway and Pneuback, who account for the vast majority of casing imports, continue to operate with the permission to import the casings needed for their production.

(b) \textbf{Brazil could take alternative measures to improve the management of waste tyres}

66. The EC has submitted in its previous submissions that there are alternative measures to the import ban on retreaded tyres that Brazil could take, as a package within a policy scheme, to improve the management of waste tyres on its territory.

67. Brazil has presented supplementary arguments in its Second Written Submission to counter the EC analysis of the alternatives.

68. As a first general comment, Brazil claims again that collection schemes, such as CONAMA Resolution 258 and Paraná Rodando Limpo, are not alternatives because they are not non-generation instruments.\textsuperscript{57}

69. Thus, Brazil declares that it only accepts non-generation alternatives to the import ban. This reflects a fundamental misunderstanding by Brazil of the nature of the requirement about existing alternatives. 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.

70. The EC considers that the alternatives that it has presented allow ensuring those objectives. Collection, controlled stockpiling, shredded tyres landfilling, material

\textsuperscript{56} Exhibit EC-46.

\textsuperscript{57} Brazil’s SWS, para. 40.
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.

71. The EC has already explained that these alternatives must form part of a policy scheme, a plan or a programme, to list different terms with the same meaning. They cannot be organised in isolation. They cannot either be rejected one by one, as Brazil continues doing, just because each one does not ensure alone that all waste tyres are properly managed.

72. Brazil claims that it has a comprehensive waste tyre management policy, where it includes the import ban, ⁵⁸ but it has attached no documents to prove it.

73. As final general comment, Brazil claims that a good illustration that the alternatives do not exist is the EC’s continued challenges with managing its growing volumes of tyre waste.⁵⁹

74. This is an unwarranted statement, based also on some distorted information. Thus, Brazil does not acknowledge that 6 EC Member States already recycle and recover 100% of their waste tyres. Second, it is not true that, as today, some 20% of waste tyres are still being landfilled. That was the situation in 2004, two years before the complete landfilling prohibition entered into force. But, what is more important, the EC has not adopted an import ban on retreaded tyres. Accordingly, the EC is not obliged to explain in this procedure its waste tyres management policy or the policy of its 25 Member States, which is not at issue in the present dispute.

75. In relation to the specific alternatives, the EC would recall, as it did in its Second Written Submission, ⁶⁰ the importance of tyre collection, transport and interim storage, as activities necessary to ensure the various recycling, recovery and other disposal practices.

⁵⁸ Brazil’s SWS, para. 42.
⁵⁹ Brazil’s SWS, paras. 45 et seq.
⁶⁰ Brazil’s SWS, paras. 98 et seq.
76. These activities should be carried out in a way ensuring that tyres are free of adult mosquitoes or their larvae and eggs. Brazil’s own exhibits reflect the need to ensure a proper handling of tyres. Thus Exhibit BRA-117 explains that tyres “should be properly discarded, covered or stacked in a shed […] so that they cannot fill with water”. Exhibit BRA-118 has an interesting photograph showing one possibility to stock tyres safely.

77. Brazil considers that stockpiling is not a sound option because it poses substantial hazards and the EC “should be well-acquainted with the risk of stockpiling”.61 As evidence, Brazil refers to some documents from the UK, France, the European retreaders and the United States.62

78. The EC notes that those documents do not refer to properly managed installations, but to illegal dumps or historic landfills. They cannot, therefore, serve to contradict the EC’s position on this question.

79. Moreover, 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. 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.

80. The EC would also like to recall that Brazil accepts landfilling of grinded or cut tyres, and that, therefore, this must also be considered as an alternative in Brazil to the import ban.63

81. In relation to energy recovery, both parties in this dispute allow energy recovery through the co-incineration of waste tyres. Brazil has concentrated its Second Written Submission on co-incineration in cement kilns, though co-incineration can also take place in other installations, like paper mills or steel furnaces.

