Before the Appellate Body
of the World Trade Organization

AB-2007-4

Brazil – Measures Affecting Imports of Retreaded Tyres
(WT/DS 332)

Appellant's Submission
by the European Communities

pursuant to Rule 21 (1)
of the Working Procedures for Appellate Review

Geneva
10 September 2007

Table of cases referred to in this submission[1]

Short Title	Full Case Title and Citation
Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
Brazil — Retreaded Tyres	Panel Report, *Brazil - Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, circulated 12 June 2007
Canada – Autos	Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, 2985
Canada – Dairy	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R and Corr.1, adopted 27 October 1999, DSR 1999:V, 2057
Dominican Republic – Import and Sale of Cigarettes	Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005
EC – Asbestos	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243
EC – Export Subsidies on Sugar	Appellate Body Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
EC – Tariff Preferences	Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 20 April 2004, DSR 2004:III, 925
Japan – Agricultural Products II	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, 277
Korea – Alcoholic Beverages	Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, 3
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
Korea – Various Measures on Beef	Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, 5
Mexico – Taxes on Soft Drinks	Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006
Turkey – Textiles	Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, adopted 19 November 1999, DSR 1999:VI, 2345
US – 1916 Act	Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, 4793

[1] References to the "Panel Report" without further indication of title are references to the Panel report subject of the present appeal.

Short Title	Full Case Title and Citation
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3
US – FSC (Article 21.5 – EC)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, 55
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
US – Section 211 Appropriations Act	Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 1 February 2002, DSR 2002:II, 589
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
US – Shrimp (Article 21.5 – Malaysia)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6481
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323

GLOSSARY

ABIP	Associação Brasileira da Indústria de Pneus Remoldados (Brazilian Association of the Retreaded Tyre Industry)
ABR	Associação Brasileira do Segmento de Reforma de Pneus (Brazilian Association of the Retreading Industry)
BIPAVER	Bureau International Permanent des Associations de Vendeurs et Rechapeurs de Pneumatiques
Commission, EC Commission	Commission of the European Communities
CONAMA	Conselho Nacional do Meio Ambiente (National Council of the Environment, presided by the Ministry of the Environment)
Council, EC Council	Council of the European Union
CTD	Committee on Trade and Development
DECEX	Departamento de Operações de Comércio Exterior (Department of Foreign Trade Operations, part of the Ministry of Development, Industry and Foreign Trade)
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EC	European Communities
EC Treaty	Treaty establishing the European Community
FOS	First Oral Statement
FWS	First Written Submission

GATT	General Agreement on Tariffs and Trade 1994
IBAMA	Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis (Brazilian Institute of the Environment and of Renewable Natural Resources)
INMETRO	Instituto Nacional de Metrologia, Normalização e Qualidade Industrial (National Institute of Metrology, Standardisation and Industrial Quality)
Mercosur	Mercado Común del Sur (Southern Common Market)
SECEX	Secretaria de Comércio Exterior (Secretariat of Foreign Trade, part of the Ministry of Development, Industry and Foreign Trade)
TPR	Tribunal Permanente de Revisión (Permanent Appeals Tribunal of Mercosur)
UNECE	United Nations Economic Commission for Europe
UNECE Vehicles Agreement	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
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

I. INTRODUCTION

1. With the present appeal, the European Communities (EC) is requesting the Appellate Body to review a number of issues of law and legal interpretation contained in the report of the Panel in *Brazil – Measures Affecting Imports of Retreaded Tyres*.[2]

2. The EC agrees with the Panel's overall conclusion that Brazil's import ban on retreaded tyres is incompatible with Article XI:1 GATT, and is not justified under Article XX(b) GATT.[3] However, the EC does not agree with the Panel that the incompatibility of the ban with Article XX(b) GATT is exclusively due to the continued importation of used tyres into Brazil in amounts that could significantly undermine the objectives of the ban.

3. In the view of the EC, in reaching such a limited finding under Article XX GATT, the Panel committed serious errors of law and legal interpretation. In particular, the Panel erred in finding that the import ban was necessary for the protection of human life and health within the meaning of Article XX(b) GATT. Moreover, the Panel equally erred by finding that the exemption of imports from other Mercosur countries does not constitute arbitrary discrimination and does not constitute unjustifiable discrimination because of the allegedly low volume of such imports. The Panel also erred by applying the same quantitative threshold to the continued importation of used tyres into Brazil. Finally, the Panel erred by exercising judicial economy with respect to the EC's claims under Articles XIII:1 and I:1 GATT in respect of the Mercosur exemption.

4. The legal errors committed by the Panel result in an overly narrow finding of incompatibility with Article XX GATT, which would appear to allow Brazil to

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[2] WT/DS332/R, circulated 12 June 2007. At the joint request of the EC and Brazil (WT/DS332/8), the DSB decided, at its meeting on 10 August 2007, that it would adopt the report no later than 20 September 2007, unless (i) the DSB decides by consensus not to do so or (ii) Brazil or the European Communities notifies the DSB of its decision to appeal pursuant to Article 16.4 of the DSU.

[3] Panel Report, para. 8.1.

leave the ban and the Mercosur exemption in place, provided that it reduces the imports of used tyres to a level at which they no longer would "significantly undermine" the alleged objective of the measure at issue, and provided that imports from other Mercosur countries remain below a level at which they would "significantly undermine" the measure at issue. This result improperly diminishes rights which the EC enjoys under the WTO Agreement and does not protect the legitimate trade interests of the EC. Moreover, the undefined quantitative thresholds applied by the Panel would lead to considerable difficulties in establishing whether Brazil has implemented the DSB's rulings and recommendations if the Panel Report were adopted as is. Finally, the legal interpretations of the Panel raise serious concerns of a systemic nature, and for this reason also must be reviewed by the Appellate Body.

5. In the present submission, the EC will first provide an overview of the background of the present appeal. It will then show that the Panel committed several errors in finding that the measure was necessary for the protection of human life and health within the meaning of Article XX (b) GATT. Subsequently, the EC will demonstrate that the Panel erred by finding that the Mercosur exemption does not constitute arbitrary or unjustifiable discrimination contrary to the chapeau of Article XX GATT. The EC will equally show that the Panel erred by finding that the imports of used tyres do not constitute arbitrary discrimination and constitute unjustifiable discrimination only to the extent that they significantly undermine the objectives of the ban. Finally, the EC will show that the Panel erred by finding that the Mercosur exemption does not constitute a disguised restriction on international trade, and that the imports of used tyres constitute a disguised restriction only to the extent that imports are taking place in such quantities that they significantly undermine the objectives of the ban.

6. In the event that the Appellate Body should not find that the Mercosur exemption is incompatible with the chapeau of Article XX (b) GATT, the EC raises a conditional appeal with respect to the Panel's treatment of the EC's most-favoured nation claim. The EC will therefore equally show that the Panel erred in exercising judicial economy in respect of the EC's MFN claim, and that Appellate Body

should find that the Mercosur exemption is incompatible with Articles XIII:1 and I:1 GATT, and is not justified by either Article XXIV or Article XX (d) GATT.

II. EXECUTIVE SUMMARY

A. The Panel Erred by finding that the Import ban was necessary within the meaning of Article XX (b) GATT

7. The Panel committed several errors in finding that the measure was necessary for the protection of human life and health within the meaning of Article XX (d) GATT. First, the Panel failed to assess the contribution made by the ban to the protection of human life and health. Second, the Panel committed several errors in its assessment of the alternatives to the import ban. Third, the Panel erred by not properly weighing and balancing the relevant factors, as required by the case law of the Appellate Body.

1. The Panel erred in assessing the contribution of the measure to the protection of human life and health

8. The Panel committed several legal errors in assessing the contribution of the measure to the protection of human life and health. First, the Panel applied an erroneous legal standard by examining whether the measure *can* make a contribution to the protection of human life or health, rather than establishing the actual contribution of the measure to this objective. Second, the Panel failed to make an objective assessment of the facts and evidence before it, which do not show that the measure makes any contribution to its stated goals. Therefore, Brazil has failed to discharge its burden of proof regarding the contribution made by the ban towards its stated objectives.

(a) The Panel incorrectly applies Article XX (b) by not establishing the actual contribution of the ban to the protection of human life and health

9. The assessment of the contribution of the ban to the protection of human life and health is an essential element of the necessity analysis under Article XX (b). However, the Panel does not seek to establish the actual contribution of the measure to its stated goals, and the importance of this contribution. Rather, the Panel only examines the question whether the measure *can* make a contribution towards the protection of human life and health.

10. The legal standard applied by the Panel with respect to the contribution requirement is inconsistent with the case law of the Appellate Body. In *Korea - Beef*, the Appellate Body explained that one of the factors to be taken into account in the exercise of weighing and balancing was "the contribution *made* by the compliance measure to the enforcement of the law or regulation at issue". Moreover, the Appellate Body also clarified that it was not sufficient to establish the contribution of the measure, but that it was equally necessary to determine the extent of the contribution made.

11. The emphasis placed by the Appellate Body on the establishment of the extent of the contribution flows from the very nature of the weighing and balancing for establishing the necessity of the measure. It is only once the contribution of the measure towards its stated goals has been assessed that this contribution can be weighed and balanced against the other relevant factors as established by the Appellate Body. In contrast, no meaningful weighing and balancing is possible on the basis of the test applied by the Panel, which fails to establish the extent to which the measure makes a contribution to its stated objective.

12. Establishing the actual contribution made by the measure at issue was particularly important given the circumstances of the present case. Retreaded tyres are safe products, which do not as such pose any particular risks to human life or health. The risks to human life or health referred to by Brazil rather relate to the large amounts of improperly managed waste tyres which, according to Brazil, litter the countryside in Brazil. Therefore, in order to demonstrate that its ban made any

contribution to the protection of public life and health, it would have been necessary for Brazil to demonstrate that the ban actually results in a reduction of waste tyres arising in Brazil.

13. The approach of the Panel contrasts sharply with its approach under the chapeau of Article XX GATT, where it qualified the importation of 2,000 tons of retreaded tyres in 2004 from other Mercosur countries as insignificant from the point of view of the objectives of the ban. However, if the Panel considered 2,000 tons of retreaded tyres to be an insignificant amount, it should then also have established whether the ban reduces the number of waste tyres arising in Brazil by a larger amount. However, this the Panel did not do. The overall approach taken by the Panel to the assessment of the contribution of the measure is legally wrong, contradictory and arbitrary, and for these reasons must be reversed.

(b) The Panel's findings regarding the potential contribution of the ban are contradictory, and not based on an objective assessment of the facts

14. The Panel's findings of fact regarding the potential contribution made by the ban, and in particular its findings that Brazilian domestic tyres are suitable for retreading and are being retreaded, is not based on an objective assessment of the facts. In particular, the Panel has ignored important facts and arguments presented by the EC, and has referred to the evidence submitted to it in a selective and distorted manner. Moreover, by relying purely on a potential capacity of the ban to contribute to the stated objective, the Panel has effectively shifted the burden of proof from Brazil to the EC.

15. First, the Panel concludes that all new tyres sold in Brazil are of a quality and construction that they can be retreaded after a first use. However, this statement is not based on any actual evidence, and is directly contradicted by evidence submitted by the EC.

16. Second, as regards retreadability after use of passenger car tyres arising in Brazil, as well as their actual rate of retreading, the Panel has selectively based its conclusion on two arbitrarily chosen pieces of evidence, namely a report prepared

by the Brazilian Retreaders Association ABR and Technical Note 001/2006 issued by the Brazilian standardisation authority INMETRO. However, neither document supports the conclusion which the Panel draws from it. Moreover, the Panel omits to consider equally relevant information which contradicts its conclusion.

17. The Panel's arbitrary approach to the evidence before it is illustrated, for instance, by its reliance on INMETRO Technical Note 001/2006. This note was issued on 16 February 2006, i.e. at a time when the Panel had already been established. Moreover, the Note is directly contradicted by an earlier note of INMETRO of 2000, which clearly stated that Brazilian tyres are typically not suitable for retreading due to the domestic conditions of use. It is unclear why the Panel would base itself exclusively on a Technical Note by INMETRO issued during the Panel proceedings, and therefore at a time when Brazil was already well aware of the significance of INMETRO's statements for those same proceedings, and at the same neglect a contradictory note from the same authority dating back to 2000, i.e. the very year in which the ban was imposed.

18. Finally, the Panel seeks to bolster its conclusions by reference to various measures that Brazil might adopt for promoting the retreading of domestic tyres *in the future*. The Panel engages in such speculation, for instance, when it comes to the automotive inspections as a tool for ensuring the regular replacement of tyres, thus ensuring their retreadability, where it relies on a legislative proposal pending in the Brazilian senate in order to support its view that vehicle inspections might become more regular in the future. This approach is fundamentally flawed. The question whether the import ban has made a contribution must be determined as at the time of the establishment of the Panel. Therefore, the objective assessment of the facts must be based on the facts available at that time.

(c) Brazil has failed to discharge its burden of proof concerning the contribution made by the ban to the protection of human life and health

19. On this basis, Brazil has failed to discharge the burden of proof incumbent on it, as the party invoking Article XX GATT, to demonstrate that the ban makes an actual

contribution to the protection of human life and health. For this reason already, the justification of the measure under Article XX (b) GATT must fail.

20. Should Brazil request the Appellate Body to complete the analysis of the Panel in this respect, such a request would be manifestly unfounded. The contribution made by the ban is a question of fact. However, in accordance with Article 17.6 of the DSU, the Appellate Body does not have the competence to make findings of fact. The Appellate Body may complete the legal analysis only in cases where the factual findings established by the Panel and the undisputed facts on the record enabled it to do so.

21. In the present case, there are no findings of fact of the Panel, or undisputed facts on the record, which would allow the Appellate Body to establish the actual contribution made by the ban to the reduction of the number of waste tyres, and consequently to the protection of human life and health. The parties did agree merely on the fact that that under the applicable international standards, tyres for passenger car vehicles may be retreaded only once. The parties also agree that tyres for commercial vehicles such as trucks and buses may in practice be retreaded up to four times, and tyres for aircraft up to eight or more times. However, the parties did not agree on what the implications of these facts are for the contribution of the ban to the reduction of the number of waste tyres arising in Brazil.

22. The prohibition of the importation of retreaded tyres could only result in a reduction of the number of waste tyres if the imported retreaded tyres were replaced either by new tyres, which are then actually retreaded after use, or by retreaded tyres which are made from tyres that have been used domestically in Brazil. This question, in turn, crucially depends on whether and to which extent tyres used domestically in Brazil can be, and in fact are being retreaded after use. Due to the conditions of usage in Brazil, Brazilian passenger car tyres are typically no longer retreadable after use. For this reason, a new tyre used in Brazil is typically no longer retreadable after its first use, and must be discarded. For the same reason, retreaded passenger car tyres produced in Brazil are overwhelmingly

not produced from tyres used domestically, but from used tyres imported under Court injunctions.

23. The Panel's statement that Brazil's industry has the "capacity" of retreading domestic used tyres is unhelpful for assessing the contribution made by the ban. That Brazil's industry may have the capacity to retread tyres has nothing to do with the question whether, and to which extent, it actually retreads domestic passenger car tyres. As the EC had explained, the retreading of passenger car tyres in Brazil largely occurs with imported used tyres. Accordingly, whether Brazil's industry has the capacity to retread tyres has no relevance for the question of whether Brazilian domestically used tyres are actually being retreaded.

24. As regards tyres for commercial vehicles and aircraft, the Panel's findings are equally deficient. For these tyres, the Panel limits itself to the simple statement that all types of retreaded tyres by definition have a shorter lifespan than new tyres. Apart from the fact that this is not true, since it assumes that the new tyres will necessarily be retreaded, this statement also does not allow assessing the actual contribution of the ban to the reduction of the number of waste tyres arising from commercial vehicles and aircraft. By the Panel's own admission, there is a large degree of uncertainty as regards the remaining useful life of an imported retreaded tyre for trucks or buses. Given that aircraft tyres can be retreaded far more frequently, this uncertainty is even larger for retreaded aircraft tyres. Thus, the Panel's reasoning amounts to allowing the banning of products on the basis of potentially minor differences in the theoretical length of the useful life of a tyre, without assessment of the actual difference.

2. The Panel erred by finding that there were no reasonably available alternative measures

25. The Panel also committed several legal errors in finding that there were no reasonably alternative measures to the import ban ensuring the same level of protection of human life and health.

(a) The Panel incorrectly excludes a better enforcement of the import ban on used tyres from consideration as an alternative

26. The Panel explains that, for the purpose of assessing whether the import ban is necessary, it will not examine the manner in which the measure is implemented *in practice*, notably in the case of the court injunctions leading to imports of used tyres for the purpose of being retreaded in Brazil.

27. There is no justification for excluding these issues in the analysis of alternatives. What is essential for this question is whether a measure contributes to the attainment of the objectives of the ban.

28. The most evident alternative to the import ban on retreaded tyres is precisely to put an end to the import of used tyres, because, as the Panel has declared, some of these used tyres are not retreaded and end up as waste in Brazil and the adverse impact of these imports is greater than the importation of the same tyres after retreading abroad would be.

29. The fact that the issue of the imports of used tyres for the purposes of being retreaded in Brazil is also assessed under the chapeau of Article XX of GATT does not impede to consider that an effective import ban on used tyres constitutes an alternative measure to the import ban on retreaded tyres. Indeed, used tyres are a different product compared to retreaded tyres and different measures can be applied to each of them, as the evolution of the Brazilian legislation, shows: while since 1991 the import of used tyres has been banned in Brazil, the import ban on retreaded tyres was only adopted in the year 2000.

(b) The Panel applies an incorrect meaning of alternative

30. On several occasions the Panel defines an "alternative" as a measure that must avoid the waste tyres arising specifically from imported retreaded tyres, reduce the number of waste tyres additionally generated by 'imported short-lifespan retreaded tyres' or reduce the 'generation' of tyre waste as much as possible.

31. This approach by the Panel does not correspond to the objective allegedly pursued by the challenged measure, namely the reduction of some specific risks to life and health deriving from waste tyre accumulation. The Panel's approach is, therefore, an erroneous and unacceptable standard to decide whether a practice is a reasonably available alternative for the purposes of Article XX(b) of the GATT.

32. The Panel links the notion of alternative not with the objectives of the measure challenged, but to the means (avoidance or non-generation of waste tyres, in our case) employed by the measure to obtain its objectives. The Panel only accepts non-generation alternatives to the import ban. This reflects a fundamental misunderstanding of the nature of the notion of available alternatives: these are not alternatives equal to a waste non-generation measure (the import ban, assuming for the sake of argument that it were to serve that objective), but alternatives, even if they consist in managing 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 and from tyre fires emissions.

33. This notion of alternative is inconsistent with the case law of the Appellate Body. In *EC – Asbestos*, the Appellate Body stated that "the remaining question was whether there was an alternative measure that would achieve the same end and that is less restrictive of trade than a prohibition" (the measure in that case). In *Korea – Various Measures on Beef*, the Appellate Body looked into the less trade-restrictive available alternatives taking into account the objective of the measure challenged: the fight against fraud with respect to the origin of beef sold by retailers. Finally, in *US – Gambling*, the Appellate Body affirmed that "a 'reasonably available' alternative measure must be a measure that would preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued […]".

34. Moreover, the application of this notion of alternative implies the rejection of several alternatives presented by the EC.

35. As regards measures to improve retreading and retreadability, the Panel simply argues that such measures would not in any way reduce the tyres additionally generated by "imported short-life span retreaded tyres", and that such measure

could be "cumulative rather than substitutable" with the ban. This reasoning is manifestly erroneous. If a measure is cumulative or complementary to the ban, then this is because it is capable of achieving the same objectives as the ban, but in a different way. However, if it is capable of achieving the same objectives, then clearly it is an alternative, which the Panel should have taken into account.

36. As regards the CONAMA scheme, the Panel eliminates an alternative where the importers of retreaded tyres are under the obligation to collect and ensure the environmentally appropriate final disposal of four unusable tyres in Brazil for every three retreaded tyres imported. As the Panel admits, the scheme "contribute[s] to reducing the accumulation of waste tyres and consequently to reducing the type of risks […] in relation to the accumulation of waste tyres". However, the Panel rejects this scheme as an alternative only on the basis of its wrong notion of alternative.

37. This rejection is a fundamental legal error in the Panel's analysis because it implies a global and direct rejection of those disposal methods concerning waste tyres management that, according to Brazil's legislation, the Brazilian states environmental authorities usually approve: "co-processing in cement kilns, co-processing with bituminous schist, rubber asphalt, rubber products and appliances". Thus, the Panel's narrow definition of alternative implies that several disposal methods, which are accepted in Brazil, cannot be considered as alternatives to the import ban on retreaded tyres.

38. In relation to co-incineration of waste tyres, which, as it is admitted by the Panel, is one of "the currently available disposal methods capable of handling the existing volume of waste tyres", the Panel seems to accept it only if the practice produces zero emissions: i.e., if emissions are inexistent and not only equal or below the emissions produced by the relevant installations when they burn conventional fuel without replacing a portion of that fuel by waste tyres. This is an impossible result and it is tantamount to rejecting this available alternative on the basis that the acceptable alternatives are only those avoiding the generation of waste tyres and not those reducing the risks of waste tyre accumulation.

39. The Panel committed further legal errors in the interpretation of Article XX(b) in applying other standards to the question of whether a certain measure is an alternative. Under consistent Appellate Body jurisprudence, the standard is that of an alternative measure that is "reasonably available". Yet, when dealing with landfilling, the Panel did not enquire what options were reasonably available, but instead focused on how tyres accumulate in landfills "in reality".