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61 Brazil’s SWS, para. 64.
62 Brazil’s SWS, paras. 64 to 70.
63 Brazil’s SWS, paras. 107 to 109.
82. Brazil starts the reasoning in its Second Written Submission by distorting the EC’s arguments in order to give the impression that co-incineration in cement kilns is dangerous.\textsuperscript{64} It continues with the surprising affirmation that dumping is a less harmful disposal method than incineration, in relation to the fire that occurred in the province of Ontario in 1996.\textsuperscript{65}

83. It is also not true that co-incineration is a short-term solution.\textsuperscript{66} It will continue to be used in the medium term until recycling is fully developed. Co-incineration plays, and will continue to play, an important role in eliminating waste tyres, especially in the current international scenario of rocketing petrol prices. This explains why, in 2004, 56.06\% of waste tyres in Brazil were used to produce alternative fuel.\textsuperscript{67} Moreover, 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.

84. Brazil has not demonstrated either that co-incineration of waste tyres increases emissions of hazardous substances. 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. It is also quite telling that Brazil has refused to provide the information requested by the EC about the 46 companies authorised to process waste tyres in Brazil.\textsuperscript{68}

85. Brazil has acknowledged that stricter emissions standards will produce fewer emissions.\textsuperscript{69} The EC agrees. 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. We are very far away from the technological and economic

\textsuperscript{64} Brazil’s SWS, para. 72.
\textsuperscript{65} Brazil’s SWS, para. 76 in relation to the heading of the section.
\textsuperscript{66} Brazil’s SWS, para. 73.
\textsuperscript{67} EC SWS, para. 126 and Exhibit EC-114.
\textsuperscript{68} See Brazil’s Response to EC’s Question No. 17.
\textsuperscript{69} Brazil’s SWS, para. 93
levels allowing our societies to ensure zero risk. The EC has the strictest standards in the world. It suffices to see its dioxin emissions limits, which are five times lower than those in Brazil. 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.

86. Finally, it should be underlined that Brazil has not responded in its Second Written Submission to the argument made by the EC in its First Oral Statement that the Basel Convention has adopted in 2004 General Technical Guidelines for the Environmentally Sound Management of wastes containing Persistent Organic Pollutants (POPs), and that cement kiln co-incineration is there considered as an appropriate technology for the destruction of the POPs content in waste.

87. In respect to material recycling, Brazil repeats in its Second Written Submission that it is not always economically and technically viable, and can only absorb a fraction of the waste tyres arising in Brazil. This statement seems more positive than the one made by Brazil in its First Written Submission. However, Brazil still insists in assessing this alternative in isolation.

88. In any case, 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, in 2004, 17.65% of waste tyres in Brazil were laminated and that 19.65% were transformed into goods and raw material.

89. For all these reasons, it must be concluded that, Brazil has alternatives to the import ban, which, when implemented correctly, ensure a proper management of
waste tyres, and prevent any health risks arising from improperly managed waste tyres.

6. Conclusion

90. In conclusion, the import ban on retreaded tyres is not aiming at the protection of human, animal or plant life and health and, when weighing and balancing the four relevant factors established by the Appellate Body, the import ban cannot be regarded as “necessary” for the protection of those interests.

B. The ban is inconsistent with the requirements of the chapeau of Article XX of the GATT

91. Moreover, as the EC already demonstrated in its previous submissions, the ban is inconsistent with the requirements of the chapeau of Article XX of the GATT.75

1. The ban constitutes an arbitrary and unjustifiable discrimination between countries where the same conditions prevail

92. The import ban on retreaded tyres constitutes, first of all, an arbitrary and unjustifiable discrimination between countries where the same conditions prevail, because, first, Brazil imports retreaded tyres from the other Mercosur countries, second, because used tyres continue to be imported into Brazil for the purposes of retreading in Brazil and, third, because Brazil does not restrict the importation and sale of non-retreadable new tyres.

93. Brazil submits again that the exemption of Mercosur countries from the imports does not constitute arbitrary or unjustifiable discrimination because it was made in compliance with its international obligations under the Treaty of Asunción and pursuant to an arbitral award of an international tribunal. Brazil considers, therefore, that the exemption is justified and reasonable.76

75  EC FWS, paras. 142 to 168, FOS, paras. 88 to 10, and SWS, paras. 149 to 182.

76  Brazil’s SWS, para. 149.
94. In this context, it must be noted first of all, that “arbitrary” and “unjustifiable” are referred to in the chapeau of Article XX GATT as alternatives. Accordingly, a measure is not just incompatible, as Brazil seems to suggest,\(^{77}\) if it is “capricious”, “unpredictable”, or even “despotic” and “tyrannical”. Rather, a measure is also incompatible with the chapeau if it is unjustified, which Brazil defines in the sense that it cannot be “legally justified”, or shown to be “defensible” or “just, reasonable, or correct”\(^{78}\).