40. Similarly, in relation to the harmfulness of tyre co-incineration emissions, the Panel relies on the fact that emission levels can vary largely, depending on the operating conditions of the facilities and their emission control technology. Again, the legally correct question is what alternative option exists and whether it is reasonably available. The fact that certain options (e.g. the best available technology) are not employed somewhere is irrelevant as long as those options are reasonably available. Further, the Panel casts doubt on the availability of the technology, asserting that the best technology "is not necessarily readily available, mostly for financial reasons". Again, the correct legal standard is not whether the alternative is "necessarily readily available", but whether it is "reasonably available".

(c) The Panel incorrectly finds that some practices already existing in Brazil or capable of disposing a small number of waste tyres are not alternatives and that, taken collectively, the available alternatives do not allow an appropriate management of waste tyres

41. The Panel rejects the scheme established by Resolution CONAMA 258/1999 and other schemes, like Paraná Rodando Limpo, because they have already been implemented in Brazil.

42. However, Brazil is not ensuring the implementation of the CONAMA scheme. This can clearly be deduced from the very high figures of incidents of non-compliance in an official IBAMA press release of June 2005, which gives evidence of fines against 8 companies. The total amount of unfulfilled tyre disposal obligations in 2005 recorded there is around nearly 70 million waste passenger tyres. Moreover, measured against 70 million non-disposed tyres, these

fines result in an amount of 0.30 R$ per tyre (60 R$ per tonne), which is extremely low and much lower than the saving, namely the cost of disposal. In violation of Article 11 of the DSU, the Panel ignored this evidence and did not deal with the question of insufficient implementation of the system established by CONAMA Resolution 258/1999.

43. Ensuring a correct and complete implementation of the CONAMA scheme is an alternative to the import ban that would be more effective than the import ban in reducing tyre waste and risks associated with it: 70 million waste passenger tyres improperly managed under the system is a figure far higher than the number of retreaded tyres imported from all sources before the imposition of the ban. The ratio is even higher if measured against the reduction in the number of waste tyres that the import ban on those retreaded tyres could have resulted in, if any.

44. Moreover, a similar conclusion should be reached in relation to other schemes like the Rodando Limpo programmes, because not all States in Brazil (or the Union itself) have so far adopted supplementary systems to the one established by the Union through CONAMA Resolution 258/1999. The Panel Report is completely silent on this important issue.

45. The Panel also finds that most of the material recycling alternatives, notably civil engineering uses, rubber asphalt and production of different products, are only capable of disposing a small or limited number of waste tyres and, therefore, cannot constitute a reasonably available alternative to the import ban.

46. These considerations made by the Panel are legally erroneous, because they do not correspond to the notion of alternative as defined by the Appellate Body. An alternative measure is one that achieves the same end as the challenged measure and that is less restrictive of trade. The case-law of the Appellate Body does not require that one single alternative measure achieves the same objective of the challenged measure and, therefore, does not allow to reject, as the Panel has done, several alternative measures just because, taken individually, one by one, they do not attain the objective of the challenged measure.

47. The Panel is also legally wrong in stating that "[t]he safest methods (material recycling) are useful but insufficient on their own to absorb the entire amount of waste from end-of-life tyres".

48. The Panel has not taken into account that the alternatives measures are those aiming to replace the import ban on retreaded tyres, while, at the same time, solving the problems raised by the additional waste tyres from those retreaded tyres. Contrary to what the Panel has declared, the alternatives measures do not have to be capable of dealing with the safe management of all the waste tyres arising in Brazil (40 million tyres every year, according to Brazil). Thus, the alternatives to the import ban only need to be capable of managing safely a number of waste tyres that corresponds to the number of waste tyres which the import ban on retreads avoids, if any. Because of its legally wrongful approach to the contribution factor, the Panel has never calculated this figure. The Panel's further legal mistake regarding the benchmark for alternative measure undermines the validity of the Panel's findings on alternatives.

49. Finally, the Panel has never made any analysis of the alternative measures taking them collectively. Rather, the Panel dismisses individual alternatives because it believes that they are not able to solve the problems in its entirety.

(d) The Panel's findings on alternatives are not based on an objective assessment of the facts

50. The Panel's findings of fact regarding alternatives are not based on an objective assessment of the facts, because the Panel has ignored important facts and arguments presented by the EC, and has referred to the evidence submitted to it in a selective and distorted manner.

51. In relation to landfilling of waste tyres, as the Panel admits in its report, the EC only proposed as an alternative the landfilling of shredded waste tyres. However, when the Panel identifies the problems related to this alternative, it does not take into account that the evidence on which it relies for its findings refers only to landfilling of whole tyres. Therefore, the Panel's analysis on the risks related to

the landfilling of waste tyres is not based on evidence and does therefore not constitute an objective assessment of the facts.

52. In any case, the pertinence of landfilling shredded tyres as an available alternative measure is a fact admitted by Brazil, because Brazil allows the landfilling of shredded tyres on its territory (Article 1 of Joint Resolution SMA/SS 1/2002, of 5 March 2002). The penultimate recital of this Joint Resolution recalls that CONAMA Resolution No. 258, of 26 August 1999, stipulates that final disposal of waste tyres shall be carried out through environmentally sound measures.

53. The Panel has not taken into account this legislation in its analysis of landfilling as an alternative. However, Brazil explained before the Panel that "[t]he regulation permitted landfilling of shredded tyres in the State of São Paulo explicitly in response to a significant jump in dengue cases in 2002". This is a clear recognition of the importance of this alternative in order to fight against mosquito-borne disease, which is one of the two objectives of the import ban on retreaded tyres. Consequently, it has to be concluded that Brazil considers landfilling of shredded tyres as a suitable way of waste tyres management. Therefore, the Panel erred in not taking into account evidence submitted to it and in rejecting this practice as an alternative to the import ban.

54. As regards controlled stockpiling, the Panel observes that it does not dispose of waste tyres and that the accumulation of waste tyres, even in stockpiles designed to prevent the risk of fires and pests, may still pose considerable risks to human health and the environment. These two statements, on which the Panel bases its rejection of stockpiling as an alternative to the import ban, do not correspond to an objective assessment of the facts.

55. Controlled stockpiling is not a final disposal operation, but it is a disposal operation according to Annex IV to the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal. Moreover, it plays an important role in waste tyres management, as the discussion paper "A National Approach to Waste Tyres", prepared by the Atech Group for "Environment Australia", explains. Consequently, controlled stockpiling is a

crucial element in managing waste tyres, and, therefore, the Panel erred in rejecting this practice as an alternative to the import ban.

56. Co-incineration is rejected as an alternative by the Panel on the basis that "the question still remains whether toxic chemicals emitted by incineration of waste tyres, regardless of the level of emission, may potentially pose health risk to humans" and that "health risks exist […], even if such risks can be significantly reduced through strict emission standards".

57. This approach is erroneous. Brazil should have demonstrated that installations co-incinerating waste tyres produce more emissions of hazardous substances than those installations only using conventional fuels, even if the emission levels are under the regulatory limits in both cases. Nothing of this sort can be found in the Panel findings. On the contrary, evidence quoted by the Panel affirms that "studies on the use of tyres in cement kilns have generally concluded that the impacts are either positive or neutral compared to the combustion of other fuels". Accordingly, the Panel should have declared that Brazil did not provide evidence to demonstrate that co-incineration is not an alternative to the import ban.

58. The Panel's findings in this relation therefore amount to an effective shift of the burden of proof which Brazil bore for the assertion that the alternative measures pointed out by the EC were not reasonably available.

59. The EC has never asked Brazil to build new industrial installations just to burn more waste tyres, but to use the existing installations that are burning only conventional fuels or that are not co-incinerating waste tyres at their full capacity. Brazil provided no evidence on the lack of unused capacity in its industry to burn more waste tyres.

60. The report quoted by the Panel also mentions that the comparative analysis between installations burning or not waste tyres "needs to be considered on a case-by-case basis as it is dependent on good operating practice as well as the particular characteristics of the tyres used and the kiln". Brazil should have proved that its cement, paper and steel installations were not capable of co-incinerating waste tyres while, at the same time, ensuring that the relevant levels of emissions are respected. The Panel should have analysed this evidence on the basis of the

Brazilian legislation on emissions from co-incinerating installations. Once again, Brazil never provided evidence on the capacity of its industry to burn safely waste tyres and the Panel relied on superficial and general evidence on co-incineration activities in other countries (mainly the USA) to conclude that, for Brazil, co-incineration is not an available alternative to the import ban.

61. The reports presented by Brazil, and on which the Panel relies as evidence to back its findings that "toxic chemicals emitted by incineration of waste tyres, regardless of the level of emission, may potentially pose health risks to humans", are not representative of the current state of the art regarding energy recovery as an alternative and, in some cases, their use is biased.

62. Moreover, the scientific evidence shows that incineration of waste tyres in cement kilns does not influence or affect the emissions of dioxins and furans, reduces SO^2 emissions and does not increment emissions for lead, nickel, chromium and cadmium.

63. In that respect, the Panel has completely ignored recent evidence provided by the EC clearly contradicting its finding. Thus, the European Communities presented a 200-page study by SINTEF for the World Business Council for Sustainable Development – Cement Sustainability Initiate - which says that "the ranges of PCDD/Fs emission concentration resulting from the use of conventional fuels such as coal and petcoke overlap with the ranges obtained with the use of secondary fuel, regardless of the type of secondary fuel" , and that "[…] [it] should be noted that the higher emissions measured in the USA were from wet kilns whereas the lower emissions (several hundred measurements) from European cement kilns were obtained from plants using the dry process". This evidence proves that those reports from the USA, which Brazil attached to its FWS and SWS, are not studies on the current state of the cement industry, which now prefers to use the dry process because of its far lower fuel consumption.

64. Finally, the Panel relies on biased and anecdotal evidence (a paper from Energy Justice Network and a presentation by the West Virginia Environmental Council) concerning some installations in the United States to demonstrate that doubts existed "on the credibility of trial burns in cement kilns", and "as to the exact level

of toxic emissions, in particular since the emission results of the trial burns may not accurately reflect actual emission levels". Both documents contain the same quotation, reproduced by the Panel in its Report, from a letter by Greenpeace addressed to environmental activists on "new data from the Modesto Incinerator".

65. These documents cannot be considered as scientific evidence and Brazil should have provided evidence on trial burns in cement kilns in its territory. Brazil failed to do so and, therefore, the Panel assessment was made on the basis of evidence that was neither reliable not related to the situation in Brazil.

66. Regarding material recycling, the Panel concludes that *it is not clear that these applications are entirely safe*. The Panel reaches this conclusion without comparing the risks that these alternatives present, if any, with the risks arising from mosquito-borne diseases and waste tyres fires, which are the objectives that the import ban attains to eliminate.

67. Moreover, when analysing the different applications, the Panel only makes that finding in relation to one specific application: civil engineering. The Panel, therefore, reaches a general conclusion, which, in relation to other material recycling applications, is not supported by the findings it has previously made. This is a violation of Article 11 of DSU, as the Appellate Body has declared in *US – Carbon Steel*.

68. Furthermore, to reach the conclusion that some civil engineering applications are not sufficiently safe, the Panel relies only, in relation to water-dwelling organisms, on a six pages publication by an unidentified organisation called Projekt Grön Kemi. However, the Panel has disregarded, without explaining the reasons, the evidence provided by the EC in relation to civil engineering, notably a 123 pages report produced by HR Wallingford Ltd., in March 2005, for the UK Department of Trade and Industry and the Environment Agency, which explains the different re-uses of tyres in port, coastal and river engineering and concludes that the overall risk of damage to the environment and human health is expected to be reduced to low to near zero.

69. Regarding material recycling, the Panel also concludes that that these applications "would not be able to dispose of a quantity of waste tyres sufficient to achieve Brazil's desired level of protection due to their *prohibitive cost*".

70. Once again, the Panel infers as general conclusion for the material recycling alternatives (that their costs are prohibitive) something that it has found in relation to only one of the alternatives: devulcanization. In relation to civil engineering and rubber asphalt, the Panel concludes that their costs are "high". But high costs are not a reason to exclude an application from the list of available alternatives. The Appellate Body has declared in *US – Gambling* that "an alternative measure may be found not to be 'reasonably available' […] where the measure imposes an undue burden on that Member, such as prohibitive costs".

71. Therefore, that an alternative bears "high costs" is not a sufficient reason to declare that an activity is not a reasonably available alternative without analysing previously whether there are other factors off-setting the high costs or whether the high cost is economically viable because it can be charged to users or consumers. In that regard, the only piece evidence on which the Panel relies to reach its finding on the high costs of rubber asphalt applications states that "this seems to be a promising outlet for recycled rubber because rubberised asphalt lasts longer than conventional asphalt". Evidence provided by the EC, which the Panel has not taken into account in its Report, also supports that "[…] all agree that, even though asphalt rubber is more expensive, it is more durable, which compensates for the high cost…"

72. Moreover, the Panel's report does not take into account a measure that has been adopted by Brazil to improve the management of waste tyres. The National Dengue Control Programme, adopted on 24 July 2002 by the Brazilian Health Ministry, refers to 100.000 grinders for shredding tyres, which will be provided to the municipalities to support the use of tyres as raw material for the construction of houses. Brazil did not rebut that this measure contributes to the better management of waste tyres in its territory and did not explain, either, to what extent this alternative was really implemented and its unused capacity to manage waste tyres.

3. The Panel erred by not weighing and balancing the relevant factors and the alternatives

73. The Panel did not carry out a proper, if any, weighing and balancing of the different factors in its Report, notwithstanding its statement that "the Panel's assessment of the necessity of the measure under Article XX(b) will be the result of a 'weighing and balancing' process, taking into account the factors considered […] and the availability of a less trade-restrictive alternative measure".

74. First, the Panel did not carry out a real weighing of the trade effects of the measure. The Panel merely points out, by referring to *EC – Asbestos*, that "there may be circumstances in which a highly restrictive measure is necessary, if no other less trade-restrictive alternative is reasonably available to the Member State concerned to achieve its objective".

75. This reference to *EC – Asbestos* does not take into account that the measure at stake in that case was not primarily an import ban, which is the only measure in the present case, but that it was a general ban on the product, including an internal prohibition on the production, processing and marketing, coupled with export and import bans. In contrast, Brazil has banned imports of retreaded tyres, whereas both the domestic production and marketing, and well as the exportation of retreaded tyres, remain allowed. The analogy that the Panel draws between *EC – Asbestos* and the present case is incorrectly based on the comparison of cases that are not similar or equivalent and it is, therefore, false.

76. Second, the Panel makes an insufficient and incorrect analysis of the contribution of the measure to the objective pursued, because, first, it applies an erroneous legal standard by examining whether the measure *can* make a contribution to the protection of human life or health, rather than establishing whether the measure actually contributes to this objective, and, second, the Panel did not establish the extent of the measure's contribution. Logically, any weighing and balancing requires knowledge not only of the existence of a contribution, but also of its magnitude. Third, the Panel fails to make an objective assessment of the facts and evidence before it, which do not show that the measure makes any contribution to its stated goals. Accordingly, since the Panel failed to establish the extent of the

actual contribution the ban makes to the reduction of the number of waste tyres arising in Brazil, and indirectly to the goal of protecting human life and health, it was incapable of "weighing and balancing" this contribution against any of the other relevant factors.

77. Moreover, the Panel does not take into account that the risks to life and health, which the challenged measure purports to eliminate, are not directly linked to retreaded tyres but to the waste into which they turn after several years. Furthermore, the level of risk will depend of the manner in which waste tyres are managed and disposed of. All this implies that the potential contribution of the measure to the objective attained is minimal because the risk of the objective being jeopardised is indirect, uncertain and relative.

78. Third, the Panel bases also its "weighing and balancing" exercise on the wrong analysis it has made of the alternatives, as it has been explained above.

79. Moreover, in the context of the relation between the trade effects of the measure and the alternatives, the Panel did not take into account the polluter-pays principle, as laid down in Principle 16 of the Rio Declaration on Environment and Development.

80. This principle is important to find a balanced solution to the case. Indeed, sound waste tyres collection and disposal schemes allow charging the environmental costs on the relevant operators/consumers, while ensuring, at the same time, a high level of environmental protection with no distortion of international trade. This is precisely what the Brazilian CONAMA scheme ensures: by obliging the importers of retreaded tyres to collect and ensure the environmentally appropriate final disposal of four unusuable tyres for every three retreaded tyres imported charges the environmental costs of the imported retreaded tyres on the importers (and indirectly on the consumers of imported retreaded tyres), while, at the same time, contributing to the disposal of one further waste tyre for every three retreaded tyres imported. Finally, the implementation of the CONAMA scheme is considerably less trade-restrictive than the import ban on retreaded tyres.

81. The Panel concludes its analysis of the necessity of the import ban stating that "[i]n 'weighing and balancing' [the] elements, the Panel is mindful of the specific circumstances of the case", and, then, it analyses certain issues. This analysis, which is the only part of the report where the Panel refers to the "weighing and balancing" exercise, summarizes all the errors the Panel has made in relation to contribution, trade-restrictiveness and alternatives. First, the Panel repeatedly refers to the idea of avoiding the waste without considering that alternatives can consist in another type of measure, provided that they ensure that the objective pursued by the measure is also attained. Second, the Panel also refers to a global assessment of the measures, not just an individual analysis, one by one; however, the Panel has not carried out that exercise in its Report. Third, the Panel insists on the idea that some of the measures have already been implemented by Brazil, without verifying, as the EC has already explained, to what extent that implementation is real and complete. Fourth, the Panel refers to the risks arising from the disposal of waste tyres, while this kind of risks is not within the boundaries of the objective of the import ban. Finally, the Panel carries out his "weighing and balancing" exercise without "balancing" its arguments about the measure and the alternatives with the absolute trade-restrictiveness of the import ban and with a real evaluation of the contribution of the import ban to the objective pursued.

82. The ruling of the Appellate Body on this issue will have considerable implications on how retreaded tyres will be regarded worldwide in the future. If the banning retreaded tyres is necessary to protect human life and health, other countries may equally feel encouraged to impose similar bans. This would mean that retreaded tyres would become a product which might be increasingly excluded from international trade. Such a result would be diametrically opposed to the interests of environmental protection and responsible waste management. Retreaded tyres are environmentally friendly products, and their production, use, and international trade should therefore be encouraged, rather than discouraged. Moreover, the development of uniform technical prescriptions (like the UNECE Regulation 108 and 109), precisely aims, among other things, at the facilitation of international trade of automobile products.

83. Moreover, issues relating to Article XX (b) GATT have implications that go beyond retreaded tyres. Retreaded tyres are not unique in having implications from the point of view of waste management. All products eventually turn into waste, and many products turn into waste which is as or even more problematic than waste tyres (for instance where the waste, unlike that of tyres, qualifies as "hazardous waste"). If it were possible to ban the importation of products simply because of the fact that they eventually turn into waste which may be difficult to dispose of and *arguendo* possibly faster than other products, then many products might in the future become affected by similar trade bans, from short-life toys and electronic consumer goods to lower-quality cars and short-life batteries to beverages bottled in plastic containers rather than in glass. The Panel did not take into account this perspective when concluding on the weighing and balancing of the factors and alternatives.

4. The Appellate Body should find that the measure is not necessary

84. In addition to reversing the Panel's findings concerning the necessity of the measure, the Appellate Body Appellate Body should also find that Brazil has failed to establish the necessity of the import ban on retreaded tyres.

85. The EC recalls that, in cases were a measure has been justified on the basis of Article XX(b) of the GATT, the burden of proof concerning the necessity of the measure is incumbent upon the respondent. In our case, Brazil had to prove that the measure made a contribution to its stated objectives, and that the alternatives to the import ban on retreaded tyres presented by the EC are not reasonably available to Brazil. If Brazil failed to do so, the measure will not be considered necessary.

86. This is precisely what has happened in this case. As the EC has explained above Brazil has not established that the measure made a contribution to its stated objectives. Moreover, in order to conclude that the measure challenged is necessary to obtain the objectives pursued, Brazil and the Panel have relied on a notion of alternative that is contrary to the concept of alternative contained in the case-law of the Appellate Body. As a consequence, if the Appellate Body agrees

with the EC's position in this case, the whole analysis made by the Panel in relation to the necessity of the measure is flawed. The consequence will be that Brazil has not proved that the import ban on retreaded tyres is a measure necessary to attain the objectives pursued by Brazil.

B. The Panel Erred by Finding that the Mercosur Exemption does not constitute arbitrary or unjustifiable discrimination contrary to the Chapeau of Article XX GATT

87. The Panel's finding that the Mercosur exemption does not constitute arbitrary or unjustifiable discrimination contrary to the chapeau of Article XX GATT is marred by serious errors of law. First, the Panel erred in finding that the fact that Brazil complied with international obligations under Mercosur precludes the existence of arbitrary discrimination. Second, the Panel equally erred in holding that the Mercosur exemption does not constitute unjustifiable discrimination because of the allegedly insignificant volumes of such imports.

1. The Panel erred in finding that the fact that Brazil complied with international obligations under Mercosur precludes the existence of arbitrary discrimination

88. The Panel's finding that the Mercosur exemption could not be regarded as constituting arbitrary discrimination because of the fact that Brazil had introduced this exemption in order to comply with a Mercosur ruling is incompatible with the chapeau of Article XX GATT. First, in reaching this finding, the Panel applied a wrong definition of what constitutes "arbitrary discrimination". Second, the Panel erred that Brazil's intention to comply with an international agreement could justify the discrimination under the chapeau of Article XX.

(a) <u>The Panel applied a wrong definition of "arbitrary discrimination"</u>

89. The Panel applied a wrong definition of what constitutes "arbitrary discrimination". According to the Panel, an act is only "arbitrary" if it is "capricious" or "unpredictable", or as "capricious" and "random". This definition

of arbitrary discrimination, as applied by the Panel, is not in accordance with the chapeau of Article XX GATT.

90. The Panel's interpretation fails to take into account the object and purpose of Article XX GATT, as required by the customary principles of treaty interpretation. Moreover, it also fails to take into account the context of the provision, and in particular the close link between "arbitrary discrimination" and "unjustifiable discrimination".

91. In international trade, few actions of governments are ever entirely "random" or "capricious". Typically, acts of discrimination, rather than being the result of whim or hazard, are either deliberately introduced to achieve certain results or arise from circumstances that were not given enough consideration when the measure was introduced. Therefore, to define "arbitrary discrimination" as action which is "random" or "capricious" would deprive the prohibition of "arbitrary discrimination" in the chapeau of Article XX GATT of its useful value. However, as the Appellate Body has confirmed, a Panel must not adopt a reading which would reduce a clause of the covered agreements to inutility.

92. In addition, the Panel also ignores the close link between the interdictions of "arbitrary" and "unjustifiable" discrimination. As the Panel had itself correctly noted, both notions have a common core in that they suggest the need to explain convincingly the rationale for the discrimination. However, in its analysis, the Panel does not seek any convincing rationale for the exception. Rather, it approaches the requirement of arbitrary discrimination in a purely negative fashion by excluding that the action had been "random" or "capricious". For this purpose, it refers to an entirely extraneous factor, namely the fact that Brazil had introduced the discrimination to comply with a Mercosur ruling.

93. Accordingly, whether a measure is arbitrary cannot be determined in isolation, but only by taking into account the objectives of the measure for which Article XX GATT is invoked. The measure will not be arbitrary if, in the light of these objectives, it appears as reasonable, predictable and foreseeable. In contrast, the view of the Panel that a measure is only arbitrary if it is "capricious" or "random" is incompatible with the chapeau of Article XX GATT, and should be rejected.

(b) The Panel erred in finding that international agreements can justify the introduction of discriminations contrary to the chapeau of Article XX GATT

94. On this basis, the mere fact that Brazil intended to comply with an obligation to implement a Mercosur ruling does not exclude that the resulting discrimination is arbitrary. Whether a measure is arbitrary (or unjustified) must be assessed in the light of the stated objectives of the measure, in our case the protection of human life and health. However, the exemption of Mercosur countries does not in anyway serve these stated objectives of Brazil. On the contrary, as the Panel itself noted, the Mercosur exemption has the potential of undermining the stated objectives of the ban, since it allows the importation of retreaded tyres from Mercosur countries, most of which are in addition produced with used tyres imported from the EC. Accordingly, when assessed in the light of the objectives of the ban, the Mercosur exemption must be regarded clearly as unreasonable and contradictory, and thus arbitrary.

95. The question whether international agreements can render discrimination compatible with the chapeau is of considerable importance not just for the present case, but for the application and interpretation of Article XX GATT in general. All WTO Members have the power to conclude international agreements. Therefore, if the mere fact of complying with an international agreement were sufficient to exclude the presence of arbitrary or unjustifiable discrimination, all WTO Members could introduce numerous discriminations in the application of measures falling under Article XX GATT, provided only they concluded international agreements with other countries which oblige them to exempt these countries from such measures. Such an outcome would seriously undermine the effectiveness of the chapeau of Article XX GATT.

96. In support of its finding, the Panel has also claimed that Mercosur is a type of agreement expressly recognised in Article XXIV GATT. This argument is fundamentally flawed. To start with, the EC does not believe that agreements justified under Article XXIV GATT entitle WTO Members to introduce discrimination in the application of measures falling under Article XX GATT. This follows from the fact that Article XXIV:8 (a) (i) and (b) explicitly exclude

measures which are justified under Article XX GATT from the need to harmonise all trade within a customs union or free trade. Moreover, the Panel's reference to Article XXIV GATT is undermined by the fact that the Panel did not verify whether Mercosur actually complies with the conditions of Article XXIV GATT. Throughout the Panel proceedings, the EC had pointed out that it was for Brazil, as the party invoking Article XXIV, to prove that Mercosur is in compliance with Article XXIV GATT. Therefore, the Panel could not simply rely on an alleged justification of the agreement under Article XXIV GATT, which has not been established.

97. The Panel has also referred to the nature of the Mercosur ruling in support of its finding. This argument is equally flawed. It is not contested that before the Mercosur Arbitral Tribunal in the dispute between Uruguay and Brazil, Brazil had not defended the import ban imposed by it on grounds related to the protection of human life and health. As the EC had explained during the Panel proceedings, the fact that Brazil invokes such grounds now against the EC, whereas it did not do so in the dispute against Uruguay, must be regarded as arbitrary, or even capricious. Overall, the Panel's approach is therefore contradictory, and its references to the "nature of the ruling" must be regarded as empty.

2. The Panel erred by finding that unjustifiable discrimination could only exist if imports under the exemption have taken place in such amounts as to significantly undermine the objectives of the ban

98. The Panel has held that unjustifiable discrimination could only exist if imports under the Mercosur exemption have taken place in such amounts as to significantly undermine the objectives of the ban. By assessing the existence of unjustifiable discrimination on the basis of import volumes, the Panel applies a test which has no basis in the text of Article XX GATT, and no support in the case law of the Appellate Body, or of previous panels.

99. The volumes of actual imports which have entered Brazil under the Mercosur exemption are irrelevant for answering the question whether this exemption constitutes arbitrary or unjustifiable discrimination. As the Panel had noted

correctly, the Mercosur exemption is an integral part of the manner in which the import ban is applied by Brazil. It is further noted that this exemption is not limited; in particular, there are no quantitative restrictions which would limit the import volumes from other Mercosur countries to "insignificant" amounts.

100. Accordingly, the volume of imports under the Mercosur exemption has nothing to do with the way in which the exemption is applied. The exemption is applied by the Brazilian authorities in the most straightforward manner: all imports from other Mercosur countries will be allowed, whereas all imports from other WTO Members are banned. Accordingly, the specific volume of imports in a given year from other Mercosur countries is not related to the application of the ban or the exemption, but rather to economic factors relating to supply and demand, including also the production capacity of retreaders in other Mercosur countries.

101. The level of imports in a given year may be subject to strong fluctuations, and for this reason also is entirely inadequate for the purposes of assessing the compatibility of a measure with Article XX GATT. Imports from other Mercosur countries increased tenfold between 2002 and 2004. There is no reason why imports might not again increase in the future. This is reflected in the conclusions of the Panel, in which it finds that although the exemption has the "potential" to undermine the objectives of the ban, as of the time of the Panel's ruling, it has not yet been shown to do so. In fact, it is highly likely that if the Panel report were adopted as it currently stands, imports of retreaded tyres form other Mercosur countries into Brazil would increase sharply, as, in reaction to the publication of the Panel report as well as renewed efforts by the Brazilian authorities to curb the importation of used tyres, several Brazilian retreaders have announced that they will move part or all of their production to Paraguay.

102. These developments show that the findings of the Panel are not only wrong in substance, but also do not contribute to a definitive settlement of the dispute. On the basis of the Panel's reasoning, any increase in imports from Mercosur may lead to disagreements between the parties as to whether the exemption is still compatible with the chapeau. It appears that such a result is not compatible with

Article 3.3 DSU, according to which the prompt settlement of disputes is essential for the effective functioning of the WTO.

103. Moreover, the Appellate Body has also confirmed repeatedly that WTO Members must be able to challenge the legislation of WTO Members as such, rather than as applied. In *US – Corrosion Resistant Steel Sunset Review*, the Appellate Body explained this possibility in particular with the need to protect the security and predictability needed to conduct future trade and to avoid a multiplicity of litigation against individual instances of application. However, this goal of providing security and predictability, as well as of avoiding a multiplicity of future disputes by "allowing the root of WTO-consistent behaviour to be eliminated", is directly contradicted by the Panel's approach. Even though recognizing the potential of discrimination implicit in the Mercosur exemption, the Panel does not "eliminate" this root of WTO-compatibility. As a consequence, the parties would be encouraged to restart WTO litigation in reaction to each significant change in export volumes.

104. Finally, it also unclear on which basis the Panel has qualified the amount of 2,000 tonnes of tyres (approximately 200,000 passenger car tyres) as "insignificant". The Panel has based its conclusion in this regard on a comparison to the volume of imports from the EC before the imposition of the ban, i.e. 14,000 tons. However, the Panel does not provide any explanation as to why 14,000 tons would be a significant number, while 2,000 tons is not. In the absence of any explanation in this regard, the Panel's approach can only be characterised as arbitrary. In addition, the Panel's approach is in stark contrast to the Panel's findings regarding the contribution of the measure to the reduction of the number of waste tyres in Brazil, where it did not require any quantification of the contribution the ban makes to the reduction of the number of waste tyres.

C. The Panel Erred by Finding that the imports of used tyres do not constitute arbitrary discrimination, and that they constitute unjustified discrimination only to the extent that they significantly undermine the objectives of the ban

105. As regards the importation of used tyres into Brazil under Court injunctions, the Panel made a number of errors which mirror the errors committed by the Panel in the treatment of the Mercosur exemption under the chapeau of Article XX GATT. First, the Panel found wrongly that the importation of used tyres under court injunctions did not constitute arbitrary discrimination. Second, the Panel erred by finding that the imports of used tyres constitute unjustified discrimination only to the extent that they significantly undermine the objectives of the ban.

1. The Panel erred by finding that the imports of used tyres do not constitute arbitrary discrimination

106. In finding that the importation of used tyres under court injunctions does not constitute arbitrary discrimination, the Panel has argued that "nothing in the evidence before us suggests that the decisions of the Brazilian courts granting these injunctions were capricious or unpredictable". These reasoning once again illustrates the Panel's overly restrictive approach to the notion of arbitrary discrimination. The Panel seems to believe that no action is arbitrary as long as there is some cause or reason explaining it, for instance the domestic law that requires judges to grant interim relief to protect retreaders against irreparable damage. The fact that these reasons may have nothing to do with the underlying objective of the ban, or that they may even directly contradict this ban, in the eyes of the Panel does not seem to suffice for qualifying a measure as arbitrary.

107. This restrictive reasoning must be rejected. What is arbitrary must be decided in the light of the stated objectives of the measure, i.e. the protection of life and health from risk. From the point of view of human life or health, there can be no difference between a retreaded tyre produced in the EC, and a retreaded tyre produced in Brazil from a casing imported from the EC.[4] On this basis, the

[4] Panel Report, para. 7.242.

importation of used tyres under court injunctions must be regarded as constituting arbitrary discrimination.

108. The Panel seeks to avoid this conclusion by drawing a distinction between the actions of Brazilian courts, on the one hand, and the compliance by the Brazilian administrative authorities with the court injunctions, on the other. However, this distinction is ill-founded. A WTO Member must assume responsibility for the acts of all its branches of government. Accordingly, the obvious contradiction between the actions branches of the Brazilian government that have allowed the importation of used tyres, and those who ban the importation of retreaded tyres, must be regarded as arbitrary behaviour on the part of Brazil.

2. The Panel erred by finding that the imports of used tyres constitute unjustified discrimination only to the extent that they significantly undermine the objectives of the ban

109. The Panel has found that the imports of used tyres under Court injunctions constitute unjustified discrimination only to the extent that they incur in such volumes that they significantly undermine the objectives of the ban. This finding is in error. The question of export volumes is of no relevance under the chapeau of Article XX GATT. As in the case of the Mercosur exemption, the effects of the court injunctions on the application of the measure should have been examined without any reference to import volumes. Such an examination would also have been entirely possible. Numerous retreaders in Brazil are, and continue to be, in the possession of injunctions allowing them to import used tyres for the purpose of retreading. These injunctions, which are res judicata, do not contain any limitations in terms of temporal validity, nor in terms of quantities that may be imported. Accordingly, they amount to an effective exemption of Brazilian retreaders from the import ban on used tyres.

110. The Panel's reliance on import volumes also has serious implications for the implementation of the Panel report. The Panel notes that imports of used tyres into Brazil had amounted in 2005 to 10,5 million tyres, and qualifies this as significant. However, there is no objective basis on which to define the threshold below which

the imports of used tyres would no longer be significant. Accordingly, the Panel's finding does not provide a clear standard for assessing compliance by Brazil.

111. Moreover, the EC would have to keep monitoring the amount of used tyres imported by Brazil, since Brazil may or may not be in compliance with its WTO obligations depending on the number of used tyres it imports in a given period. Also, the EC could always do this only for a past period, and thus never be assured of Brazil's WTO compliance in the present and the future. Such a result would not be in accordance with the objective of the prompt settlement of dispute set out in Article 3.3 DSU.

D. The Panel erred by finding that the Mercosur exemption does not constitute a disguised restriction on international trade, and that the imports of used tyres constitute a disguised restriction only to the extent that imports are taking place in such quantities that they significanctly undermine the objectives of the ban

112. The Panel finds that the Mercosur exemption does not constitute a disguised restriction on international trade since imports have not been significant, and that the imports of used tyres constitute a disguised restriction only to the extent that imports are taking placed in such quantities that they significantly undermine the objectives of the ban. For the same reasons as set out above regarding the existence of unjustifiable discrimination, the Panel's reliance on import volumes for the purposes of determining compatibility with the chapeau of Article XX GATT is erroneous.

E. Conditional Appeal: The Panel Erred by failing to address the EC's claim under Articles XIII: 1 and I:1 GATT

113. The Panel erred by deciding to exercise judicial economy with respect to the EC's claim under Article XIII:1 and I:1 GATT. In the hypothesis that the Appellate Body should not find that the Mercosur exemption as such already leads to the incompatibility of the ban with the chapeau of Article XX GATT, the EC asks the Appellate Body to reverse the Panel's decision to exercise judicial economy with respect to the EC's claims under Article XIII:1 and I:1 GATT, and to complete the

analysis by the Panel and find that the Mercosur exemption is incompatible with Article XIII:1 and I:1 GATT, and that they are not justified by Articles XX(d) or XXIV.

1. The Panel erred by deciding to exercise judicial economy

114. The discretion of Panels to exercise judicial economy is not without limits. As the Appellate Body has decided, a Panel may not decline to rule on claims if a ruling on these claims is necessary to secure a complete resolution of the dispute. The Appellate Body has held that a Panel also exercises false economy if, by declining to rule on a particular claim, it deprives the complaining party of a remedy.

115. In the present case, the Panel exercised "false judicial economy" within the meaning of the case law of the Appellate Body. The Panel exercised judicial economy purely on the grounds that it "had already found that the import prohibition as well as the fines are inconsistent with Article XI:1 and are not justified under Article XX (b)".

116. However, the Panel failed to take into consideration the very narrow basis on which it had found that the import prohibition was incompatible with Article XX GATT. Since the Panel found an incompatibility with the chapeau of Article XX GATT only to the extent that imports of used tyres are occurring in amounts which significantly undermine the ban, Brazil might implement the report by reducing the level of imports of used tyres to below a "significant" level while maintaining the ban in place. At the same time, since the Panel had not found the Mercosur exemption to be incompatible with the chapeau of Article XX GATT, Brazil might also maintain this exemption in place, provided that imports under that exemption do not rise above a "significant" level.

117. The Panel's findings therefore do not require the removal of the Mercosur exemption. For this reason, the Panel should have addressed the EC's claim that this exemption as such is incompatible with Article XIII:1 and I:1 GATT. It should be noted in this context that according to the settled case law of the Appellate Body, the EC is entitled to challenge this exemption, which is contained

in a legislative instrument, "as such". Therefore, the question of the volumes of imports occurring under this exemption - which the Panel wrongly took into account in deciding the compatibility of the ban with the chapeau of Article XX GATT - cannot affect the EC's entitlement to challenge the compatibility of the exemption with Brazil's WTO obligation "as such".

2. The Appellate Body should find that the Mercosur exemption is incompatible with Articles XIII:1 and I:1 GATT

118. The Appellate Body should complete the legal analysis of the Panel and find that the Mercosur exemption is incompatible with Articles XIII:1 and I:1 GATT, and is not justified under Articles XXIV GATT and XX (d) GATT. The Appellate Body may complete the legal analysis of the Panel since there are sufficient findings of the Panel and uncontested facts on the record to allow the Appellate Body to do so.

119. It is not contested that the Mercosur exemption constitutes a violation of Articles XIII:1 and I:1 GATT. The only question to be addressed is therefore whether the exemption could be justified, as claimed by Brazil, on the basis of Articles XXIV or XX (d) GATT. This is not the case.

(a) The exemption is not justified by Article XXIV GATT

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

121. As regards the first condition, it is for Brazil, as the party invoking these provisions, to establish that the conditions of the exception are met. During the Panel proceedings, Brazil limited itself to asserting, without offering any further

proof or argument, that these conditions are met by Mercosur. In contrast, the EC demonstrated during the Panel proceedings that, on a number of points, there are numerous important and open questions as to Mercosur's compliance with the conditions of Article XXIV:8(a) and 5(a) GATT.

122. Since Brazil, as the Party bearing the proof in this respect, has not demonstrated that Mercosur is in accordance with Article XXIV:8 (a) and 5(a) GATT, it has failed to establish a prima facie case that Mercosur is compliant with these provisions. Accordingly, the Appellate Body should conclude that Brazil has failed to demonstrate that Mercosur is in accordance with the requirements of Article XXIV:8 (a) and 5(a) GATT, and on that basis, reject Brazil's defence.

123. Second, in accordance with *Turkey – Textiles*, Brazil must show that without the exclusion of Mercosur members from the import ban, the formation of Mercosur would have been prevented. However, this is clearly not the case.

124. Article XXIV:8 (a) (i) GATT explicitly exempts from the need to liberalise trade within the customs union a number of measures, including in particular those which are justified under Article XX GATT. This means that the maintenance of restrictive regulations of commerce which are justified on the basis of Article XX GATT does not prevent the formation of a customs union. In other words, the selective abolition of such measures only as regards trade with other members of the customs union is not necessary for the formation of a customs union.

125. This is precisely where the fundamental logical contradiction of Brazil's arguments lies. If, as Brazil argued, the import ban on retreaded tyres was indeed justified as measure necessary to protect human life or health under Article XX (b) GATT, then there was no need to abolish this ban in trade with other Mercosur countries, since its maintenance was explicitly allowed by Article XXIV:8(a) GATT. If, in contrast, the ban is not justified under Article XX (b) GATT, then it should be removed for all WTO Members, and not just for other Mercosur Members.

(b) The exemption is not justified by Article XX (d) GATT

126. The Mercosur exemption can equally not be justified as a measure "necessary to secure compliance with laws and regulations" within the meaning of Article XX (d) GATT.

127. First, the obligation to comply with the ruling of the Arbitral Tribunal is not contained in a "law or regulation" within the meaning of Article XX (d) GATT. In *Mexico – Soft Drinks*, the Appellate Body found that the term "laws and regulations" covered "rules that form part of the domestic legal system of a WTO Member, including rules deriving from international agreements that have been incorporated into the domestic legal system of a WTO Member or have direct effect according to that WTO Member's legal system". However, the obligation to comply with rulings of Mercosur Arbitral Tribunals is not such a rule.

128. Second, Brazil confuses the notions of "securing compliance" and "complying". By adopting the Mercosur exemption, Brazil was "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 from the actor which is "securing" the compliance. In other words, measures adopted under Article XX (d) GATT are *enforcement* measures.

129. Third, 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", would be rendered ineffective.

130. Fourth, Brazil has also not demonstrated that the Mercosur exemption was "necessary" as required by Article XX (d) GATT. Brazil could have complied with the ruling of the Mercosur Arbitral Tribunal by simply exempting all third countries form the import ban, rather than just its Mercosur partners. Accordingly,

Brazil had a reasonable, and GATT-consistent alternative available which it failed to take.

III. BACKGROUND OF THE APPEAL

131. As background for this appeal, the European Communities provides hereunder some information concerning the product at issue, the measures adopted by Brazil that were challenged before the Panel, their trade effects, and the findings and conclusions of the Panel, some of which are the object of this appeal.

A. The Product at Issue

132. The products at issue in this dispute are retreaded tyres classified under the codes 4012.11, 4012.12, 4012.13 and 4012.19 of the HS Nomenclature. These headings cover retreaded tyres used on motor cars (including station wagons and racing cars), buses or lorries, on aircrafts, and other vehicles.

133. According to the HS nomenclature, retreaded tyres are clearly distinguished from used pneumatic tyres, which are classified under HS code 4012.20. The present case does not concern measures of Brazil affecting the importation of used tyres falling under that HS code.

134. The United Nations Economic Commission for Europe, under the UNECE Vehicles Agreement,[5] has developed two Regulations covering the manufacture and testing of retreaded tyres. UNECE Regulation 108 establishes technical standards for passenger car tyres and their trailers.[6] UNECE Regulation 109 establishes technical standards for commercial vehicles and their trailers.[7] Unlike for truck and passenger vehicle tyres, there are no international standards for the

[5] 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 (Exhibit EC-5). The UNECE Vehicles Agreement currently has 44 contracting parties. The EC is a party to the Agreement, Brazil is not.

[6] Exhibit EC-6.

[7] Exhibit EC-7.

retreading of aircraft tyres. The most widely used standard in this area is the US Federal Aviation Administration's Advisory Circular AC 145-4 .[8]

135. The EC applies both UNECE Regulation 108 and 109 and has recently made them mandatory.[9] Brazil also has recently developed technical standards for the production of retreaded car tyres. Portaria No. 133,[10] adopted on 27 September 2001 by INMETRO, imposes a mandatory standard for the production and marketing of retreaded passenger car tyres in Brazil. UNECE Regulation 108 was used by Brazil as a basis and starting point for developing the technical regulation contained in Portaria No. 133/2001. In the area of truck tyres, Brazil has not yet adopted technical regulations.