95. In the view of the EC, what is legally justified, defensible, reasonable and correct must primarily be established taking into account the objectives of the measures, here the protection of human life and health. In this respect, the EC sees no justification whatsoever for exempting certain imports from an import ban which is supposedly necessary for the protection of public health, just because Brazil has agreed to do so in an international agreement. Such discrimination is simply not legally justified, defensible or reasonable. Moreover, Brazil’s interpretation undermines the “chapeau” by allowing WTO Members to agree between themselves on discriminatory measures harmful to other WTO Members.

96. The discrimination in the present case is all the more unreasonable because Brazil is at least partially responsible for the obligation it now invokes. As the EC has already shown\(^ {79}\), if Brazil truly believed that the import ban was necessary to protect human life and health, it could have invoked Article 50 of the Treaty of Montevideo, which protects precisely these interests, in the course of the dispute with Uruguay. However, for reasons which are unknown, remain unexplained or unconvincingly explained, Brazil did not invoke this provision against Uruguay, whereas it now invokes human life and health against the EC. This behaviour deserves to be characterised as “unpredictable” and “capricious”, and thus as arbitrary in the very sense of the word.

\(^{77}\) Brazil’s SWS, para. 149.

\(^{78}\) Brazil’s SWS, para. 148.

\(^{79}\) EC SWS, para. 162.
97. In relation to the used tyres that are imported into Brazil for retreading, Brazil claims that the ban has not been suspended by domestic courts. But this is only a formal description of the current situation, because the Brazilian courts have lifted the ban in several cases for an important, and sometimes unlimited, number of casings. What will happen in the future, as a consequence of the defence of the ban before the courts by the Brazilian Government, is irrelevant for the purposes of this litigation because the facts have to be assessed as they stood when this Panel was established.

98. The fact remains that imports of used tyres constitute an arbitrary and unjustifiable discrimination in relation to the ban on retreaded tyres, because waste arising from both types of imports pose the same life and health risks.

99. For all these reasons and those given in previous submissions, it must be concluded that the import ban of retreaded tyres constitutes an arbitrary and unjustifiable discrimination between countries where the same conditions prevail.

2. The ban constitutes a disguised restriction on international trade

100. In relation to the second requirement of the chapeau of Article XX of the GATT, Brazil continues to elude the core issue: that due to the combination of the import ban, the Mercosur exemption to the ban and the used tyres imported to be retreaded, the export flow of tyres from the EC has been radically altered. The EC no longer exports retreaded tyres to Brazil. This trade has been replaced by exports of used tyres to Brazil and the other Mercosur countries, where they are used to produce retreaded tyres, as the EC has proved notably in the tables inserted in paragraphs 79, 83 and 84 of its First Written Submission.

101. Moreover, Brazil misrepresents one of the EC's allegations in relation to the imports from other Mercosur countries. The EC has never argued that the Brazilian tyre industry benefits by imports of retreaded tyres from Mercosur countries made from imported casings. The EC argument is that Uruguayan

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80 Brazil’s SWS, para. 151.
81 Brazil’s SWS, para. 164.
retreaders benefit from the possibility to import into Brazil retreads from other Mercosur countries.

102. In this context, Brazil alleges that the replacement of EC imports by Mercosur imports is not complete. This argument is irrelevant because there is still some replacement and the rest has been replaced by domestic retreaded tyres or by domestics or imported new tyres. The restriction of international trade is evident.

103. Brazil also claims that it does not protect the Brazilian domestic new tyres manufacturers or its domestic retreading industry. The EC considers those claims completely unfounded.

104. In relation to the protection of its domestic new tyres manufacturers, Brazil continues not responding to the EC’s argument that the two tables inserted in Brazil’s First Written Submission do not demonstrate that Brazil does not protect its domestic new tyres manufacturers, because the tables do not include any estimation of what would have occurred if the import ban on retreaded tyres had not been in place.

105. To demonstrate that the import ban does not protect its domestic retreading industry, Brazil relies on the prohibition to import casings adopted by Portaria SECEX 14/2004. However, as the EC has already explained, this prohibition is not fully enforced in Brazil, and domestic retreaders operate with casings imported from outside Mercosur, including the EC.