136. Retreading is the generic term for reconditioning worn tyres by the addition of new material. Thus, retreading takes advantage of the fact that most types of new tyres have been constructed with the capability of more than one life, and thus retreading offers an economic and environmental alternative as opposed to the production and consumption of new tyres.[11] In order to be retreaded, a used tyre must meet certain conditions. Notably, the tyre must not show any signs of damage as set out in the UNECE regulations.[12]

137. According to UNECE Regulation 108, passenger car tyres may only be retreaded once. No similar limitation applies to commercial vehicles tyres or aircraft tyres, which may therefore be retreaded more than once. The number of times which a tyre can be retreaded until it must be rejected depends on the concrete conditions

8 Exhibit- EC-14.

9 EC FWS, para. 19.

10 Exhibit EC-11.

11 It should be noted, however, that there exist certain types of low-quality new tyres which are no longer suitable for retreading after use; cf. UK Environment Agency, Tyres Report, points 4.1 and 4.2 (Exhibit EC-15). See also the further evidence which the EC submitted in this regard to the Panel, referenced below in paras. 126 and 127 and footnotes 47 and 50.

12 UNECE Regulation 108 (Exhibit EC-6), pt. 6.4.4.1; for commercial vehicles, the enumeration of damages differs somewhat; cf. UNECE Regulation 109 (Exhibit EC-7), pt. 6.2.4.

and circumstances of use. In practice, commercial vehicle tyres can be retreaded up to 3 to 4 times, whereas aircraft tyres can be retreaded up to 8 times.[13]

138. After a used tyre (casing) has been inspected to check its suitability for retreading, the old tread is removed by buffing in order to present a suitable surface to accept the new tread. Once buffing has been completed, the tyre is again inspected for any minor flaws, which, if found, will be repaired. If the tyre cannot be repaired, it will be rejected. The tyre is then ready for rebuilding where new tread, and sometimes new sidewalls, are applied. If any flaws are found as a result of the production process, the tyre will be rejected and destroyed.

139. As regards conformity assessment, retreaded tyres are tested using the same load, speed and endurance criteria that apply to new tyres. In order for a retread to conform to the UNECE Regulations, the manufacturer is required to apply to its National Type Approval Authority which will investigate the range of tyres to be manufactured, as well as the production and process control systems that will be used.

140. The parties to the present dispute agree that retreaded tyres, when produced in accordance with the standards of UNECE Regulations 108 and 109 or equivalent standards, are comparable to new tyres in all aspects of performance, quality, safety, and durability.

141. Moreover, a retreaded tyre cannot be regarded as waste as it is not destined for the disposal operations listed in Annex IV to the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal. Rather, it is to be placed on the wheels of a vehicle in precisely the same manner as a new tyre and intended to perform exactly the same function. From the consumer's point of view, retreaded and new tyres can be substituted with one another. Retreading of tyres is a mature, well-established practice which is both technically and environmentally sound, and is practiced in numerous countries world-wide, including in many WTO Members. The use of retreaded tyres is also encouraged

[13] Cf. OCDE, Improving Recycling Markets, p. 126, note 58 (Exhibit EC-16); cf. also BIPAVER, How a Retread is Made (Exhibit EC-17).

by many governments as an economically and environmentally sound alternative for public procurement, including for emergency vehicles such as fire engines and other emergency vehicles, or for school buses.

142. Retreading is a safe and mature technology which has considerable environmental advantages. It does not only prevent a used tyre from being discarded needlessly. Since the retreaded tyre uses the majority of the tyre's resources, it also leads to considerable savings in terms of energy, materials, and emissions.[14]

143. Moreover, the principal raw materials for modern tyre production are rubber compound, steel and textile, with the rubber compound making up the greatest part of the raw material.[15] This means that waste tyres have a high energy content compared with other wastes and fossil fuels, which makes them a suitable and valuable alternative fuel in co-incineration installations.[16]

144. Overall, retreaded tyres are a safe and environmentally friendly product. In terms of their safety and lifespan, retreaded tyres are in fact a perfect substitute for new tyres. The production and consumption of retreaded tyres should therefore be encouraged, rather than discouraged.

B. The Measures Adopted by Brazil

145. The main measure at issue in the present dispute is a ban on the importation of retreaded tyres into Brazil. The ban was first introduced by Portaria No. 8 of 25 September 2000.[17] At the time the panel was established, the legal basis of this ban

14 Cf. UK Environment Agency, Tyres Report, point 4.1 (Exhibit EC-15).

15 UK Environment Agency, Tyres Report, Table 2.1, (Exhibit EC-15).

16 UK Environment Agency, Tyres Report, Table 4.5 (Exhibit EC-15).

17 Exhibit EC-26. On the evolution of the legislative situation in Brazil, cf. EC FWS, para. 50 et seq. It should be noted that the EC's challenge also relates to any prohibition on the importation of used goods to the extent that such prohibition is applied by the Brazilian authorities to the importation of retreaded tyres.

was Article 40 of Portaria SECEX No. 14 of 2004,[18] which provides that import licences shall not be issued for imports of retreaded used tyres to be used as consumer goods or raw materials classified under NCM heading 4012, with the exception of retreaded tyres classified under NCM headings 4012.11.00, 4012.12.00, 4012.13.00 or 4012.19.00, originating in and coming from Member States of Mercosur under Economic Complementation Agreement No 18.[19] As regards the requirement to obtain an import license, the relevant provisions are Article 9, paragraph II (e) and Article 35 of Portaria SECEX No. 14.

146. Subsequent to the adoption of Portaria No. 8 of 25 September 2000, Brazil also adopted Presidential Decree No. 3919 of 14 September 2001.[20] This decree, which is still applicable today, subjects the importation, as well as the marketing, transportation, storage, keeping or warehousing of used and retreaded imported tyres to a fine of 400 R$ (around 152 € or 250 CHF) per unit.

147. Moreover, restrictions regarding the marketing of imported retreaded tyres have equally been adopted by the Brazilian State of Rio Grande do Sul.[21]

148. Finally, under Article 40 of Portaria SECEX No. 14, imports of retreaded tyres from other Mercosur countries are exempted from the ban (hereinafter: the Mercosur exemption). Following the adoption of Portaria Secex No. 8 of 25 September 2000, Uruguay had requested, by note of 27 August 2001, the initiation of arbitral proceedings within Mercosur. Uruguay alleged that Portaria SECEX No 8 of 25 September 2000 constituted a new restriction of commerce between the parties, which was incompatible with Brazil's commitments under Mercosur. During the proceedings before the Mercosur Arbitral Tribunal, Brazil did not invoke any grounds relating to human life or health in defence of the ban. In its award of 9 January 2002, the Arbitral Tribunal found that the Brazilian measure

18 Exhibit EC-29**.** In the meantime, Brazil has again replaced the legal basis for the import ban, which is now contained in Article 41 of Portaria SECEX nº 35, of 24/11/2006, again with no textual change.

19 On the exemption of Mercosur countries, cf. further below.

20 Exhibit EC-34.

21 Exhibits EC-34 and 35 and Panel Report, para. 2.11 – 2.12.

was incompatible with Mercosur Decision 22/00, which obliges parties not to introduce new restrictions of commerce.

149. Following the arbitral award, Brazil eliminated the ban for retreaded tyres imported from other Mercosur countries by means of Portaria SECEX No. 2 of 8 March 2002.[22] This exemption was maintained in the subsequent codification in Portaria SECEX No. 17 of 1 December 2003,[23] then in Article 40 of Portaria Secex No. 14 of 17 November 2004.[24]

150. Additionally, Presidential Decree No. 4592 of 11 February 2003[25] exempts retreaded tyres imported from other Mercosur countries from the financial penalties set out in Presidential Decree 3919.[26]

151. It is noteworthy that Uruguay also instituted dispute settlement proceedings against Argentina for a similar ban on the importation of retreaded tyres. In a ruling of 20 December 2005, the Permanent Appeals Tribunal of Mercosur found that the ban could not be justified on the basis of Article 50 of the Treaty of Montevideo, which relates to the protection of the environment, and was therefore incompatible with Argentina's obligations under Mercosur.[27] In a ruling rendered on 8 June 2007, the Permanent Appeals Tribunal of Mercosur also decided that certain retaliatory measures adopted by Uruguay against the ban were not disproportionate in relation to the objective of enforcement of the ruling of 20 December 2005.[28]

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22 Exhibit EC-41.

23 Exhibit EC-28.

24 Exhibit EC-29. The exemption is equally maintained in Article 41 of Portaria SECEX nº 35 of 24/11/2006, which has in the meantime, without textual changes, replaced Portaria Secex No. 14 of 17 November 2004.

25 Exhibit EC-42.

26 Exhibit EC-34.

27 Exhibit EC-44 and EC FWS, para. 78.

28 Ruling 1/2007 of 8 June 2007. The Ruling is available at http://200.40.51.219/msweb/portal%20intermediario/es/documentos/TPR%20Laudo%2001%20-%2007.pdf.

C. The Trade Effects of Brazil's Measures

152. The trade effect of the Brazilian measures on EC producers and exporters of retreaded tyres has been considerable. Until the imposition of the ban, Brazil had been an important market for EC retreaders, representing approximately 20% of their export market, and exports were increasing year on year until the imposition of the ban. Before the imposition of the ban in 2000, EU exports of retreaded tyres to Brazil had been at a level close to 14.000 tons per year. Since the adoption of the ban, EU exports have declined to reach close to zero.

153. At the same time, imports of used tyres (i.e.: casings from the EC to Brazil) have increased dramatically since 2000, and were in 2005 at a level of more than 70.000 tons. This development is largely to the benefit of the domestic retreaders in Brazil. In fact, these domestic retreaders would not be able to operate without the supply of imported tyre casings as domestic used passenger car tyres are of such poor condition after their first use as to render them unsuitable for retreading in the vast majority of cases. This poor condition is on account of the poor condition of the road infrastructure in Brazil, driving habits, and poor vehicle maintenance. Nevertheless, the importation of used tyres after 2000 was only achieved by individual cases being brought before the Brazilians courts. An example is the Decision of the Superior Court of Justice (Superior Tribunal de Justiça) of Brazil of 12 December 2003,[29] which held that Brazilian retreaders were entitled to import casings as an "indispensable primary matter" for the continuation of their economic activity. The fact that Brazilian retreaders have invested considerable resources into judicial proceedings to secure the right to import used tyres from abroad provides further confirmation to the fact that Brazilian used tyres are generally not suitable for retreading and thus not available domestically in sufficient quantities for producing retreaded tyres in amounts meeting the existing demand.

154. In addition, Brazilian imports of retreaded tyres from Uruguay have increased significantly since the lifting of the ban on Mercosur countries. Since 2002, when

[29] Exhibit EC-46.

the ban was lifted on Mercosur countries, imports have increased tenfold from 200 tons to 2000 tons per year in 2004. Moreover, it is foreseeable that, if the Panel report were confirmed as it currently stands, imports of retreaded tyres from other Mercosur countries will increase even more sharply. According to recent newspaper reports (Exhibits **EC-A-1** and **EC-A-2**), Brazilian retreading companies have announced there intention to relocate their production to Paraguay. These relocations reflect the fear on the part of Brazilian retreaders that following the Panel report, Brazil might make the importation of used tyres, which are an indispensable primary material for retreaders more difficult in the future. For this reason, Brazilian retreaders would relocate to other Mercosur countries, which do not apply a ban on used tyres, and then export their production to Brazil under the Mercosur exemption.

155. Overall, the protection created by Brazil's import ban has caused considerable harm to the EC retreading industry. Many of the Community exporters had to find a new market to compensate for what had been a large proportion of their export revenue. Whilst some were successful in finding new markets, others were not able to survive the effects of the ban. This protection benefits largely the producers of new tyres, as well as retreaders located in Brazil and in other Mercosur countries, which are now retreading carcasses imported for this purpose from the EC and other third countries.

D. The Findings of the Panel

156. The Panel concluded that the Brazilian ban on the importation of retreaded tyres is inconsistent with Article XI:1 of GATT.

157. However, as regards the justification of the measure, the Panel found that the import ban was a measure necessary to protect human, animal or plant life or health under subparagraph b) in Article XX of GATT 1994. The Panel also found that the Mercosur exemption to the import ban could not be regarded as constituting arbitrary or unjustifiable discrimination or disguised restriction on trade, and that the imports of used tyres into Brazil do not constitute arbitrary discrimination. In contrast, the Panel found that the imports of used tyres

constitute unjustified discrimination and a disguised restriction on trade, but only to the extent that they occur in such volumes as to significantly undermine the objectives of the ban. On this basis, the Panel concluded that the import ban was not justified under Article XX(b) of GATT 1994.

158. The Panel further concluded that the fines are inconsistent with Article XI:1 of GATT 1994. For reasons similar to those developed for the ban itself, the Panel also concluded that the fines are not justified under Article XX(b) or (d) of GATT 1994.

159. The Panel also concluded that the marketing restrictions maintained by the Brazilian State of Rio Grande do Sul in respect of retreaded tyres are inconsistent with Article III:4 of GATT 1994, and that the measures maintained by the Brazilian State of Rio Grande do Sul were not justified under Article XX(b) of GATT 1994.

160. Finally, the Panel decided to exercise judicial economy in respect of the European Communities' claims under Articles XIII:1 and I:1 as regards the MERCOSUR exemption and Brazil's defence under Articles XXIV and XX(d) of GATT 1994.

IV. THE PANEL ERRED BY FINDING THAT THE IMPORT BAN WAS NECESSARY WITHIN THE MEANING OF ARTICLE XX (B) GATT

161. Under Article XX(b) of the GATT 1994, the Panel examined, first, whether waste tyres pose a risk to human, animal or plant life and health and, second, whether Brazil's measures at issue are "necessary to protect human, animal or plant life or health" (the "necessity test").

162. The European Communities appeals several findings made by the Panel relating to the "necessity test" and on that basis requests the Appellate Body to reverse the Panel's conclusion that the import ban on retreaded tyres is "necessary" within the meaning of Article XX(b). For this reason, the EC will first recall the requirements of the necessity test under Article XX (b) GATT, as developed by the Appellate Body. Then, the EC will show that the Panel erred in assessing the contribution of the measure to the objectives of the ban. Subsequently, the EC will demonstrate

that the Panel erred by finding that there were no reasonably available alternatives at the disposal of Brazil. Finally, the EC will also demonstrate that the Panel failed to carry out a "weighing and balancing" of the relevant elements, as required by the Appellate Body. In conclusion, the EC submits that the Appellate Body should find that the measure is not necessary within the meaning of Article XX (b) GATT.

A. The requirements of the necessity test under Article XX (b) GATT

163. The requirements of the necessity test, as contained in paragraphs (b) and (d) of Article XX of GATT 1994 and paragraph (a) of Article XIV of the GATS, have been interpreted in several previous cases by the Appellate Body. According to its case-law, the necessity of a measure should be determined through the analysis of a series of factors: the importance of the interests or values protected by the challenged measure, the contribution of the measure to the realization of the objectives pursued by it, and the restrictive impact of the measure on international trade. Once these three factors have been assessed, the Appellate Body explained that an analysis of possible alternatives to the challenged measure should be undertaken and that a process of weighing and balancing of the factors and the alternatives should be carried out to determine whether the challenged measure is "necessary".[30]

164. It is worth recalling that the Appellate Body has stated clearly that "it is well-established that a responding party invoking an affirmative defence bears the burden of demonstrating that its measure, found to be WTO-inconsistent, satisfies the requirements of the invoked defence".[31] In the context of the present case, this means that Brazil must prove that its import ban on retreaded tyres is "necessary"

[30] Appellate Body Report *Korea – Various Measures on Beef*, para, 164; Appellate Body Report *EC – Asbestos*, para. 172; Appellate Body Report *US – Gambling*, para. 306, and Appellate Body Report *Dominican Republic – Import and Sale of Cigarettes*, para. 70.

[31] Appellate Body Report *US – Gambling*, para. 309, referring also to the Appellate Body Reports in *US – Gasoline*, paras. 22-23, *US – Wool Shirts and Blouses*, paras. 15-16, and *US – FSC (Article 21.5 – EC)*, para. 133.

to achieve the objectives relating to the protection of life or health of humans, animals or plants.

165. The European Communities appeals the findings made by the Panel in relation, first, to the contribution of the measure to the protection of human, animal or plant life and health, second, to the existence of alternative measures and, third, to the weighing and balancing of the different factors. This is without prejudice to several criticisms that the EC will raise in relation to some elements of the Panel's reasoning and findings concerning other parts of the "necessity test".

B. The Panel erred in assessing the contribution of the measure to the protection of human life and health

166. The Panel committed several legal errors in assessing the contribution of the measure to the protection of human life and health. First, the Panel applied an erroneous legal standard by examining whether the measure *can* make a contribution to the protection of human life or health, rather than establishing the actual contribution of the measure to this objective. Second, the Panel failed to make an objective assessment of the facts and evidence before it, which do not show that the measure makes any contribution to its stated goals. On this basis, the EC submits that Brazil has failed to discharge its burden of proof regarding the contribution made by the ban towards its stated objectives.

1. The Panel incorrectly applies Article XX (b) by not establishing the actual contribution of the ban to the protection of human life and health

167. The assessment of the contribution of the ban to the protection of human life and health is an essential element of the necessity analysis under Article XX (b). However, the Panel, in its reasoning, does not seek to establish the actual contribution of the measure to its stated goals, and the importance of this contribution. The Panel consistently examines the question whether the measure *can* make a contribution towards the protection of human life and health. For

instance, in paragraph 7.122, the Panel describes its approach as follows (emphasis added):

> The Panel notes that both parties have linked the question of whether the import ban contributes to the reduction of the risks to human health, animal and plant life and health to its impact on the reduction of the number of waste tyres in Brazil. The Panel agrees that this approach constitutes, overall, the relevant benchmark for the assessment of the measure's contribution to the objective pursued. Therefore, the Panel will assess: (a) whether the import ban *can* contribute to the reduction of the number of waste tyres generated in Brazil; and (b) whether the reduction of the number of waste tyres *can* in turn contribute to the reduction of the risks to human, animal and plant life and health arising from waste tyres.

168. In other words, the Panel does not assess whether the bans makes an actual contribution to is stated objectives, as it only refers to the *potential* contribution which the measure might make. This is also reflected in the final conclusions which it reaches on this point:[32]

> In light of the above, the Panel concludes that the prohibition on the importation of retreaded tyres *is capable* of making a contribution to the objective pursued by Brazil, in that it *can lead* to a reduction in the overall number of waste tyres generated in Brazil, which in turn *can reduce* the potential for exposure to the specific risks to human, animal, plant life and health that Brazil seeks to address.

169. The legal standard applied by the Panel with respect to the contribution requirement is inconsistent with the case law of the Appellate Body. In *Korea - Beef*, the Appellate Body explained that one of the factors to be taken into account in the exercise of weighing and balancing was "the contribution made by the compliance measure to the enforcement of the law or regulation at issue".[33]

170. Moreover, and this reveals the Panel's second legal mistake, the Appellate Body also clarified that it was not sufficient to merely ascertain the contribution of the

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[32] Panel Report, para. 7.148 (emphasis added). The same approach of the Panel can be found in other parts of its report, where it resorts to the same or equivalent language, e.g. by referring to "the capacity of the chosen measure to contribute to the realization of the objective" (see, *inter alia*, paras. 7.118, 119, 122, 142, 151, 295, 347).

[33] Appellate Body Report, *Korea – Beef*, para. 164 (emphasis added).

measure, but that it was equally necessary to determine the extent of the contribution made:[34]

> There are other aspects of the enforcement measure to be considered in evaluating that measure as "necessary". *One is the extent to which the measure contributes to the realization of the end pursued* [...]. *The greater the contribution, the more easily a measure might be considered to be "necessary".*

171. The emphasis placed by the Appellate Body on the establishment of the extent of the contribution flows from the very nature of the weighing and balancing for establishing the necessity of the measure. It is only once the contribution of the measure towards its stated goals has been assessed that this contribution can be weighed and balanced against the other relevant factors as established by the Appellate Body. In contrast, no meaningful weighing and balancing is possible on the basis of the test applied by the Panel, as this fails to establish the extent to which the measure makes a contribution to its stated objectives.

172. In other words, the Panel transforms the necessity test into a mere test of potential suitability of the measure. This is obvious when the Panel explains that in its view, "a determination of a measure's contribution to a particular objective is primarily an analysis of the pertinence and relevance of the chosen means for the achievement of the aim pursued".[35] However, the contribution required in the necessity analysis is more than mere suitability. As the Appellate Body has explained, "necessity" is a concept considerably closer to the pole of "indispensable" than to the one of "making a contribution to".[36] Thus, it is not sufficient for a measure to merely be able to make a contribution; rather, where relevant and possible, this contribution must be verifiable and significant when weighed and balanced against the other relevant factors.

173. Establishing the actual contribution made by the measure at issue would certainly have been relevant and possible in the present case. *Relevant*, as it should be

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34 Appellate Body Report, *Korea – Beef*, para. 163 (emphasis added).

35 Panel Report, para. 7.119 (emphasis added).

36 Appellate Body Report, *Korea – Beef*, para. 161. Note that, even in this context, the Appellate Body speaks of "a contribution", not a "potential" contribution.

recalled that retreaded tyres are safe products, which, according to the common view of both parties, do not as such pose any particular risks to human life or health. The risks to human life or health referred to by Brazil rather relate to the large amounts of incorrectly managed waste tyres which, according to Brazil, litter the countryside in Brazil. Therefore, in order to demonstrate that its ban made any contribution to the protection of public life and health, it would have been necessary for Brazil to demonstrate that the ban results in a reduction of waste tyres arising in Brazil.

174. As regards the contribution of the ban to the reduction of the number of waste tyres, the Panel states that "this demonstration could be made through a quantification, where feasible, but it could also be made through any other means that might sufficiently demonstrate whether the measure can contribute to the reduction of the number of waste tyres".[37] This is manifestly wrong. The number of waste tyres arising in a particular country is clearly a quantitative concept. The EC does not understand, therefore, how the contribution of the measure to the reduction of the number of waste tyres could be expressed in any other way than through a quantification.[38] Moreover, one has to note that the Panel committed an obvious logical error by equating "contribute" and "can contribute": the Panel stated that "whether the import ban *contributes* to the reduction of the number of waste tyres" was a "demonstration [that] could be made … through any other means that might sufficiently demonstrate whether the measure *can* contribute to the reduction of the number of waste tyres".[39]

175. During the Panel proceedings, Brazil contested that it was under any obligation to quantify the number of tyres which would be reduced through the ban.[40] In support of its view, Brazil referred to the ruling of the Appellate Body in *EC – Asbestos*, according to which a risk to human life or health may be evaluated "either in

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37 Panel Report, para. 7.118 (emphasis added).

38 Obviously, it is not necessary that such a quantification is made with absolute precision; the indication of an approximate number of tyres would be sufficient.

39 Panel Report, para. 7.118 (emphasis added).

40 Cf. Panel Report, para. 7.117.

quantitative or qualitative terms".[41] However, the facts underlying *EC – Asbestos* are not comparable to the issues of the present case. *EC – Asbestos* was concerned with a product, namely asbestos fibres, which is directly harmful to human life and health. This is entirely different from the issues of the present case, where the risks imputed to retreaded tyres are indirect and remote, and depend crucially on the number of additional waste tyres arising from the importation of retreaded tyres. In this context, it should be noted that the EC in the present case has not argued that Brazil should have established the risk to human life or health arising from mosquitoe-borne diseases or from tyre fires in quantitative or qualitative terms.

176. The EC would equally like to underline that the present case does not concern the assessment of the contribution of a measure to its stated goals in the presence of scientific uncertainty about the existence of risks to human life or health. The parties do not disagree that risks to human life or health may arise under certain conditions from the presence of improperly managed tyres in Brazil. Rather, one of the questions in the present case is whether the import ban on retreaded tyres reduces the number of waste tyres in Brazil. This is not a question with inherent uncertainty, which therefore must be accepted. Rather, it is a factual question which, with some degree of precision, can be answered empirically or by using economic methods taking into account factors such as supply and demand, substitution effects, lifespan of tyres, and the rate of retreading of tyres. In fact, during a late stage of the Panel proceedings, Brazil attempted to provide such an economic assessment in the form of a study prepared by Prof. Nastari.[42] However, as the EC demonstrated during the Panel proceedings, this study was based on an erroneous methodology and untenable assumptions, notably as regards the rate of retreading in Brazil, and therefore did not allow establishing the contribution of the ban to the reduction of waste tyres arising in Brazil.[43]

177. The very indirect nature of the alleged risks attributed to imported retreaded tyres should have called for a particularly diligent examination of the contribution made

41 Cf. Appellate Body Report, *EC – Asbestos*, para. 167.

42 Exhibit BRA-146.

43 Cf. EC SOS para. 36 and Exhibit EC-122.

by the ban to the reduction of the number of waste tyres arising in Brazil. However, the Panel did the very opposite by not even attempting to establish this contribution, let alone its magnitude.

178. This approach of the Panel contrasts sharply with its approach under the chapeau of Article XX GATT, where it qualified the importation of 2,000 tons of retreaded tyres in 2004 from other Mercosur countries as insignificant from the point of view of the objectives of the ban.[44] However, if the Panel considered 2,000 tons of retreaded tyres to be an insignificant amount, it should then also have established whether the ban reduces the number of waste tyres arising in Brazil by a larger amount. However, this the Panel did not do. The overall approach taken by the Panel to the assessment of the contribution of the measure is legally wrong, contradictory and arbitrary, and for these reasons must be reversed.

179. Overall, for the reasons set out above, the Panel erred by failing to establish the actual contribution of the ban to the protection of human life and health. The Panel's findings in paras. 7.115 to 7.148 should therefore be reversed.

2. The Panel's findings regarding the potential contribution of the ban are contradictory, and not based on an objective assessment of the facts

180. In accordance with the second sentence of Article 11 of the DSU, it is the duty of the Panel "to make an objective assessment of the matter before it, including an objective assessment of the facts of the case".

181. It is true that in accordance with Article 17.6 DSU, an appeal is limited to issues of law covered in the Panel report and to legal interpretations by the Panel. However, as indicated by the Appellate Body in *Korea – Taxes on Alcoholic Beverages*, a panel's discretion as a trier of facts is not unlimited: "That discretion is always subject to and circumscribed by, among other things, the panel's duty to render an objective assessment of the matter before it".[45] Therefore, the Appellate Body is

44 Cf. Panel Report, para. 7.288. On this finding of the Panel, cf. also below para. 334 et seq.

45 Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, para. 162.

competent to review whether or not the Panel has made such an objective assessment of the facts before it, as required by Article 11 DSU.[46]

182. The EC submits that the Panel's findings of fact regarding the potential contribution made by the ban, and in particular its findings that Brazilian domestic tyres are suitable for retreading and are being retreaded, is not based on an objective assessment of the facts. In particular, the Panel has ignored important facts and arguments presented by the EC, and has referred to the evidence submitted to it in a selective and distorted manner. Moreover, by relying purely on a potential capacity of the ban to contribute to the stated objective, the Panel has effectively shifted the burden of proof from Brazil to the EC.

183. To start with, the EC had contested that all new tyres sold in Brazil are necessarily of such a quality and construction that they can be retreaded after a first use. In support of its submission, the EC had presented substantial evidence concerning the existence on the market of low-quality non-retreadable tyres.[47] The Panel acknowledged this fact in para. 7.127 of its report, in which it indicates that "[i]t is understood that not all passenger car tyres have the capacity of having two useful lives; some of them may not be capable of being retreaded and become waste after one life only". However, in its later analysis, the Panel, without assessing in any way the evidence presented by the EC, states that it has "no reason to believe that new tyres sold in Brazil are low-quality tyres".[48] In support of this statement, the Panel refers merely to a statement by Brazil according to which tyres sold in Brazil "are high-quality tyres that comply with strict technical and performance standards that are based on international standards and that tyres manufactured in accordance with these standards have the potential to be retreaded".

184. Similarly, the Panel concludes at a later point "that Brazil has established that, prima facie, the new tyres it allows onto the market are of retreadable quality

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46 Appellate Body Report, *EC – Hormones*, para. 132.

47 EC FOS, para. 28, EC Answer to the Panel's Question No. 11 (with reference to Exhibits EC-15 and EC-67 to EC-71).

48 Panel Report, para. 7.137.

meeting relevant international standards".[49] However, as the EC had explained during the Panel proceedings,[50] the international standards applicable to the production of new tyres ensure that tyres meet the necessary safety standards, but do not ensure that they will necessarily be retreadable. In other words, those new tyres that are not be retreadable from the outset and that are sold in Brazil and elsewhere manage to satisfy the applicable (international) standards which exist in Brazil, and they can do so because potential retreadability is not an element of these standards. Accordingly, the Panel's statement that new tyres sold in Brazil are necessarily of a kind capable of retreading is without any factual basis, is vitiated the Panel's failure to assess the evidence and does therefore not constitute an objective assessment of the facts.

185. As regards retreadability after use of passenger car tyres arising in Brazil, as well as their actual rate of retreading, the Panel has equally committed serious errors. In paragraph 7.135, the Panel refers to a large number of pieces of evidence submitted by the parties. However, the Panel does not conduct any overall assessment of the evidence. Rather, it selectively bases its conclusion on two arbitrarily chosen pieces of evidence, namely a report prepared by the Brazilian Retreaders Association ABR and Technical Note 001/2006 issued by the Brazilian standardisation authority INMETRO.[51] However, neither document supports the conclusion which the Panel draws from it. Moreover, the Panel omits to consider equally relevant information which contradicts its conclusion.

186. As regards the ABR report, the relevant statement, when quoted in full, reads as follows: "ABR believes that the large majority, but not the totality, of passenger car casings reformed in Brazil are imported, and is unable to precise the percentage of casings that is effectively obtained in the local market."[52] The Panel relies entirely on the statement that "not the totality" of the tyres are imported.

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49 Panel Report, para. 7.250.

50 EC's Comments on the Replies by Brazil to the Questions of the Panel after the second substantive meeting, paras. 18-20 (in relation to the Panel's question 91).

51 Panel Report, para. 7.136.

52 Exhibit BRA-95, para. 6.

However, this statement, as is recognised also in the subsequent clarification that ABR is unable to indicate the precise percentage of tyres which are of local origin, does not in any way support a conclusion that the percentage of retreaded casings which are of domestic origin is any more than marginal.

187. At the same time, the Panel fails to consider a second report prepared by ABR submitted by Brazil as Exhibit BRA-157, which fully confirms the view of the EC that Brazilian passenger car tyres are typically no longer retreadable after use:[53]

> Specifically in the case of passenger car tyres, there is an exaggerated fatigue factor due to the conditions of the Brazilian roads, whereby a great loss of casings occurs already in the original lifespan. Since such casings are the raw material for retreading companies, the market for this sector becomes short-supplied.

188. As regards the INMETRO Technical Note 001/2006, this note was issued on 16 February 2006, i.e. at a time when the Panel had already been established. In the proceedings before the Panel, the EC had pointed out that this undermined the evidentiary value of the Note, an aspect which the Panel did not give any consideration.[54] Moreover, the Note is directly contradicted by an earlier note of INMETRO of 2000, which stated the following:[55]

> The national tyre reconditioning industry needs to import used tyres in order to use the carcasses as raw material. It is widely confirmed that using domestic used tyres to obtain the carcasses is economically unviable given our conditions of use.

189. It is unclear why the Panel would base itself exclusively on a Technical Note by INMETRO issued during the Panel proceedings, and therefore at a time when Brazil was already well aware of the significance of INMETRO's statements for those same proceedings, and at the same neglect a contradictory note from the same authority dating back to 2000, i.e. the very year in which the ban was imposed. In addition to this omission, the Panel also failed to make an assessment

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53 Exhibit BRA-157, para. 6. Cf. EC Closing Statement at the second substantive meeting with the Panel, para. 22. Exhibit BRA-157 is referred to in footnote 1238 to the Panel report alongside Exhibit BRA-95, but not discussed in any way.

54 EC SWS, para. 39, EC SOS, para. 27.

55 Exhibit EC-45, para. 4.

of this important piece of evidence, by limiting itself to an incomplete reference to the arguments of the parties.[56] In the view of the EC, this approach to the available evidence is arbitrary, and violates the requirements of Article 11 DSU.

190. Moreover, the Panel also ignored other evidence which directly contradicted its conclusions. For instance, the EC had referred to an overview of the Brazilian Tyre Market prepared by the consultancy LAFIS.[57] This study indicates the overall rate of retreading for all types of vehicles (passenger vehicle and commercial vehicles) as 9.9%. Since retreading of domestic tyres for commercial vehicles does occur in Brazil, this implies that the rate of retreading for passenger car vehicles must be far below 9.9%. However, this information is equally not reflected in the Panel's assessment and conclusions. The Panel dealt with the LAFIS report only in footnote 1237 of its report, where it refers to the parties' arguments, but conducts no independent assessment.

191. Similarly, the Panel fails to give any weight to the fact that Brazilian retreaders have made great efforts in order to obtain the right to import casings which they need for the purpose of retreading, and have obtained this right through injunctions granted by Brazilian courts. On the contrary, the Panel has simply claimed that this aspect was not "a part of the design of the measure", and therefore declined to consider the relevance of this aspect in the context of the contribution analysis.[58]

192. This wilful exclusion of relevant evidence and facts is arbitrary, and incompatible with Article 11 DSU. Regardless of whether the importation of used tyres is part of the design of the measure, the importation of used tyres is a fact, and therefore should have been considered in the context of the contribution analysis. In fact, the imports under injunctions are relevant in two respects. First of all, the fact that imports of large amounts of used passenger tyres occurred for the purpose of domestic retreading indicates that retreaded tyres in Brazil are not produced with

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[56] The panel dealt with INMETRO's Technical Note of 2000 only in footnote 1240 of its report, where it refers to the parties' arguments, but fails to mention the EC's important argument that the term "economically unviable" does relate to the question of suitability (EC SWS, para. 40).

[57] Exhibit EC-92, p. 11.

[58] Panel Report, para. 7.140.

domestic, but with import carcasses. Therefore, to the extent that an imported retreaded tyre is replaced by a tyre made with an imported carcass, the ban cannot contribute to the reduction of the number of waste tyres.

193. Second, the fact that retreaders have expended considerable energy and money on obtaining the right to import carcasses[59] casts considerable doubt on the claims of the Brazilian authorities, including the INMETRO Technical Note 001/2006, according to which such carcasses are readily available in Brazil. The unavailability of useable carcasses was also directly confirmed by the statements of Brazilian retreaders submitted by the EC.[60]

194. Similarly, to the extent that retreaded tyres continue to be imported due to the Mercosur exemption, the ban also cannot contribute to the reduction of the number of waste tyres. The Panel, however, overlooked the obvious fact that the banned imported retreaded tyres would also compete with such tyres imported from other Mercosur countries, the imports from which may well increase in the future.[61]

195. Finally, the Panel seeks to bolster its conclusions by reference to various measures that Brazil has taken or at some point might adopt for promoting the retreading of domestic tyres *in the future*.[62] This approach is fundamentally flawed. The question whether the import ban has made a contribution must be determined as at the time of the establishment of the Panel. Therefore, the objective assessment of the facts must be based on the facts available at that time. As the Appellate Body has confirmed in *US – Shrimp (Article 21.5 – Malaysia)*, speculation about future events is not a sufficient basis for the objective assessment of the facts.[63]

196. The Panel engages in such speculation, for instance, when it comes to the automotive inspections as a tool for ensuring the regular replacement of tyres, thus

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59 EC FWS, para. 82; FOS, para. 37; EC Reply to the Panel's Question No. 20, para. 36.

60 Cf. Exhibit EC-72, and the EC's reply to the Panel's question 20, para. 35.

61 Panel Report, para. 7.125.

62 Paras. 7.134, 7.337 and 7.138 of the Panel Report.

63 Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 95.

ensuring their retreadability. In the course of the Panel proceedings, it was confirmed that under Brazilian law, there are no regular inspections of vehicles; rather, in most Brazilian states, such inspections are taking place only when a vehicle is first licensed or changes ownership.[64] However, Brazil also referred to its intention to introduce federal legislation to make the obligation to conduct annual vehicle inspections mandatory throughout Brazil.

197. The Panel notes this statement with the conclusion that therefore, "it appears that mandatory inspections are taking place in Brazil and that more frequent inspection are to be expected once Bill 5979/2001 is approved".[65] However, the mandatory inspections to which the Panel refers are only those occurring at first registration or at change of ownership of the vehicle, which is not sufficiently frequent to ensure a regular and timely replacement of tyres before they are used to a point where they can no longer be retreaded. In contrast, the intention of the Brazilian executive to introduce annual mandatory inspections in the future is simply irrelevant in the context of the analysis of the contribution made by the measure to the objectives of the ban. Moreover, it is remarkable that the Panel in its predictions relies on a bill dating from 2001, which has been lying in the Brazilian Chamber without movement since 2004.

198. In conclusion, the assessment of the Panel of the contribution made by the ban to the protection of human life and health is not based on an objective assessment of the facts. For this reason also, the findings contained in paragraphs 7.115 to 7.148 of the Panel Report should be reversed.

3. Brazil has failed to discharge its burden of proof concerning the contribution made by the ban to the protection of human life and health

199. On this basis, the EC submits that Brazil has failed to discharge the burden of proof incumbent on it, as the party invoking Article XX GATT, to demonstrate that the ban makes an actual contribution to the protection of human life and

64 Cf. Brazil's Reply to the EC's Questions No. 8 and 9; Brazil's Reply to the Panel's Question No. 2.

65 Panel Report, para. 7.138.

health. For this reason already, the justification of the measure under Article XX (b) GATT must fail.

200. In the event that Brazil should request the Appellate Body to complete the analysis of the Panel in this respect, the EC submits that such a request would be manifestly unfounded. The contribution made by the ban is a question of fact. However, in accordance with Article 17.6 of the DSU, the Appellate Body does not have the competence to make findings of fact. The establishment of the facts is a task of the panel, which must be carried out in accordance with Article 11 DSU. Therefore, as explained by the Appellate Body in EC – Asbestos, the Appellate Body may complete the legal analysis only in cases where the factual findings established by the Panel and the undisputed facts on the record enabled it to do so.[66]

201. In the present case, there are no findings of fact of the Panel, or undisputed facts on the record, which would allow the Appellate Body to establish the actual contribution made by the ban to the reduction of the number of waste tyres, and consequently to the protection of human life and health.

202. The parties did agree merely on the fact that that under the applicable international standards, tyres for passenger car vehicles may be retreaded only once.[67] The parties also agree that tyres for commercial vehicles such as trucks and buses may in practice be retreaded up to four times, and tyres for aircraft up to eight or more times, while there are no such limits under the applicable standards.[68] However, the parties did not agree on what the implications of these facts are for the contribution of the ban to the reduction of the number of waste tyres arising in Brazil.[69]

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66 Appellate Body Report, *EC – Asbestos*, para. 78 (footnote omitted); cf. equally Appellate Body Report, *Korea – Dairy*, para. 92, 102; Appellate Body Report, *Canada – Autos*, para. 133; Appellate Body Report, *US – Hot Rolled Steel*, para. 180.

67 Cf. Panel Report, para. 7.127.

68 Panel Report, para. 7.129.

69 In para. 7.139 of its Report, the Panel claims that "both parties agreed that if imports of both used and retreaded tyres were banned, waste volumes would be at their lowest". However, the EC never made such a statement. Paragraph 36 of the EC's SOS, to which the Panel refers in footnote 1261, contains no such statement, but rather refutes the study prepared by Prof Nastari and submitted by Brazil as Exhibit BRA-146. Moreover, the statement is also manifestly incorrect in substance,

203. As the EC explained, and the Panel accepted, the prohibition of the importation of retreaded tyres could only result in a reduction of the number of waste tyres if the imported retreaded tyres were replaced either by new tyres, which are then actually retreaded after use, or by retreaded tyres which are made from tyres that have been used domestically in Brazil.[70] This question, in turn, crucially depends on whether and to which extent tyres used domestically in Brazil can be, and in fact are being retreaded after use. As the EC has explained with pertinent evidence, due to the conditions of usage in Brazil, Brazilian passenger car tyres are typically no longer retreadable after use. For this reason, a new tyre used in Brazil is typically no longer retreadable after its first use, and must be discarded. For the same reason, retreaded passenger car tyres produced in Brazil are overwhelmingly not produced from tyres used domestically, but from imported used tyres imported under Court injunctions.

204. On this central question, the Panel does not reach any findings which would allow assessing the contribution made by the ban. Rather, as regards passenger car tyres, the Panel merely finds that "Brazil has the production capacity to retread domestic tyres, and that domestic tyres are suitable for retreading and are being retreaded".[71] As the EC explained earlier, the statement that Brazilian domestic tyres are suitable for retreading is based on a distorted examination of evidence. However, in any event, the Panel fails to provide any indication as to the number of domestic tyres which are suitable for retreading, and the number of tyres which are actually being retreaded. Accordingly, there are no panel findings or undisputed fact which would allow assessing the actual contribution of the ban to the reduction of the number of waste tyres.

205. Similarly unhelpful is the Panel's statement that Brazil's industry has the "capacity" of retreading domestic used tyres. That Brazil's industry may have the capacity to retread tyres has nothing to do with the question whether, and to which

since the total volume of waste tyres arising in a country will depend on numerous factors, and not just on measures affecting imports of new or retreaded tyres.

70 Panel Report, para. 7.124-7.125.

71 Panel Report, para. 7.142.

extent, it actually retreads domestic passenger car tyres. As the EC had explained, the retreading of passenger car tyres in Brazil largely occurs with imported used tyres. Accordingly, whether Brazil's industry has the capacity to retread tyres has no relevance for the question of whether Brazilian domestically used tyres are actually being retreaded.

206. Finally, as regards tyres for commercial vehicles and aircraft, the Panel's findings are equally deficient. For these tyres, the Panel limits itself to the simple statement that all types of retreaded tyres by definition have a shorter lifespan than new tyres.[72] Apart from the fact that this is not true, since it assumes that the new tyres will necessarily be retreaded, this statement also does not allow to asses the actual contribution of the ban to the reduction of the number of waste tyres arising from commercial vehicles and aircraft. This is illustrated by the Panel's own reflections on commercial vehicles:[73]

> Brazil also argues that a commercial vehicle retreaded tyre that is imported closer to the end of its useful life could have less than 20 per cent of its useful life left. However, by the same token, the Panel notes that an imported commercial vehicle retreaded tyre could have up to 80 per cent of its useful life remaining.

207. Accordingly, even on the basis of the Panel's own assumptions, there is a large degree of uncertainty as regards the remaining useful life of an imported retreaded tyre for trucks or buses. Given that aircraft tyres can be retreaded far more frequently, this uncertainty is even larger for retreaded aircraft tyres. Thus, the Panel's reasoning amounts to allowing the banning of products on the basis of potentially minor differences in the theoretical length of the useful life of a tyre, without assessment of the actual difference. The EC does not believe that this is sufficient for establishing the actual contribution of the ban as regards commercial vehicle and aircraft tyres.

208. In conclusion, the EC submits that the Appellate Body should find that Brazil has failed to discharge its burden of proof concerning the contribution made by the ban to the protection of human life and health.

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72 Panel Report, para. 7.130.

73 Panel Report, para. 7.129.

C. The Panel erred by finding that there were no reasonably available alternative measures

209. The Panel also committed several legal errors in finding that there were no reasonably alternative measures to the import ban ensuring the same level of protection of human life and health. First, the Panel incorrectly excludes certain alternatives from its consideration. Second, the Panel incorrectly defined the meaning of alternative. Third, the Panel incorrectly finds that some practices already existing in Brazil or capable of disposing of a small number of waste tyres are not alternatives and that, taken collectively, the available alternatives do not allow an appropriate management of waste tyres. Fourth, the Panel's finding is not based on an objective assessment of the facts.