106. Brazil also considers that the EC should do everything within their power to stop the exportation of used tyres from the EC to Brazil. The EC finds this argument unacceptable. First of all, retreadable casings are not waste, but valuable raw material for the production of retreaded tyres. Therefore, Brazil is asking the EC to

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82 Brazil’s SWS, para 163.
83 Brazil’s SWS, para. 159.
84 Brazil’s FWS, para. 147 and 148.
85 Brazil’s SWS, para. 161.
86 Ibidem.
violate Article XI:1 of the GATT. In addition, Brazil itself allows the importation of used tyres as raw material for retreaders. Brazil cannot ask the EC to prevent what its own courts allow.

107. Finally, Brazil relies on the negotiation in Mercosur of a common waste policy, which, according to Brazil, would restore the original *erga omnes* application of the import ban. This argument is irrelevant taking into account that it refers to a measure that has not yet been adopted.

108. In conclusion, for all the reasons explained now and those given in previous submissions, the import ban cannot be justified under Article XX (b) GATT.

### III. The fines on importation, marketing, transportation, storage, keeping or warehousing of imported retreaded tyres are not justified under articles XX(b) and (d) GATT

109. As the EC has shown in its previous submissions, the fines imposed by Brazil on the importation, marketing, transportation, storage, keeping or warehousing of imported retreaded tyres are incompatible with Article XI:1 GATT, or, in the alternative, Article III:4 GATT.

110. In its Second Written Submission, Brazil has not made any separate submissions on the fines, but merely characterised them as an "ancillary enforcement measure that must stand or fall with the ban".

111. The EC has demonstrated that the import ban is incompatible with Article XI:1 GATT, and is not justified under Article XX (b) GATT. Accordingly, the Panel should find that the fines enforcing this ban are likewise incompatible with Article XI:1 GATT.

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87 Brazil’s SWS, para 162.
88 EC FWS, para. 169 et seq.; EC SWS, para. 183 et seq.
89 Brazil’s SWS, para. 166.
IV. THE RESTRICTIONS ON THE MARKETING OF IMPORTED RETREADED TYRES AT STATE LEVEL

112. In its submissions, the EC has demonstrated that the restrictions on the marketing of imported retreaded tyres adopted by the Brazilian state of Rio Grande do Sul are incompatible with Article III:4 GATT.90

113. In its Second Written Submission, Brazil has not contested this incompatibility with Article III:4 GATT. However, Brazil has asserted that the state measures do not have legal effect, and that to the extent that they do, they are justified by Article XX (b) GATT.91 The EC does not agree with these assertions. In fact, Brazil has neither shown that the Rio Grande do Sul law does not have legal effect, nor that it would be justified by Article XX (b) GATT.

A. Rio Grande do Sul Law No. 12.114 does have legal effect

114. In support of its argument that Rio Grande do Sul Law No. 12.114 does not have legal effect, Brazil has argued “that to the extent that the state measures purport to regulate interstate or international commerce”, the Brazilian government has exclusive jurisdiction over such matters.92 Moreover, Brazil also submits a legal opinion issued by the Office of the Chief of Staff to the Brazilian President, which recommends that the Solicitor General of Brazil bring an action of unconstitutionality against the Rio Grande do Sul law.93

115. To start with, it is not clear that the Rio Grande do Sul law can be regarded as unconstitutional under Brazilian law. This question arises in particular in respect of paragraph 2 of Article 1 of the Rio Grande do Sul law, which imposes certain disposal obligations on importers of retreaded and used tyres. It appears arguable that such disposal obligations relate to environmental protection, which according

90 EC FWS, para. 181 et seq.; EC FOS, para. 107 et seq.; EC SWS, para. 188 et seq.
91 Brazil’s SWS, para. 195.
92 Brazil’s SWS, para. 197.
93 Brazil’s SWS, para. 198 and Exhibit BRA-156.
to Brazil’s own submission,\textsuperscript{94} falls under the concurrent competence of the Brazilian states and the federal government.\textsuperscript{95}

116. This is implicitly also confirmed by Brazil’s own submissions before the Panel. It is noteworthy that Brazil has refrained from arguing that the Rio Grande do Sul law is unconstitutional in its entirety; it has merely argued that “to the extent it is unconstitutional”, it has no legal effect. Moreover, in Brazil’s First Written Submission, Brazil itself argued that the disposal obligations contained in paragraph 2 of Article 1 of the law had legal effect, and attempted to justify them as “penalties for non-compliance”.\textsuperscript{96}

117. In addition, the EC notes that even if the Rio Grande do Sul law were fully or partially unconstitutional, this does not mean that it does not have legal effect. Rather, as Brazil itself has explained,\textsuperscript{97} in order to have the law declared unconstitutional, a specific action of unconstitutionality is necessary.