210. These errors occur, at different occasions and levels, in relation to the two categories of alternative measures presented by the EC: those measures to reduce the number of waste tyres accumulating in Brazil and those to improve the management of waste tyres in Brazil.

211. Measures intended to reduce the number of waste tyres accumulating in Brazil include, amongst others, measures to encourage or ensure the retreading of domestic passenger car tyres, measures to improve the low suitability of passenger car tyres in Brazil for retreading, government procurement of retreaded rather than new tyres, policies aiming at a longer safe use of tyres, including technical inspection, and measures to prevent the import of used tyres into Brazil.

212. Measures to improve the management of waste tyres are collecting and disposal systems and include those which have been set up by CONAMA Resolution 258/99[74] or have been put in place in several States of the Union, and disposal methods such as controlled landfilling and stockpiling, energy recovery and material recycling.

213. The EC will deal with the legal errors concerning the alternatives in turn, by grouping them not by alternatives but according to the nature of each error.

1. The Panel incorrectly excludes a better enforcement of the import ban on used tyres from consideration as an alternative

214. The Panel explains that, for the purpose of assessing whether the import ban is necessary, it will not examine the manner in which the measure is implemented in practice, notably in the case of the court injunctions leading to imports of used tyres for the purpose of being retreaded in Brazil.[75]

215. The EC finds that there is no justification for excluding these issues in the analysis of alternatives. What is essential for the question of the assessment of alternatives is whether a measure contributes to the attainment of the objectives of the ban. Whether an alternative concerns the way the ban is implemented is therefore irrelevant as long as it is capable of improving the attainment of the objectives of the ban.

216. If Brazil is entitled, as the Panel has stated,[76] to reduce the risks to life and health arising from the accumulation of waste tyres, the most evident alternative to the import ban on retreaded tyres is precisely to put an end to the import of used tyres. This is all the more so because, as the Panel has declared, some of these used tyres are not retreaded and end up as waste in Brazil and the adverse impact of these imports is greater than the importation of the same tyres after retreading abroad would be.[77]

217. The fact that the issue of the imports of used tyres for the purposes of being retreaded in Brazil is also assessed under the chapeau of Article XX GATT, where the Panel concludes that the import ban on retreaded tyres is applied in a manner that constitutes a means of unjustifiable discrimination and a disguised restriction, does not impede to consider that an effective import ban on used tyres constitutes an alternative measure to the import ban on retreaded tyres. Indeed, used tyres are

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74 As explained in the para. 7.176 of the Panel Report, this Resolution imposes an obligation on importers of retreaded tyres to collect and ensure the environmentally appropriate final disposal of four unusable tyres in Brazil for every three retreaded tyres imported.

75 Panel Report, para. 7.107.

76 Panel Report, paras. 7.100 and 7.102.

77 Panel report, paras. 7.296 and 7.304.

a different product compared to retreaded tyres and different measures can be applied to each of them, as the evolution of the Brazilian legislation, explained above in chapter III.B, shows: while since 1991 the import of used tyres have been banned in Brazil (with partial interruptions), the import ban on retreaded tyres was only adopted in the year 2000.

218. The EC, therefore, concludes that the Panel erred in artificially excluding from the necessity analysis an alternative measure equally available to Brazil, namely the adoption of measures needed to ensure a correct implementation and enforcement of the import ban on used tyres.

2. The Panel applies an incorrect meaning of alternative

219. On several occasions in its Report, the Panel defines an "alternative" as a measure that must avoid the waste tyres arising specifically from imported retreaded tyres. Thus, the Panel relies on that notion to discard, as an alternative measure, the promotion of domestic retreading and enhanced retreadability of locally used tyres in Brazil, i.e., all measures to reduce the number of waste tyres, by arguing that "this would not lead to the reduction in the number of waste tyres additionally generated by 'imported short-lifespan retreaded tyres'".[78]

220. This approach is also used by the Panel regarding one of the measures to improve the management of waste tyres: Resolution CONAMA 258/1999. According to the Panel, "the Resolution would not seem able to achieve the same level of protection as the import ban", that Brazil purports "by reducing the 'generation' of tyre waste as much as possible".[79]

221. As the EC has explained above, this approach by the Panel does not correspond to the objective allegedly pursued by the challenged measure, namely the reduction of some specific risks to life and health deriving from waste tyre accumulation,

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78 Panel Report, para. 7.168, where the Panel, following Brazil, states that those measures "would not lead to the reduction in the number of waste tyres additionally generated by 'imported short-lifespan retreaded tyres'. The argument is repeated in the conclusion of the relevant chapter in the Panel Report, para.7.172, as well as, indirectly, in para. 7.214, third sentence.

79 Panel Report, para. 7.177.

which is the objective which the Panel has referred to in most other places of its report. The Panel's approach is, therefore, an erroneous and unacceptable standard to decide whether a practice is a reasonably available alternative for the purposes of Article XX(b) of the GATT.

222. In particular, the Panel links the notion of alternative not with the objectives of the measure challenged, but to the means (avoidance or non-generation of waste tyres, in our case) employed by the measure to obtain its objectives. In other words, the Panel only accepts non-generation alternatives to the import ban. This reflects a fundamental misunderstanding of the nature of the notion of available alternatives: these are not alternatives equal to a waste non-generation measure (the import ban, assuming for the sake of argument that it were to serve that objective), but alternatives, even if they consist in managing 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 and from tyre fires emissions.

223. This notion of alternative, which is applied by the Panel to exclude the alternatives proposed by the EC, is inconsistent with the case law of the Appellate Body. In *EC – Asbestos*, the Appellate Body stated that "the remaining question was whether there was an alternative measure that would achieve the same end and that is less restrictive of trade than a prohibition" (the measure in that case).[80] In *Korea – Various Measures on Beef*, the Appellate Body looked into the less trade-restrictive available alternatives taking into account the objective of the measure challenged: the fight against fraud with respect to the origin of beef sold by retailers.[81] Finally, in *US – Gambling*, the Appellate Body affirmed that "a 'reasonably available' alternative measure must be a measure that would preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued […]".[82]

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80 Appellate Body Report, *EC – Asbestos*, para. 172 (emphasis added).

81 Appellate Body Report, *Korea – Various Measures on Beef*, para. 175.

82 Appellate Body Report, *US – Gambling*, para. 308 (emphasis added).

224. Moreover, the application of this notion of alternative implies the rejection of several alternatives presented by the EC, notably measures to improve the domestic retreading and retreadability of tyres, the scheme adopted under Resolution CONAMA 258/1999, and co-incineration of waste tyres.

225. As regards measures to improve retreading and retreadability, the Panel simply argues that such measures would not in any way reduce the tyres additionally generated by "imported short-life span retreaded tyres", and that such measure could be "cumulative rather than substitutable" with the ban.[83] This reasoning is manifestly erroneous. If a measure is cumulative or complementary to the ban, then this is because it is capable of achieving the same objectives as the ban, but in a different way. However, if it is capable of achieving the same objectives, then clearly it is an alternative, which the Panel should have taken into account. The fact that the effects of a ban and certain alternatives may be cumulative does not mean that such alternatives must no longer be taken into account in the weighing and balancing under Article XX (b) GATT. The flawed nature of the Panel's approach becomes very apparent in that the Panel suddenly shifts to a different objective in this context, namely the reduction of waste tyres additionally accumulated through the importation of retreaded tyres. The Panel thereby not only deviates from what it understood as Brazil's objective, it also makes it logically impossible for any other measure that does not specifically target imported retreaded tyres to be an eligible alternative.

226. As regards the CONAMA scheme, the Panel eliminates an alternative where the importers of retreaded tyres are under the obligation to collect and ensure the environmentally appropriate final disposal of four unusable tyres in Brazil for every three retreaded tyres imported. As the Panel admits, the scheme "contribute[s] to reducing the accumulation of waste tyres and consequently to reducing the type of risks […] in relation to the accumulation of waste tyres".[84] However, the Panel rejects this scheme as an alternative only on the basis of its wrong notion of alternative.

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83 Panel Report, para. 7.168 – 7.169.

84 Panel Report, para. 7.176, second sentence.

227. This rejection is a fundamental legal error in the Panel's analysis because it implies a global and direct rejection of those disposal methods concerning waste tyres management that, according to Brazil's legislation, the Brazilian states environmental authorities usually approve: "co-processing in cement kilns, co-processing with bituminous schist (a form of pyrolisis), rubber asphalt, rubber products and appliances (sandals, shoes, carpets)".[85] Thus, the Panel's narrow definition of alternative implies that several disposal methods, which are accepted in Brazil, cannot be considered as alternatives to the import ban on retreaded tyres.

228. In relation to the specific case of co-incineration of waste tyres, which, as it is admitted by the Panel, is one of "the currently available disposal methods capable of handling the existing volume of waste tyres",[86] the Panel seems to accept it only if the practice produces zero emissions: i.e., if emissions are inexistent and not only equal or below the emissions produced by the relevant installations (cement kilns, paper mills, steel plants…) when they burn conventional fuel (coal, peat, fuel-oil or gas) without replacing a portion of that fuel by waste tyres. This is an impossible result, which cannot be obtained with current technologies, and it is tantamount to rejecting this available alternative on the basis that the acceptable alternatives are only those avoiding the generation of waste tyres and not those reducing the risks of waste tyre accumulation. Again, the Panel rejects co-incineration as an alternative only on the basis of its wrong notion of alternative.

229. In its concluding section on Article XX (b) GATT, the Panel once again recalls its general view that none of the alternatives identified by the EC as regards the improvement of waste management and waste disposal "involve avoiding the entry of the imported retreaded tyres into Brazil in the first place".[87] This statement betrays the logical fallacy of the Panel's reasoning. In the view of the Panel, no measure could ever be considered an alternative to a ban unless it removes the very specific risks relating to the specific goods to be imported, even if domestic goods produce exactly the same risks. According to the Panel, a WTO Member is

85 See Response of Brazil to the Panel's Question number 43.

86 Panel Report, para. 7.195.

87 Panel Report, para. 7.214.

therefore entitled to address risks relating to human, animal, or plant life and health through measures affecting only imported goods, without having to take similar measures also as regards domestic goods posing identical risks. WTO Members would thus be encouraged to put the burden of the achievement of their objectives uniquely on imported products, without adopting similar contributing measures which would affect their own industry. The EC does not believe that such a view constitutes an appropriate interpretation of Article XX(b) GATT.

230. The Panel committed further legal errors in the interpretation of Article XX(b) in applying other standards to the question of whether a certain measure is an alternative. Under consistent Appellate Body jurisprudence, the standard is that of an alternative measure that is "reasonably available". Yet, when dealing with landfilling, the Panel did not enquire what options were reasonably available, but instead focused on how tyres accumulate in landfills "in reality".[88]

231. Similarly, in relation to the harmfulness of tyre incineration emissions, the Panel relies on the fact that emission levels can vary largely, depending on the operating conditions of the facilities and their emission control technology. Again, the legally correct question is what alternative option exists and whether it is reasonably available. The fact that certain options (e.g. the best available technology) are not employed somewhere is irrelevant as long as those options are reasonably available.[89]

232. Further, the Panel casts doubt on this latter point of availability of the technology, asserting that the best technology "is not necessarily readily available, mostly for financial reasons".[90] Again, the correct legal standard is not whether the alternative is "necessarily readily available", but whether it is "reasonably available".

233. In conclusion, the notion of alternative, which the Panel uses to reject several of the alternatives proposed by the EC, is legally incorrect.

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88 Panel Report, para. 7.184.

89 Panel Report, paras. 7.192 and 7.193.

90 Panel Report, para. 7.193.

3. The Panel incorrectly finds that some practices already existing in Brazil or capable of disposing a small number of waste tyres are not alternatives and that, taken collectively, the available alternatives do not allow an appropriate management of waste tyres

234. The Panel rejects the scheme established by Resolution CONAMA 258/1999 and other schemes, like Paraná Rodando Limpo, because they have already been implemented in Brazil.[91]

235. However, contrary to what the Panel concludes, Brazil is not ensuring the implementation of the CONAMA scheme. Brazil has adopted the CONAMA scheme, but Brazil has not implemented it. As the EC explained during the Panel proceedings, this can clearly be deduced from the very high figures of incidents of non-compliance indicated in Exhibit BRA-69, where Brazil submits the numbers contained in an official IBAMA press release of June 2005, which gives evidence of fines against 8 companies.[92] The total amount of unfulfilled tyre disposal obligations in 2005 recorded there is around 340 thousand tonnes, i.e. nearly 70 million waste passenger tyres. Moreover, measured against 70 million non-disposed tyres, these fines result in an amount of 0.30 R$ per tyre (60 R$ per tonne), which is extremely low and much lower than the saving, namely the cost of disposal. In other words, Brazil neither implements correctly the obligations under CONAMA Resolution 258/1999 nor is it enforcing properly this collection and disposal system. In violation of Article 11 of the DSU, the Panel ignored this evidence and did not deal with the question of insufficient implementation of the system established by CONAMA Resolution 258/1999.[93]

236. The EC considers that ensuring a correct and complete implementation of the CONAMA scheme is an alternative to the import ban that would be more effective than the import ban in reducing tyre waste and risks associated with it: 70 million

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91 Panel Report, para. 7.178. Though the language used in the Report by the Panel on this issue is descriptive and unclear, the last part of para. 7.178 can be read as considering that this is one of the reasons why these schemes are not reasonably available to Brazil as an alternative to the import ban.

92 Exhibit EC-102.

93 Panel Report, paras. 7.174 and 7.178.

waste passenger tyres improperly managed under the system, taking just the established number of 2005, is a figure far higher than the number of retreaded tyres imported from all sources before the imposition of the ban. The ratio is even higher if measured against the reduction in the number of waste tyres that the import ban on those retreaded tyres could have resulted in, if any.

237. Moreover, a similar conclusion should be reached in relation to other schemes like the Rodando Limpo programmes, because not all States in Brazil (or the Union itself) have so far adopted supplementary systems to the one established by the Union through CONAMA Resolution 258/1999. The Panel Report is completely silent on this important issue, even if the Panel identifies clearly that the European Community presented the adoption of these supplementary programmes as an alternative measure.[94] This is again incompatible with the Panel's duty under Article 11 of the DSU.

238. The Panel also finds that most of the material recycling alternatives, notably civil engineering uses, rubber asphalt and rubber granulates to produce different products, are only capable of disposing a small or limited number of waste tyres and, therefore, cannot constitute a reasonably available alternative to the import ban.[95]

239. The European Communities submits that these considerations made by the Panel are legally erroneous, because they do not correspond to the notion of alternative as defined by the Appellate Body. As the EC explained above, an alternative measure is one that achieves the same end as the challenged measure and that is less restrictive of trade. The case-law of the Appellate Body does not require that one single alternative measure achieves the same objective of the challenged measure and, therefore, does not allow to reject, as the Panel has done, several alternative measures just because, taken individually, one by one, they do not attain the objective of the challenged measure.

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94 Panel Report, paras. 7.161 and 7.174.

95 See para. 7.201 of the Panel Report for civil engineering, para. 7.205 for rubber asphalt and para. 7.206 for rubber granulates. In the case of civil engineering and rubber asphalt, the reason provided by the Panel for their limited use is their high costs, and this issue will be analysed by the EC in the following chapter as findings that are not based on an objective assessment of the facts.

240. In this context, the Panel is also legally wrong in stating that "[t]he safest methods (material recycling) are useful but insufficient on their own to absorb the entire amount of waste from end-of-life tyres".[96]

241. An important legal an logical flaw lies in the fact that the Panel has not taken into account that the alternatives measures are those aiming to replace the import ban on retreaded tyres, while, at the same time, solving the problems raised by the additional waste tyres from those retreaded tyres. Contrary to what the Panel has declared, the alternatives measures do not have to be capable of dealing with the safe management of all the waste tyres arising in Brazil (40 million tyres every year, according to Brazil).[97] Thus, the alternatives to the import ban only need to be capable of managing safely a number of waste tyres that corresponds to the number of waste tyres which the import ban on retreads avoids, if any. Because of its legally wrongful approach to the contribution factor, the Panel has never calculated this figure. The Panel's further legal mistake regarding the benchmark for alternative measure undermines the validity of the Panel's findings on alternatives.

242. Finally, the position taken by the Panel in relation to the practices that are capable of disposing only some amount of waste tyres is in contradiction with the statement, made in its conclusion on the necessity of the measure, that "[o]ur examination of these alternatives suggests that none of these, either individually *or collectively*, would be such that the risk arising from waste tyres in Brazil would be safely eliminated, as is intended under the current import ban" (emphasis added).[98]

243. The Panel has never made any analysis of the alternative measures taking them collectively. There is not a single paragraph in the Panel's report carrying out that kind of analysis. Rather, the Panel dismisses individual alternatives because it

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96 Panel Report, para. 7.212, in fine.

97 See, e.g. Panel Report, para. 7.198, which relates to all of the tyre waste arising in Brazil every year.

98 Panel Report, para. 7.214, fifth sentence.

believes that they are not able to solve the problems in its entirety.[99] Also the Panel's conclusion is more focused on individual alternatives than all of them, taken together.[100] This is a major legal flaw, which shows that the assessment by the Panel of the existing available alternatives to the import ban is based on a legally incorrect notion of alternative.

4. The Panel's findings on alternatives are not based on an objective assessment of the facts

244. In the section concerning contribution, the EC has already referred to the second sentence of Article 11 of the DSU, which provides that it is the duty of the Panel "to make an objective assessment of the matter before it, including an objective assessment of the facts of the case".[101]

245. The EC would like to add here that, according to the Appellate Body,[102]

> […] under Article 11 of the DSU, a panel is charged with the mandate to determine the facts of the case and to arrive at factual findings. In carrying out this mandate, a panel has the duty to examine and consider all the evidence before it, not just the evidence submitted by one or the other party, and to evaluate the relevance and probative force of each piece thereof. […]
>
> […] The determination of the significance and weight properly pertaining to the evidence presented by one party is a function of a panel's appreciation of the probative value of all the evidence submitted by both parties considered together.

246. Moreover, the Appellate Body has stated that[103]

> The duty to make an objective assessment of the facts is, among other things, an obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence. The deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel's duty to make

99 Panel Report, paras. 7.205 and 7.206.

100 Panel Report, para. 7.212.

101 Above para. 180 et seq.

102 Appellate Body Report *Korea – Dairy*, para. 137 (emphasis added).

103 Appellate Body Report *EC – Hormones*, para. 133.

> an objective assessment of the facts. The wilful distortion or misrepresentation of the evidence put before a panel is similarly inconsistent with an objective assessment of the facts.

247. The EC submits that the Panel's findings of fact regarding alternatives are not based on an objective assessment of the facts, because the Panel has ignored important facts and arguments presented by the EC, and has referred to the evidence submitted to it in a selective and distorted manner.

248. This is a recurrent problem in all the individual alternatives proposed by the EC: landfilling, controlled stockpiling, co-incineration and material recycling.

249. In relation to landfilling of waste tyres, it must be stressed that, as the Panel admits in its report, the EC only proposed as an alternative the landfilling of shredded waste tyres.[104] However, when the Panel identifies the problems related to this alternative,[105] it does not take into account that the evidence on which it relies for its findings refers only to landfilling of whole tyres. The five documents and studies describing the risks of this alternative refer only to "whole tyres" or describe to occurrences, like tyres "rising to the surface", "tyres destabilise a landfill", "landfilled tyres work their way back to the surface" or "can cause instability by rising to the surface",[106] which can only be caused by whole tyres. Therefore, the Panel's analysis on the risks related to the landfilling of waste tyres is not based on evidence and does therefore not constitute an objective assessment of the facts.

250. Moreover, the Panel has neither explained nor relied on any evidence proving how shredded tyres can possibly contribute to the dissemination of mosquito-borne diseases.

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104 Panel Report, paras. 7.182, *in fine*, and 7.184, first sentence.

105 The Panel states, at para. 7.183 of the Report, that "the problems related to the landfilling of waste tyres include, *inter alia*, instability of sites that will affect future land reclamation, long-term leaching of toxic substances, and the risk of tyre fires and mosquito-borne diseases". However, only the two last risks are within the objective of the import ban on retreaded tyres.

106 Panel Report, footnote 1318.

251. In any case, the pertinence of landfilling shredded tyres as an available alternative measure is a fact admitted by Brazil, because Brazil allows the landfilling of shredded tyres on its territory. Article 1 of Joint Resolution SMA/SS[107] 1/2002, of 5 March 2002,[108] conditions final tyre disposal in waste landfills to previous decharacterization by grinding or cutting the tyre, resulting in parts unlikely to accumulate water or other liquids, and to the previous mixing of these parts with household waste or its spread over the latter, for both wastes to be in proportion to assure the landfill's stability.[109] The penultimate recital of this Joint Resolution recalls that CONAMA Resolution No. 258, of 26 August 1999, stipulates that final disposal of waste tyres shall be carried out through environmentally sound measures.

252. The Panel has not taken into account this legislation in its analysis of landfilling as an alternative. However, Brazil explained, in its oral statement at the second meeting,[110] that "[t]he regulation that the EC cites, Joint Resolution No. 1, is a state measure with no nation-wide application" and that "[t]he regulation permitted landfilling of shredded tyres in the State of São Paulo explicitly in response to a significant jump in dengue cases in 2002". The EC considers that this is clear recognition of the importance of this alternative in order to fight against mosquito-borne disease, which is one of the two objectives of the import ban on retreaded tyres. Consequently, it has to be concluded that Brazil considers landfilling of shredded tyres as a suitable way of waste tyres management. Therefore, the Panel erred in not taking into account evidence submitted to it and in rejecting this practice as an alternative to the import ban.

253. Finally, the comment of the Panel that landfilling of waste tyres in many countries has substantially declined (in reality, this comment is limited to the situation in the

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107 State Secretary for the Environment/State Secretary for Health.

108 Exhibit BRA-67.

109 This is, therefore, one of processes or techniques that have been licensed by the environmental agencies according to Article 1 (c) of Ruling No. 8 of 15 May 2002 of IBAMA. According to this provision, the simple transformation of tyres into rubber remnants, chips or splinters is not sufficient.

110 Brazil SOS, para. 32.

European Communities)[111] is irrelevant for the purposes of assessing alternative measures to the import ban of retreaded tyres in Brazil, because, as the EC explained during the proceedings before the Panel, the EC has not adopted an import ban on retreaded tyres and its public health problems are not the same as those existing in Brazil.

254. As regards controlled stockpiling, the Panel observes that it does not dispose of waste tyres and that the accumulation of waste tyres, even in stockpiles designed to prevent the risk of fires and pests, may still pose considerable risks to human health and the environment.[112] These two statements, on which the Panel bases its rejection of stockpiling as an alternative to the import ban, do not correspond to an objective assessment of the facts.

255. Controlled stockpiling is not a final disposal operation, but its is a disposal operation according to Annex IV to the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal, which refers to it as "temporary storage". Moreover, as the EC explained to the Panel, it plays an important role in waste tyres management. The discussion paper "A National Approach to Waste Tyres", prepared by the Atech Group for "Environment Australia",[113] affirms that "[c]ollection, transport and (where appropriate) intermediate storage are very significant components in the management of waste tyres", because "[r]egardless of the ultimate fate of a waste tyre, arrangements have to be put in place for its collection and transport" and "[t]he costs, difficulties and other factors associated with this part of the waste tyre chain have a direct bearing on the opportunities and viability for the various use, processing and disposal practices that may be considered".

256. Consequently, the EC insists that controlled stockpiling is a crucial element in managing waste tyres, and that, therefore, the Panel erred in rejecting this practice as an alternative to the import ban. As the EC explained in the previous chapter,

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111 Panel Report, para. 7.185.

112 Panel Report, para. 7.188.

113 Exhibit BRA-8, chapter 8.2.1, at page 59 of Part I.

the mere fact that controlled stockpiling does not suffice alone to avoid the risks that the import ban intends to eliminate is not a reason to reject it as an alternative.

257. Co-incineration is rejected as an alternative by the Panel on the basis that "the question still remains whether toxic chemicals emitted by incineration of waste tyres, regardless of the level of emission, may potentially pose health risk to humans"[114] and that "health risks exist […], even if such risks can be significantly reduced through strict emission standards".[115]

258. This approach is erroneous. Brazil should have demonstrated that installations co-incinerating waste tyres produce more emissions of hazardous substances than those installations only using conventional fuels, even if the emission levels are under the regulatory limits in both cases. Nothing of this sort can be found in the Panel findings. On the contrary, evidence quoted by the Panel affirms that "studies on the use of tyres in cement kilns have generally concluded that the impacts are either positive or neutral compared to the combustion of other fuels".[116] Accordingly, the Panel should have declared that Brazil did not provide evidence to demonstrate that co-incineration is not an alternative to the import ban.

259. The Panel's findings in this relation therefore amount to an effective shift of the burden of proof which Brazil bore for the assertion that the alternative measures pointed out by the EC were not reasonably available.

260. The EC has never asked Brazil to build new industrial installations just to burn more waste tyres, but to use the existing installations that are burning only conventional fuels or that are not co-incinerating waste tyres at their full capacity. The EC explained to the Panel that, in 2004, 56.06 per cent of waste tyres in Brazil were used as alternative fuel,[117] and there are reasons to believe that this practice

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114 Panel Report, para. 7.192.

115 Panel Report, para. 7.194.

116 Panel Report, para. 7.192, quoting the report "A National Approach to Waste Tyres" (2001), prepared by Atech Group for the Commonwealth Department of Environment (Australia) (Exhibit BRA-8).

117 Panel Report, para. 4.206.

could be increased.[118] Brazil should have proved that its cement, paper and steel installations were not capable of co-incinerating more waste tyres. But Brazil provided no evidence on the lack of unused capacity in its industry to burn more waste tyres.

261. The report quoted by the Panel also mentions that the comparative analysis between installations burning or not waste tyres "needs to be considered on a case-by-case basis as it is dependent on good operating practice as well as the particular characteristics of the tyres used and the kiln".[119] This is correct, but, then, Brazil should have proved that its cement, paper and steel installations were not capable of co-incinerating waste tyres while, at the same time, ensuring that the relevant levels of emissions are respected. The Panel should have analysed this evidence on the basis of the Brazilian legislation on emissions from co-incinerating installations.[120] Once again, although the EC asked a question on this issue to Brazil at the very beginning of the proceedings before the Panel,[121] Brazil never provided evidence on the capacity of its industry to burn safely waste tyres and the Panel relied on superficial and general evidence on co-incineration activities in other countries (mainly the USA) to conclude that, for Brazil, co-incineration is not an available alternative to the import ban.

262. Another issue that the EC would like to insist upon again, as it did before the Panel,[122] is that the reports presented by Brazil, and on which the Panel relies as evidence in its report[123] to back its findings that "toxic chemicals emitted by incineration of waste tyres, regardless of the level of emission, may potentially

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118 The 2004 Report of the "Sindicato Nacional da Indústria do Cimento" in Brazil (Exhibit EC-85) states that "O co-processamento nas fábricas de cimento brasileiras é crescente, tendo aumentado 22 per cent entre 2002 e 2003" (Co-incineration in Brazilian cement kilns is increasing, having grown 22 per cent between 2002 and 2003). This Exhibit was attached to the Response of the European Communities to the Panel's Question No. 48.

119 Panel Report, para. 7.192.

120 CONAMA Resolution n. 316, of 29 October 2002 (Exhibit BRA-104), which also refers to another CONAMA Resolution n. 264, of 26 August 1999.

121 EC Question to Brazil No. 17.

122 Cf, for example, to the EC FWS, para. 118 and its footnotes.

123 Panel Report, footnote 1339.

pose health risks to humans",[124] are not representative of the current state of the art regarding energy recovery as an alternative and, in some cases, their use is biased.

263. First, the report from the Environment Council cannot be quoted to prove what the Panel concludes, because it only states that "burning the tyres produces emissions that have to be carefully controlled […] so that the final emissions are within limits set by the Environment Agency".[125] Nothing in this quotation backs the Panel's finding that any level of emissions from co-incineration of waste tyres as a partial replacement of conventional fuels poses health risks.

264. Second, the Report from Okopol was produced in March 1996 for Greenpeace Nederland,[126] and it is limited to a cement installation in Lixhe (Belgium) that was applying for an official permit to co-incinerate waste which consisted of chips of impregnated wood, waste paints and lacquers, and waste oils and lubricants. Waste tyres were also other possible secondary fuel but it was not analysed, and, therefore the statement concerning organic emissions quoted by the Panel in its Report does not correspond to a situation where waste tyres were co-incinerated in the installation.

265. Third, the criticism made by the European Environment Agency to energy recovery in cement kilns is limited to wet cement kilns,[127] an old technology as the EC will explain below, and Brazil has not provided evidence showing that this is the technology used by the cement industry in its territory and that more effective technologies are not reasonably available to it.

266. Finally, the study and letter from Prof. Schwartz dating from 1998, quoted in the Panel Report,[128] are only based on a risk assessment handbook published in California in 1993, and cannot be considered as representative of the situation in

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124 Panel Report, para. 7.192.

125 Panel Report, footnote 1339.

126 Panel Report, footnote 1339.

127 Panel Report, footnote 1339.

128 Panel Report, footnote 1339.

2006-2007, because, as the EC repeatedly explained to the Panel, the technology used now and the current emissions levels are safer and stricter than they were fifteen years ago. Good evidence of this assertion is that the Panel Report refers to several official bodies affirming that co-incineration of waste tyres is environmentally safe: the Basel Convention Secretariat, the British Environment Agency, the USA Environmental Protection Agency and the UK Used Tyre Working Group.[129]

267. Thus, confronted with the position of these official bodies, the personal position of Prof. Schwartz appears totally irrelevant. The best evidence of this is that the Californian authorities did not follow his advice and continued authorising the co-incineration of waste tyres, as do an important number of WTO Members, including Brazil.[130]

268. Moreover, as the EC explained in its reply to one of the Panel's Questions,[131] the scientific evidence shows that incineration of waste tyres in cement kilns does not influence or affect the emissions of dioxins and furans, reduces SO^2 emissions and does not increment emissions for lead, nickel, chromium and cadmium.

269. In that respect, the Panel has completely ignored recent evidence provided by the EC clearly contradicting its finding. Thus, the European Communities presented a 200-page study by SINTEF for the World Business Council for Sustainable Development – Cement Sustainability Initiate - which says that "the ranges of PCDD/Fs emission concentration resulting from the use of conventional fuels such as coal and petcoke overlap with the ranges obtained with the use of secondary fuel, regardless of the type of secondary fuel" (emphasis added),[132] and that "[…] [it] should be noted that the higher emissions measured in the USA were from wet kilns whereas the lower emissions (several hundred measurements) from European

129 Panel Report, para. 7.191 and footnote 1338.

130 EC SWS, paras. 119 to 129, where reference is made to the USA, Australia, Japan, the EC and Brazil.

131 EC Reply to Panel's Question No 48, referring to the study performed by IVL Swedish Environmental Research Study Ltd, attached as Exhibit EC-87.

132 Formation and Release of POPs in the Cement Industry, 23 January 2006, Exhibit EC-86, at p. 97.

cement kilns were obtained from plants using the dry process" (emphasis added). This evidence proves that those reports from the USA, which Brazil attached to its FWS and SWS, are not studies on the current state of the cement industry,133 which now prefers to use the dry process because of its far lower fuel consumption.134

270. Moreover, the SINTEF study concludes that:[135]

> The PCDD/F data presented in this report shows that:
>
> • Most cements kilns can meet an emission level of 0.1 ng TEQ/Nm³ if primary measures are applied;
>
> • Co-processing of alternative fuels and raw materials, fed to the main burner, kiln inlet or the precalciner does not seem to influence or change the emissions of POPs;
>
> • Data from dry preheater cement kilns in developing countries presented in this report show very low emission levels, much lower than 0.1 ng TEQ/Nm³.

271. Finally, the Panel relies on biased and anecdotal evidence to demonstrate that doubts existed "on the credibility of trial burns in cement kilns",[136] and "as to the exact level of toxic emissions, in particular since the emission results of the trial burns may not accurately reflect actual emission levels".[137] This evidence consists of two papers attached to Brazil's first written submission,[138] which refer to three specific installations in the United States: in the case of Energy Justice Network it is the Modesto Incinerator, Westley, California, and in the presentation by the West Virginia Environmental Council the installations are Willow Island and Grant Town power plant. Both documents contain the same quotation, reproduced

133 Those studies are attached by Brazil as Exhibits BRA-26, BRA-48, BRA-49, BRA-50, BRA-51, BRA-141 and BRA-142.

134 The different technological processes in cement production are explained in the SINTEF Study, Exhibit EC-86, at pp. 33 to 41.

135 Exhibit EC-86, at p. 179.

136 Panel Report, para. 7.192, in fine.

137 Panel Report, para. 7.193, in fine.

138 Exhibits BRA-50 and BRA-51.

by the Panel in its Report,[139] from a letter by Greenpeace addressed to environmental activists on "new data from the Modesto Incinerator".[140]

272. The EC considers that these documents cannot be considered as scientific evidence and it is of the opinion that Brazil should have provided evidence on trial burns in cement kilns in its territory. Brazil failed to do so and, therefore, the Panel assessment was made on the basis of evidence that was neither reliable not related to the situation in Brazil. The Panel's approach therefore amounts to an effective shift of the burden of proof to the EC.

273. For the above reasons, the Panel's analysis on the risks related to the co-incineration of waste tyres is not based on recent and reliable scientific evidence and does therefore not constitute an objective assessment of the facts, in violation of Article 11 of the DSU.

274. Regarding material recycling, the Panel concludes that it is not clear that these applications are entirely safe,[141] the Panel reaches this conclusion without comparing the risks that these alternatives present, if any, with the risks arising from mosquito-borne diseases and waste tyres fires, which are the objectives that the import ban attains to eliminate.

275. Moreover, when analysing the different applications, the Panel only makes that finding in relation to one specific application: civil engineering.[142] The Panel, therefore, reaches a general conclusion, which, in relation to other material recycling applications, is not supported by the findings it has previously made.

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139 Panel Report, footnotes 1342 and 1347.

140 This letter from Greenpeace was never appended by Brazil in its submissions to the Panel. The text may be found in www.energyjustice.net/tires/files/greenpeaceletter.html.

141 Panel Report, para. 7.208.

142 Panel Report, para. 7.202: more exactly, the Panel finds that "it is not clear whether some of these engineering applications are sufficiently safe" (emphasis added). The applications that are not sufficiently safe are mentioned in footnote 1359: silage clamps, civil structures on slopes and civil engineering in water.

This is a violation of Article 11 of DSU, as the Appellate Body has declared in *US – Carbon Steel*.[143]

276. Furthermore, to reach the conclusion that some civil engineering applications are not sufficiently safe, the Panel relies only, in relation to water-dwelling organisms, on a six pages publication by an unidentified organisation called Projekt Grön Kemi. However, the Panel has disregarded, without explaining the reasons, the evidence provided by the EC in relation to civil engineering, notably a 123 pages report produced by HR Wallingford Ltd., in March 2005, for the UK Department of Trade and Industry and the Environment Agency, which explains the different re-uses of tyres in port, coastal and river engineering and concludes that the overall risk of damage to the environment and human health is expected to be reduced to low to near zero.[144]

277. Regarding material recycling, the Panel also concludes that that these applications "would not be able to dispose of a quantity of waste tyres sufficient to achieve Brazil's desired level of protection due to their prohibitive cost".[145]

278. Once again, the Panel infers as general conclusion for the material recycling alternatives (that their costs are prohibitive) something that it has found in relation to only one of the alternatives: devulcanization.[146] In relation to civil engineering and rubber asphalt, the Panel concludes that their costs are "high". But high costs are not a reason to exclude an application from the list of available alternatives. As the Panel itself recalls in its Report, the Appellate Body has declared in *US – Gambling* that

> An alternative measure may be found not to be 'reasonably available' […] where the measure imposes an undue burden on that Member, such as prohibitive costs…(emphasis added) [147]

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143 Appellate Body Report *US – Carbon Steel*, para. 142.

144 Exhibit EC-106, page 106, last para.

145 Panel Report, para. 7.208.

146 Panel Report, para. 7.207.

147 Appellate Body Report on *US – Gambling*, para. 308.

279. Therefore, that an alternative bears "high costs" is not a sufficient reason to declare that an activity is not a reasonably available alternative without analysing previously whether there are other factors off-setting the high costs or whether the high cost is economically viable because it can be charged to users or consumers. In that regard, the only piece evidence on which the Panel relies to reach its finding on the high costs of rubber asphalt applications states that "this seems to be a promising outlet for recycled rubber because rubberised asphalt lasts longer than conventional asphalt".[148] Evidence provided by the EC as Exhibit EC-117, attached to its SWS, which the Panel has not taken into account in its Report, also supports this analysis:

> "[…] all agree that, even though asphalt rubber is more expensive, it is more durable, which compensates for the high cost…"

280. Moreover, the Panel's report does not take into account a measure that has been adopted by Brazil to improve the management of waste tyres and to which the EC referred to in its second written submission. The National Dengue Control Programme, adopted on 24 July 2002 by the Brazilian Health Ministry,[149] refers in its chapter 5.1 (environmental health actions) to 100.000 grinders for shredding tyres, which will be provided to the municipalities to support the use of tyres as raw material for the construction of houses. In the course of the proceedings before the Panel, Brazil did not rebut that this measure could contribute to the better management of waste tyres in its territory and did not explain, either, to what extent this alternative was really implemented and its unused capacity to manage waste tyres. Therefore, the Panel should have taken into account this practice as an alternative measure. The Panel's failure to analyse one of the alternatives presented by the EC represents a violation of Article 11 of the DSU.

281. In conclusion, by relying on insufficient evidence or ignoring the evidence provided by the EC the Panel has not made an objective assessment of the facts and has, therefore, violated Article 11 of the DSU.

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148 Footnote 1367, referring to the report of the OECD Working Group on Waste Prevention and Recycling, Improving Recycling Markets.

149 Exhibit EC-93.

5. General conclusion concerning alternatives

282. In conclusion, when assessing the existing available alternatives to the import ban the Panel, as explained above, has committed numerous legal errors. For those reasons, the Panel findings in paragraphs 7.107 and 7.149 to 7.208 of the Panel report should be reversed.

D. The Panel erred by not weighing and balancing the relevant factors and the alternatives

283. As the EC has already explained above, the Appellate Body has declared that a process of weighing and balancing of the relevant factors (importance of the objectives pursued, trade-restrictiveness of the measure and contribution of the measure to the objective) and the alternatives available should be carried out to determine whether the challenged measure is "necessary".

284. Though the Appellate Body has not, so far, defined the terms "weighing and balancing", this language refers clearly to a process where, in the first place, the importance of each element is assessed individually and, then, its role and relative importance is taken into consideration together with the other elements for the purposes of deciding whether the challenged measure is necessary to attain the objective pursued.

285. The EC submits that the Panel did not carry out a proper, if any, weighing and balancing of the different factors in its Report, notwithstanding its statement that "the Panel's assessment of the necessity of the measure under Article XX(b) will be the result of a 'weighing and balancing' process, taking into account the factors considered […] and the availability of a less trade-restrictive alternative measure".[150] In other words, the Panel pretends that it has carried out the required weighing and balancing, but it has not actually done it.

286. First, the Panel did not carry out a real weighing of the trade effects of the measure. The Panel merely points out, by referring to *EC – Asbestos*, that "there

[150] Panel Report, para. 7.209.

may be circumstances in which a highly restrictive measure is necessary, if no other less trade-restrictive alternative is reasonably available to the Member State concerned to achieve its objective".[151]

287. But, as the EC already explained in the proceedings before the Panel,[152] this reference to *EC – Asbestos* does not take into account that the measure at stake in that case was not primarily an import ban, which is the only measure in the present case, but that it was a general ban on the product, including an internal prohibition on the production, processing and marketing, coupled with export and import bans.[153] In this sense, the "import ban" was merely the internal sale prohibition as enforced "at the border" within the meaning of the Note Ad Article III of GATT 1994. In contrast, Brazil has banned imports of retreaded tyres, whereas both the domestic production and marketing, and well as the exportation of retreaded tyres, remain allowed. The analogy that the Panel draws between *EC – Asbestos* and the present case is incorrectly based on the comparison of cases that are not similar or equivalent and it is, therefore, false.

288. Second, as the EC has already explained in chapter IV.B, the Panel makes an insufficient and incorrect analysis of the contribution of the measure to the objective pursued, because, first, it applies an erroneous legal standard by examining whether the measure can make a contribution to the protection of human life or health, rather than establishing whether the measure actually contributes to this objective, and, second, the Panel did not establish the extent of the measure's contribution. Logically, any weighing and balancing requires knowledge not only of the existence of a contribution, but also of its magnitude. Third, the Panel fails to make an objective assessment of the facts and evidence before it, which do not show that the measure makes any contribution to its stated goals. Accordingly, since the Panel failed to establish – even in terms of general order of magnitude - the extent of the actual contribution the ban makes to the

151 Panel Report, para. 7.211.

152 EC SWS, para. 64,

153 Article 1 of the French Decree No. 96-1133 concerning asbestos and products containing asbestos, reproduced in para. 2 of the Appellate Body Report on *EC- Asbestos*.

reduction of the number of waste tyres arising in Brazil, and indirectly to the goal of protecting human life and health, it was incapable of "weighing and balancing" this contribution against any of the other relevant factors.

289. Moreover, the Panel does not take into account that the risks to life and health, which the challenged measure purports to eliminate, are not directly linked to retreaded tyres but to the waste into which they turn after several years. Furthermore, the level of risk will depend of the manner in which waste tyres are managed and disposed of. All this implies that the contribution, if any, of the measure to the objective attained is minimal because the risk of the objective being jeopardised is indirect, uncertain and relative. These aspects should have been taken into account by the Panel when it weighed the contribution of the measure.

290. Third, the Panel bases also its "weighing and balancing" exercise on the wrong analysis it has made of the alternatives, as it has been extensively explained in chapter IV.C.

291. Moreover, in the context of the relation between the trade effects of the measure and the alternatives, the Panel did not take into account Principle 16 of the Rio Declaration on Environment and Development, which provides that

> National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.

292. The EC insisted before the Panel on the importance of this principle to find a balanced solution to the case.[154] Indeed, sound waste tyres collection and disposal schemes allow charging the environmental costs on the relevant operators/consumers, while ensuring, at the same time, a high level of environmental protection with no distortion of international trade. This is precisely what the CONAMA scheme, adopted by Brazil and to which the EC has already

[154] EC FWS, paras. 138 and 139, and EC's Comments to Response of Brazil to Question 122 from the Panel.

referred above,[155] ensures: by obliging the importers of retreaded tyres to collect and ensure the environmentally appropriate final disposal of four unusable tyres for every three retreaded tyres imported charges the environmental costs of the imported retreaded tyres on the importers (and indirectly on the consumers of imported retreaded tyres), while, at the same time, contributing to the disposal of one further waste tyre for every three retreaded tyres imported. Finally, the implementation of the CONAMA scheme is considerably less trade-restrictive than the import ban on retreaded tyres.