118. Brazil has informed the Panel that such an action has been recommended by a legal adviser to the President. However, this information is irrelevant for the purposes of the present proceedings. First of all, it is not clear whether and when such an action will be commenced, nor when and how it will be decided. Moreover, the measure at issue in the present dispute is the state law as in force at the time of the establishment of the Panel. Whether this law might be declared unconstitutional by a Brazilian court at some point in the future is therefore of no consequence for the objective assessment of the facts to which the Panel must proceed in the present case.

119. Finally, Brazil has also argued that import licences will be issued by a federal authority, which will apply federal law only.\textsuperscript{98} However, Brazil does not explain

\textsuperscript{94} Cf. Brazil’s Reply to the Panel’s Question No. 62.

\textsuperscript{95} Cf. EC SWS, para. 201.

\textsuperscript{96} Brazil’s FWS, para. 188.

\textsuperscript{97} Cf. Brazil’s Reply to the Panel’s Question No. 62; cf. equally EC SWS, para. 202.

\textsuperscript{98} Brazil’s SWS, para. 198.
what position the authorities of the State of Rio Grande do Sul would take. Assuming the import ban at federal level were lifted, it is not clear that the Rio Grande do Sul authorities would not interfere with the marketing of retreaded tyres which they consider are imported and sold in Rio Grande do Sul in contravention of Law No. 12.114, for instance because the disposal obligations foreseen in this law have not been complied with.

120. For all these reasons, Brazil has not demonstrated that Rio Grande do Sul Law No. 12.114 does not have legal effect, and the Panel should accordingly rule on this measure.

B. The State law is not justified under Article XX (b) GATT

121. As regards the question of a justification of the Rio Grande do Sul law, Brazil claims that the measure is justified under Article XX (b) GATT, 99 but has so far failed to offer any arguments in support of this claim.

122. Accordingly, since it is Brazil which has the burden of proof to establish that the conditions of Article XX (b) GATT are met, the Panel should find that Brazil has failed to discharge this burden. As regards specifically paragraph 2 of Article 1 of the said law, the EC would like to add that a measure which requires the disposal of ten used tyres for every imported retreaded tyre is manifestly disproportionate, since it cannot reasonably be argued that the importation of one retreaded tyre would lead to an additional amount of ten waste tyres to be disposed of.

123. In conclusion, the Panel should therefore find that the restrictions on the marketing of imported retreaded tyres at state level are incompatible with Article III:4 GATT, and are not justified under Article XX (b) GATT.

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99 Brazil’s SWS, para. 199 (v).
V. **The Mercosur exemption is not justified under Article XXIV or XX (d) GATT**

124. In its Submissions in the present dispute, the EC has shown that the exemption of imports from other Mercosur countries from the ban on retreaded tyres and the associated fines is incompatible with Articles XIII:1 and 1:1 GATT.100

125. Once again, Brazil does not deny this inconsistency. Rather, it argues that the Mercosur exemption is justified under Articles XXIV and XX (d) GATT.101 In addition, in its second written submission, Brazil has also advanced that it is working with its Mercosur partners to eliminate the Mercosur exemption.102

126. However, as the EC will show, the conditions of these exceptions are not met in the present case. The EC will equally show that Brazil’s alleged efforts to remove the Mercosur exemption are both irrelevant and unsupported.

   **A. The Mercosur exemption is not justified under Article XXIV GATT**

127. In accordance with the case law of the Appellate Body in *Turkey – Textiles*, a defending party must fulfill two conditions in order to justify a measure under Article XXIV GATT: first, it must demonstrate that the measure is introduced upon the formation of a customs union that fully meets the requirements of Article XXIV:5 (a) and 8 (a) GATT; and second, 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.103

128. As regards the first condition, Brazil has limited itself to the simple assertion that Mercosur is in compliance with Articles XXIV:5 (a) and 8 (a) GATT, without substantiating this with any sufficient evidence. As regards the second condition, Brazil has been unable to show the necessity of the Mercosur exemption, and has

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100 EC FWS, para. 193 et seq. For the scope of the Mercosur exemption, the EC refers to paras. 210 et seq. of its SWS.

101 Brazil’s FWS, para. 163 et seq.; Brazil’s SWS, para. 167 et seq.

102 Brazil’s SWS, para. 193 et seq.

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 GATT.

1. Brazil has not established that Mercosur is a customs union in accordance with Article XXIV:5 and 8 GATT

   (a) The burden of proof for establishing the conditions of Article XXIV:5 and 8 GATT remains with Brazil

129. In its second written submission, Brazil has continued its strategy of simply asserting, rather than proving, the compatibility of Mercosur with the requirements of Article XXIV:5 and 8 GATT.

130. This strategy is not admissible. It must be recalled that it is Brazil, as the party invoking Article XXIV GATT, which has the burden of proof with respect to the fulfilment of the conditions of this provision. With the exception of a calculation by the Secretariat on weighted average tariff rates,\(^\text{104}\) Brazil has chosen to present almost no evidence to discharge this burden.

131. In its Second Written Submission, Brazil has vaguely referred to “documents submitted by Brazil and its Mercosul partners” to the Committee on Regional Trade Agreements, which it claims to have incorporated into its submission.\(^\text{105}\) However, 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 GATT. The EC considers that this blanket reference does not constitute a sufficient way of discharging Brazil’s burden of proof. The EC would also add that documents submitted to the Committee in 1995 to 1997 do not reflect the current state of affairs on all relevant issues.

132. In this context, it is also important to note that despite the information submitted by Brazil and its Mercosur partners, the Committee on Regional Trade

\(^\text{104}\) WT/COM/1/Add. 15, referred to in Brazil’s SWS, para. 170.

\(^\text{105}\) Brazil’s SWS, para. 173.
Agreements and the Committee on Trade and Development did not reach the conclusion that Mercosur is in compliance with Article XXIV GATT. In fact, in the Committee on Regional Trade Agreements, many WTO Members expressed and continue to express doubts about Mercosur’s compliance with the conditions of this provision.\(^{106}\) 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 GATT.

133. Brazil has also claimed that the EC has recognised Mercosur as a customs union and therefore has recognised that the conditions of Article XXIV GATT are fulfilled.\(^{107}\) This assertion is surprising. Throughout the present proceedings, the EC has clearly and unambiguously stated that Brazil has failed to demonstrate that the conditions of Articles XXIV:5 and 8 GATT are fulfilled.\(^{108}\) Brazil should not be allowed to escape its burden of proof by imputing statements to the EC which the EC has not made.

134. Overall, the burden of proof for establishing that Mercosur is in compliance with Article XXIV:5 and 8 GATT therefore rests with Brazil.

(b) There are open questions regarding the compliance of Mercosur with the conditions of Article XXIV:5 and 8 GATT

135. Moreover, notwithstanding Brazil’s burden of proof, the EC would also like to point to a number of salient issues on which there are open questions as to the compliance of Mercosur with the conditions of Article XXIV GATT.

136. First, Article XXIV:8 (a) (i) GATT 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. In this regard, it is noteworthy that for certain sectors, notably the automotive and the sugar sectors, trade has not

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\(^{106}\) Cf. EC SWS, para. 221.

\(^{107}\) Brazil’s SWS, para. 168.

\(^{108}\) EC Reply to the Panel’s Question No. 76; EC SWS, para. 219.
been entirely liberalised within Mercosur.\textsuperscript{109} As the Mercosur member States have confirmed, the automotive sector alone accounts for approximately 29\% 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) GATT.

137. Second, Article XXIV:8 (a) (ii) GATT 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\% of the tariff lines according to the information given by the Mercosur member States.\textsuperscript{110} 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.

138. It should be stressed that the failure to comply with the requirements of Article XXIV: 8 (a) GATT could not be justified as part of an “interim arrangement” within the meaning of Article XXIV:5 (c) GATT. 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.\textsuperscript{111} Since there appear to be no exceptional circumstances which would justify a longer transition period, this period has already expired for Mercosur.

139. Third, Article XXIV:5 (a) GATT requires that the duties and other regulations of commerce imposed on trade with certain parties shall not on the whole be higher

\textsuperscript{109} Cf. WT/COMTD/1/Add.17, p. 3 (\textit{Exhibit EC-121}).

\textsuperscript{110} Cf. WT/COMTD/1/Add.17, p. 2 (\textit{Exhibit EC-121}).

\textsuperscript{111} Paragraph 3 of the Understanding.
or more restrictive than the general incidence of the duties and other regulations of commerce prior to the formation of the customs union. In this regard, Brazil has referred to calculations of weighted export tariff rates prepared by the WTO Secretariat. However, Brazil has 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 answer to this question is far from obvious. As the measure at issue in the present dispute illustrates, Mercosur countries have adopted and continue to adopt non-tariff measures affecting extra-Mercosur imports and exports. Moreover, the EC 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, these duties are not addressed in the calculations of the Secretariat, either.

140. In conclusion, the EC maintains that Brazil has not demonstrated that the conditions of Article XXIV:8 (a) and 5 (a) GATT are met.

2. Brazil has not shown that the Mercosur exemption is necessary for the formation of the customs union

141. As regards the second requirement established by the Appellate Body, Brazil has not been able to show that the Mercosur exemption was necessary for allowing the formation of Mercosur. Instead, Brazil has contested that it must demonstrate the necessity of the measure.

142. In support of this argument, Brazil relies principally on the findings of the Panel in US – Line Pipe. Brazil argues that according to the findings of this Panel, it is not required to demonstrate that the measure was necessary. Despite the contrary findings of the Appellate Body in Turkey – Textiles, Brazil argues that the reasoning of the Panel in US – Line Pipe “is sound and should not be disturbed”.

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112 Brazil’s Reply to the Panel’s Question No. 75, referring to WT/COMTD/1/Add.15.
113 Brazil’s SWS, para. 181.
114 Brazil’s SWS, para. 183.
143. This reliance by Brazil on the Panel in *US – Line Pipe* is misplaced. It should be recalled that 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 EC considers it odd, to say the least, that Brazil would ask the Panel not to “disturb” findings which the Appellate Body has already overturned.

144. Moreover, the reliance by Brazil on *US – Line Pipe* is also unjustified in substance. The Panel in *US – Line Pipe* did not concern an exemption from a measure which is allegedly justified under Article XX GATT, but rather the question whether the US could exclude its NAFTA partners from the scope of a safeguard measure. However, it is noteworthy that whereas Article XXIV:8 (a) (i) GATT specifically exempts measures justified under Article XX GATT from the need to liberalise substantially all trade, it does not refer to Article XIX GATT, which concerns safeguard measures.

145. Finally, Brazil also greatly over-interprets the findings of the Panel in *US – Line Pipe*. 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 Panel argued 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”.

146. This reasoning manifestly has no application in the present case. The EC 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 EC is arguing that if Brazil were correct that the ban on the importation

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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, and are in addition produced with used tyres imported from the EC.

147. The EC’s reasoning is supported by the explicit wording of Article XXIV:8 (a) GATT, which explicitly excludes measures justified under Article XX GATT from the need to liberalise trade within the customs union. Accordingly, an exemption from such measures cannot be necessary for the purposes of allowing the formation of a customs union.

148. Brazil’s interpretation, in contrast, fails to give any useful meaning to the explicit reference in Article XXIV:8 (a) GATT to Article XX GATT. This is not in accordance with the principle of effective treaty interpretation. As the Appellate Body has confirmed on numerous occasions, 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”.118 This is however precisely what Brazil proposes with respect to the references in Article XXIV:8 GATT to Article XX GATT.

149. For all these reasons, the Panel should find that the Mercosur exemption is not justified by Article XXIV GATT.

B. The Mercosur exemption is not justified under XX (d) GATT

150. In its second written submission, Brazil has also persisted in arguing that the Mercosur exemption is justified under Article XX (d) GATT as a measure “necessary to secure compliance with laws and regulations”.119


119 Brazil’s SWS, para. 184 et seq.
151. In this respect, Brazil has not advanced any new arguments. For this reason, the EC will briefly restate its main concerns, and for the rest refer to the discussion of this defence in its Second Written Submission.\textsuperscript{120}

152. First, Brazil has not shown that Article 21.2 of the Protocol of Brasilia is a “law or regulation” which could be invoked or enforced in the Brazilian legal order. In order to establish such a proposition, Brazil should have shown 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 No 8 of 2000, which had imposed the ban on retreaded tyres. However, Brazil has not provided any such evidence.

153. Second, Brazil confuses the notions of “securing compliance” and “complying”. By adopting the Mercosur exemption, Brazil was undeniably “complying” with its obligations under Mercosur. However, if all the terms of Article XX (d) GATT 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, measures adopted under Article XX (d) GATT are enforcement measures.

154. Third, it is also noted that Brazil’s interpretation would have dramatic consequences for the WTO. If Brazil was right, WTO Members could in the future grant each other advantages without having to justify this under Article XXIV GATT, or having to obtain a waiver, provided only that they have agreed to do so in an international agreement which forms part of their domestic legal order. In this way, the most-favoured nation principle, which the Appellate Body has referred to as a “cornerstone of the world trading system”,\textsuperscript{121} would be rendered almost ineffective. It is submitted 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) GATT.

\textsuperscript{120} EC SWS, para. 239 et seq.

155. Fourth, Brazil has also not demonstrated that the Mercosur exemption was “necessary” as required by Article XX (d) GATT. As certain third parties have also remarked, Brazil could perfectly well have complied with the ruling of the Mercosur Arbitral Tribunal by simply exempting all third countries from the import ban, rather than just its Mercosur partners. Accordingly, Brazil had a reasonable alternative available which it failed to take.

156. Finally, the Mercosur exemption would also not fulfil the requirements of the chapeau of Article XX GATT. In particular, the Mercosur exemption constitutes an unjustifiable and arbitrary discrimination between countries where the same conditions prevail. This is particularly obvious since Brazil even allows the imports of tyres from Mercosur countries which are made from used tyres originating in the EC.

157. For all the reasons set out above, the Panel should reject Brazil’s defence under Article XX (d) GATT as what it is, namely a desperate attempt of justifying the unjustifiable.

C. Brazil’s claim that it is working with Mercosur partners to eliminate the Mercosur exemption is both irrelevant and unsupported

158. In what appears to be a final attempt to obtain clemency for the Mercosur exemption, Brazil has also claimed that it is working with its Mercosur partners to eliminate the Mercosur exemption.123

159. At the outset, it must be remarked that these remarks are irrelevant for the purposes of deciding this dispute. The measure at issue in respect of the EC’s claim under Articles XIII:1 and I:1 GATT is the Mercosur exemption as in force at the date of establishment of the Panel. 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.


123 Brazil’s SWS, para. 193 et seq.
160. Moreover, Brazil’s claim that it would “soon be allowed to prohibit retreaded tyre imports from other Mercosur countries” is also entirely unsupported. In support of this statement, Brazil has submitted a draft Mercosur agreement on waste policy. However, 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 EC therefore sees no basis for Brazil’s statement that it “would soon be allowed to prohibit retreaded tyre imports from other Mercosul countries”. Moreover, it does not appear particularly likely that Uruguay, after having obtained the right to export retreaded tyres to Brazil and Argentina through two Mercosur dispute settlement proceedings, would now agree to a prohibition of these same exports.

161. For all the reasons the EC has set out, the Panel should therefore find that the Mercosur exemption is incompatible with Article XIII:1 and I:1 GATT, and is not justified under any provision of the WTO Agreements.

VI. CONCLUSION

162. In conclusion, the EC reiterates the conclusions it has set out in its First Written Submission.

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163. Thank you for your attention. We are looking forward to answering any questions that the Panel may wish to ask.

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124 Brazil’s SWS, para. 194 and Exhibit BRA-155.

125 EC FWS, para. 223.
LIST OF EXHIBITS

Exhibit EC – 122  Assessment by the Trade Analysis Unit of the European Commission of Exhibit BRA-146, Expert Report of M. Nastari

Exhibit EC – 123  Information about the company “Datagro Limitada”

Exhibit EC – 123  V. Pinheiro & W. Tadei: “Frequency, Diversity, and Productivity Study on the Aedes aegypti most preferred Containers in the City of Manaus, Amazonas, Brazil