293. The Panel concludes its analysis of the necessity of the import ban stating that "[i]n 'weighing and balancing' [the] elements, the Panel is mindful of the specific circumstances of the case",[156] and, then, it refers to certain issues: that non-generation measures are a pertinent way of addressing the risks from the accumulation of waste tyres,[157] that a combination of measures may be appropriate,[158] that the Brazilian measure only addresses a specific component of the overall risk from the accumulation of waste tyres in Brazil,[159] that none of the alternatives proposed by the EC involve avoiding the entry of the imported retreaded tyres into Brazil,[160] that none of the alternatives proposed by the EC, either individually or collectively, would be such that the risks arising from waste tyres in Brazil would be safely eliminated,[161] and that Brazil already implements some of the alternatives measures identified by the EC and that the imposition of an import ban appears to be consistent with other efforts by Brazil to control the risks arising from the accumulation and disposal of waste tyres.[162]

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155 Paras. 226 and 234 to 236 of this submission.

156 Panel Report, para. 7.213, first sentence.

157 Panel Report, para. 7.213, second sentence.

158 Panel Report, para. 7.213, third sentence.

159 Panel Report, para. 7.214, first sentence.

160 Panel Report, para. 7.214, third sentence.

161 Panel Report, para. 7.214, fifth sentence.

162 Panel Report, para. 7.214, last sentence.

294. This analysis, which is the only part of the report where the Panel refers to the "weighing and balancing" exercise, summarizes all the errors the Panel has made in relation to contribution, trade-restrictiveness and alternatives. First, the Panel repeatedly refers to the idea of avoiding the waste without considering that alternatives can consist in another type of measure, provided that they ensure that the objective pursued by the measure is also attained. Second, the Panel also refers to a global assessment of the measures, not just an individual analysis, one by one; however, the Panel has not carried out that exercise in its Report. Third, the Panel insists on the idea that some of the measures have already been implemented by Brazil, without verifying, as the EC has already explained, to what extent that implementation is real and complete. Fourth, the Panel refers to the risks arising from the disposal of waste tyres, while this kind of risks is not within the boundaries of the objective of the import ban. Finally, the Panel carries out his "weighing and balancing" exercise without "balancing" its arguments about the measure and the alternatives with the absolute trade-restrictiveness of the import ban and with a real evaluation of the contribution of the import ban to the objective pursued.

295. To sum up, what the Panel has done is not a real "weighing and balancing" of the different factors and the alternatives, as required by the Appellate Body. The Panel's superficial analysis is, therefore, contrary to Article XX(b) of the GATT.

296. Before concluding on this section, the EC would also like to point out that the ruling of the Appellate Body on this issue will have considerable implications on how retreaded tyres will be regarded worldwide in the future. If Brazil were to prevail with the argument that banning retreaded tyres is necessary to protect human life and health, other countries may equally feel encouraged to impose similar bans. This would mean that retreaded tyres would become a product which might be increasingly excluded from international trade. Such a situation would be extremely harmful to the public perception of retreaded tyres, since it would create the impression that retreaded tyres are environmentally problematic products. The EC considers that such a result would be diametrically opposed to the interests of environmental protection and responsible waste management. Retreaded tyres are environmentally friendly products, and their production, use, and international

trade should therefore be encouraged, rather than discouraged. This is in line with the UNECE Motor Vehicle Agreement, of which the international standards on retreaded tyres in UNECE Regulations 108 and 109 form a part. Through the development of uniform technical prescriptions, this international agreement precisely aims, among other things, at the facilitation of international trade of automobile products.

297. The EC would also like to stress that the issues relating to Article XX (b) GATT have implications that go beyond retreaded tyres. Contrary to the assertions of Brazil before the Panel, retreaded tyres are not unique in having implications from the point of view of waste management. All products eventually turn into waste, and many products which are commonly traded today turn into waste which is as or even more problematic than waste tyres (for instance where the waste, unlike that of tyres, qualifies as "hazardous waste"). If it were possible to ban the importation of products simply because of the fact that they eventually turn into waste which may be difficult to dispose of and arguendo possibly faster than other products, then many products might in the future become affected by similar trade bans, from short-life toys and electronic consumer goods to lower-quality cars and short-life batteries to beverages bottled in plastic containers rather than in glass. The Panel did not take into account this perspective when concluding on the weighing and balancing of the factors and alternatives.

298. For all these reasons, the EC concludes that the Panel has made no weighing and balancing of the three factors and the alternatives, and that, for this reason, the findings in paragraphs 7.209 to 7.216 of the Panel Report should be reversed.

E. The Appellate Body should find that the measure is not necessary

299. In addition to reversing the Panel's findings concerning the necessity of the measure, the Appellate Body Appellate Body should also find that Brazil has failed to establish the necessity of the import ban on retreaded tyres.

300. The EC recalls that, in cases were a measure has been justified on the basis of Article XX(b) of the GATT, the burden of proof concerning the necessity of the

measure is incumbent upon the respondent. In our case, Brazil had to prove that the measure made a contribution to its stated objectives, and that the alternatives to the import ban on retreaded tyres presented by the EC are not reasonably available to Brazil. If Brazil failed to do so, the measure will not be considered necessary.

301. This is precisely what has happened in this case. As the EC has explained above Brazil has not established that the measure made a contribution to its stated objectives. Moreover, in order to conclude that the measure challenged is necessary to obtain the objectives pursued, Brazil and the Panel have relied on a notion of alternative that is contrary to the concept of alternative contained in the case-law of the Appellate Body. As a consequence, if the Appellate Body agrees with the EC's position in this case, the whole analysis made by the Panel in relation to the necessity of the measure is flawed. The consequence will be that Brazil has not proved that the import ban on retreaded tyres is a measure necessary to attain the objectives pursued by Brazil.

302. For these reasons, the Appellate Body should find that the measure is not necessary within the meaning of Article XX (b) GATT.

V. THE PANEL ERRED BY FINDING THAT THE MERCOSUR EXEMPTION DOES NOT CONSTITUTE ARBITRARY OR UNJUSTIFIABLE DISCRIMINATION CONTRARY TO THE CHAPEAU OF ARTICLE XX GATT

303. In its report, the Panel came to the conclusion that the exemption of imports of retreaded tyres[163] from other Mercosur countries does not constitute arbitrary and unjustified discrimination, and does therefore not result in the ban being contrary to the chapeau of Article XX GATT. More specifically, the Panel first found that the Mercosur exemption did not constitute "arbitrary discrimination" because it was based on Brazil's obligation to comply with a Mercosur ruling.[164] Second, the

[163] In para. 7.13 and 7.279 of its report, the Panel claims that the exemption applies only to one specific of retreaded tyre, namely remoulded tyres. As the EC had explained in considerable detail during the Panel proceedings (cf. EC SWS, para. 210 to 215), this is not in accordance with the situation under Brazilian law. The EC also notes that in other parts of the Panel report (e.g. paragraph 7.114), the Panel again speaks of an exemption for "retreaded tyres".

[164] Panel Report, para. 7.270-7.284.

Panel found that the Mercosur exemption did not constitute "unjustified discrimination" because it had not resulted in the importation of retreaded tyres in such volumes as to significantly undermine the objectives of the ban.[165]

304. The EC notes that the Panel's analysis on this point is confused and marred by serious errors of law. The EC will begin with some preliminary comments regarding the definition of arbitrary and unjustifiable discrimination, and the relationship between the two notions. The EC will then show that the fact that Brazil complied with international obligations under Mercosur does not preclude the existence of arbitrary discrimination. Subsequently, the EC will also demonstrate that the volumes of the imports which have taken place under the Mercosur exemption are of no relevance to the question whether that exemption represents arbitrary or unjustifiable discrimination.

A. The definition of arbitrary and unjustifiable discrimination

305. The Panel begins its discussions of the notions of "arbitrary" and "unjustifiable discrimination" by recalling the dictionary definitions of the terms "arbitrary" and "unjustifiable". With reference to The Shorter Oxford Dictionary, the Panel defines the term "arbitrary" as follows:[166]

> "***arbitrary*** **1** Dependent on will or pleasure; **2** Based on mere opinion or preference as opp. to the real nature of things; capricious, unpredictable, inconsistent; 3 Unrestrained in the exercise of will or authority; despotic, tyrannical."

306. With reference to the same dictionary, the Panel defines the term "unjustifiable" as follows:[167]

> "***unjustifiable*** Not justifiable, indefensible."
>
> "***justifiable*** **2** Able to be legally or morally justified; able to be shown to be just, reasonable, or correct; defensible."

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165 Panel Report, para. 7.285-7.288.

166 Panel Report, para. 7.257.

167 Panel Report, para. 7.259.

307. The Panel concludes that "read in the context of the chapeau of Article XX, these definitions suggest, overall, the need to be able to "defend" or convincingly explain the rationale for any discrimination in the application of the measure".[168] The Panel equally notes that there is a close relationship between the notions of arbitrary and unjustifiable discrimination, and therefore announces that it will treat both conditions together.[169]

308. The EC agrees with the Panel that the notions of "arbitrary" and "unjustifiable" discrimination are closely related. As the Appellate Body has explained in *US – Gasoline*, both expressions may be read side-by-side, and impart meaning to one another.[170] From this point of view, the EC considers that the prohibition of "arbitrary" and "unjustifiable" discrimination have as their common element the requirement that the discrimination must be explained through convincing, reasonable, and rational arguments. This is also in accordance with the case law of the Appellate Body, which derived from the chapeau of Article XX GATT that the exceptions contained in this provision must be applied reasonably, and with due regard to the legal rights of other WTO Members.[171]

309. Moreover, the EC submits that what is arbitrary and unjustifiable discrimination must be established in relation to the objectives of the measure at issue, in the present case, the protection of life and health from risks arising from mosquito-borne diseases and tyre fires.[172] This follows from the fact that, as the Appellate Body has explained, the chapeau of Article XX GATT is an expression of the requirements of good faith, and requires a delicate balancing of the interests of the Member invoking an exception under Article XX and the rights of other Members under other provisions of the WTO Agreement.[173] It also follows from the fact that

168 Panel Report, para. 7.260.

169 Panel Report, para. 7.225.

170 Appellate Body Report, *US – Gasoline*, p. 23.

171 Appellate Body Report, *US – Gasoline*, p. 22; Appellate Body Report, *US – Shrimp*, para. 158.

172 EC FOS, para. 92; EC SWS, para. 152.

173 Appellate Body Report, *US – Shrimp*, para. 158-159.

Article XX GATT specifically prohibits discrimination between "countries where the same conditions prevail". Therefore, any discrimination in the application of the measure must be justified by reference to the objectives of the measures, and the conditions prevailing in the countries concerned.

310. At the same time, it is also noted that the terms "arbitrary" and "unjustifiable" discrimination are not identical. As the EC explained during the Panel proceedings, the term "arbitrary" has its "centre of gravity" in the lack of consistency and predictability in the application of the measure, while the term "unjustifiable" refers more to the lack of motivation and capacity to convince.[174] For this reason, as illustrated by the use of the word "or" between "arbitrary" and "unjustifiable" in the chapeau of Article XX, the prohibition of arbitrary discrimination and arbitrary discrimination in the chapeau of Article XX GATT constitute separate requirements. Therefore, if a measure is applied so as to result in discrimination which is either arbitrary or unjustifiable, it will not be justified under Article XX GATT.

311. As the EC will show hereunder, the Panel's application interpretation and application of the chapeau of Article XX GATT is incompatible with these principles in several important respects.

B. The Panel erred in finding that the fact that Brazil complied with international obligations under Mercosur precludes the existence of arbitrary discrimination

312. The Panel concluded in its report that the Mercosur exemption could not be regarded as constituting arbitrary discrimination because of the fact that Brazil had introduced this exemption in order to comply with a Mercosur ruling.[175] The EC submits that in reaching this finding, the Panel applied a wrong definition of what constitutes "arbitrary discrimination". Moreover, the Panel equally erred in considering that international agreements could justify the introduction of what

174 EC FWS, para. 152.

175 Panel Report, para. 7.281.

would otherwise constitute arbitrary discrimination contrary to the chapeau of Article XX GATT.

1. The Panel applied a wrong definition of "arbitrary" discrimination

313. The Panel based its finding that the Mercosur exemption was not "arbitrary" on the fact that Brazil was obliged, under Mercosur, to comply with a ruling of a Mercosur Tribunal. According to the Panel, for this reason, the Mercosur exemption could not be regarded as "capricious" or "unpredictable",[176] or as "capricious" and "random".[177]

314. With this definition, the Panel remains at the level of a selective reading of a dictionary, without taking into account the purpose and context of the provision which it is interpreting. However, in accordance with the customary principles of international law, as codified in Article 31 of the Vienna Convention on the Law of Treaties, a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[178]

315. In the view of the EC, the Panel's interpretation fails to take into account the object and purpose of Article XX GATT. Moreover, it also fails to take into account the context of the provision, and in particular the close link between "arbitrary discrimination" and "unjustifiable discrimination".

316. In international trade, few actions of governments are ever entirely "random" or "capricious". Typically, acts of discrimination, rather than being the result of whim or hazard, are either deliberately introduced to achieve certain results or arise from circumstances that were not given enough consideration when the measure was introduced. Therefore, to define "arbitrary discrimination" as action which is "random" or "capricious" would deprive the prohibition of "arbitrary

176 Panel Report, para. 7.272, 7.280.

177 Panel Report, para. 7.281.

178 Cf. Appellate Body Report, *US – Gasoline*, p. 17.

discrimination" in the chapeau of Article XX GATT of its useful value. However, as the Appellate Body has confirmed, a Panel must not adopt a reading which would reduce a clause of the covered agreements to inutility.[179]

317. In addition, the Panel also ignores the close link between the interdictions of "arbitrary" and "unjustifiable" discrimination. As the Panel had itself correctly noted, both notions have a common core in that they suggest the need to explain convincingly the rationale for the discrimination.[180]

318. However, in its analysis, the Panel does not seek any convincing rationale for the exception. Rather, it approaches the requirement of arbitrary discrimination in a purely negative fashion by excluding that the action had been "random" or "capricious". For this purpose, it refers to an entirely extraneous factor, namely the fact that Brazil had introduced the discrimination to comply with a Mercosur ruling.[181]

319. The EC submits that this approach to the element of "arbitrary discrimination" is not compatible with the object and purpose of Article XX GATT. As the Appellate Body has explained, the chapeau of Article XX GATT is an expression of the requirements of good faith, and requires a delicate balancing of the interests of the Member invoking an exception under Article XX and the rights of other Members under other provisions of the covered agreements.[182] However, the Panel does not carry out such a balancing of interests if it allows Members to introduce discrimination on the basis of purely extraneous factors which have nothing to do with the objectives of the measure, merely because such discrimination is not "random" or "capricious".

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179 Appellate Body Report, *US – Gasoline*, p. 23; Appellate Body Report, *Canada – Dairy*, para. 133.

180 Panel Report, para. 7.260.

181 It is noted in this context that the Panel equally refused to examine in a way the origins or justification of that judgment, which is relevant because the outcome of that ruling was potentially influenced by the fact that Brazil choose not to invoke the applicable health or environmental exceptions of the Mercosur Agreement.

182 Appellate Body Report, *US – Shrimp*, para. 158-159.

320. The view that discrimination may still be "arbitrary" even if it is not "random" or capricious" also finds confirmation in the practice of the Appellate Body. For instance, in *US – Shrimp*, the Appellate Body referred to the "rigidity" and "inflexibility" of certain certification requirements introduced by the United States as constituting "arbitrary discrimination".[183] However, there is nothing in the Appellate Body report to suggest that the action of the United States, which was intended to protect marine turtles, had been "random" or "capricious".

321. Accordingly, the EC submits that whether a measure is arbitrary cannot be determined in isolation, but only by taking into account the objectives of the measure for which Article XX GATT is invoked. The measure will not be arbitrary if, in the light of these objectives, it appears as reasonable, predictable and foreseeable. In contrast, the view of the Panel that a measure is only arbitrary if it is "capricious" or "random" is incompatible with the chapeau of Article XX GATT, and should be rejected.

2. The Panel erred in finding that international agreements can justify the introduction of discrimination contrary to the chapeau of Article XX GATT

322. The EC submits that contrary to the findings of the Panel, the mere fact that Brazil intended to comply with an obligation to implement a Mercosur ruling does not exclude that the resulting discrimination is arbitrary.[184]

323. As the EC has explained, whether a measure is arbitrary (or unjustified) must be assessed in the light of the stated objectives of the measure, in our case the protection of human life and health. However, the exemption of Mercosur countries does not in anyway serve these stated objectives of Brazil. On the

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183 Appellate Body Report, *US – Shrimp*, para. 500.

184 The EC notes in this context that the Panel did not find that Brazil's obligation to comply with the Mercosur ruling would also mean that the discrimination is also "justified" (cf. para. 7.285 of the Panel Report). In any event, given the close links between "arbitrary discrimination" and "unjustified discrimination", the EC considers that compliance with international agreements neither excludes "arbitrary discrimination" nor "unjustified discrimination".

contrary, as the Panel correctly noted,[185] the Mercosur exemption has the potential of undermining the stated objectives of the ban, since it allows the importation of retreaded tyres from Mercosur countries, most of which are in addition produced with used tyres imported from the EC. Accordingly, when assessed in the light of the objectives of the ban, the Mercosur exemption must be regarded clearly as unreasonable and contradictory, and thus arbitrary. The fact that at the same time, Brazil was attempting to comply with Mercosur obligations which are contradictory with its own stated objectives does not remove, but only confirms, the objective arbitrary character of the exemption.

324. The EC would also stress that the question whether international agreements can render discrimination compatible with the chapeau is of considerable importance not just for the present case, but for the application and interpretation of Article XX GATT in general. All WTO Members have the power to conclude international agreements. Therefore, if the mere fact of complying with an international agreement were sufficient to exclude the presence of arbitrary or unjustifiable discrimination, all WTO Members could introduce numerous discriminations in the application of measures falling under Article XX GATT, provided only they concluded international agreements with other countries which oblige them to exempt these countries from such measures. Clearly, such an outcome would seriously undermine the effectiveness of the chapeau of Article XX GATT.

325. This also follows from the fact that Article XX GATT explicitly prohibits discrimination between "countries where the same conditions prevail". Whether the same conditions prevail *in* a particular country is an objective question, not a question of legal obligations vis-à-vis another country. Moreover, as the Appellate Body has explained, the chapeau of Article XX GATT is an expression of the requirement of good faith. This requirement would be undermined if WTO Members could discriminate between countries "where the same conditions" prevail simply by agreeing, through the conclusion of an international agreement, to grant certain third countries preferential treatment. Such a view goes against the

185 Panel Report, para. 7.355.

very heart of the multilateral trading system. As the Appellate Body has confirmed, the most-favoured nation system is a "cornerstone" of the WTO legal system.[186] It is therefore inconceivable that the mere compliance with an international agreement would suffice to render discrimination between countries where the same conditions prevail compatible with the chapeau of Article XX GATT.

326. The Panel has attempted to mitigate the systemic consequences of its reasoning by claiming that it has "considered the specific circumstances of the case, including the nature of the international agreement and of the ruling on the basis of which Brazil has acted".[187] As regards the nature of the agreement, namely Mercosur, the Panel claims that "this type of agreement is expressly recognised in Article XXIV, which provides a framework for WTO Members to discriminate in favour of their partners or free trade areas, subject to certain conditions".[188] At the same time, the Panel also explains that it makes no determination as to whether Mercosur meets the requirements of Article XXIV GATT in respect of customs unions.[189]

327. This reasoning is fundamentally flawed. To start with, the EC does not believe that agreements justified under Article XXIV GATT entitle WTO Members to introduce discrimination in the application of measures falling under Article XX GATT. This follows from the fact that Article XXIV:8 (a) (i) and (b) explicitly exclude measures which are justified under Article XX GATT from the need to harmonise all trade within a customs union or free trade. In other words, if a measure is necessary for the purposes of protecting human life and health, then Article XXIV does not require the exemption of partners in a customs union from such measures if the same conditions apply in these countries. Accordingly, Article XXIV GATT is no justification for introducing discrimination in the application of measures which are justified for reasons of protecting human life and health.

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186 Appellate Body Report, *EC – Tariff Preferences*, para. 101.

187 Panel Report, para. 7.283.

188 Panel Report, para. 7.274.

189 Panel Report, para. 7.274; cf. also para. 7.284.

328. Moreover, the Panel's reference to Article XXIV GATT is undermined by the fact that the Panel did not even verify whether Mercosur actually complies with the conditions of Article XXIV GATT. Throughout the Panel proceedings, the EC had pointed out that it was for Brazil, as the party invoking Article XXIV, to prove that Mercosur is in compliance with Article XXIV GATT. Moreover, in the absence of any such demonstration by Brazil, the EC had also pointed out, with specific evidence, that there were various aspects on which there are open questions as to Mercosur's compliance with the requirements of Article XXIV:5 and 8 GATT, and that Brazil had failed to demonstrate such compliance.[190] Since the Panel decided to exercise judicial economy with respect to the EC's claims under Articles XIII:1 and I:1 GATT, the Panel did not address the issue of Mercosur's compliance with Article XXIV.

329. This notwithstanding, the Panel has invoked the "nature" of Mercosur as an agreement within the meaning of Article XXIV GATT as a factor it has taken into account in deciding that the resulting discrimination was not arbitrary within the meaning of Article XX GATT. With its reasoning, the Panel has therefore allowed Brazil to rely on an agreement which could well be inconsistent with the conditions of Article XXIV to justify the introduction of discrimination contrary to the chapeau of Article XX GATT. This approach is unacceptable. It is incompatible with the requirement of good faith inherent in the chapeau of Article XX GATT. Moreover, it undermines not only the chapeau of Article XX GATT, but also the basic respect for the conditions of Article XXIV GATT, which is a separate GATT exception.

330. The Panel also claims "that it has taken the nature of the ruling on the basis of which Brazil has acted" into account.[191] At the outset, the EC would submit that this ruling is equally irrelevant for the question whether there is arbitrary discrimination between countries where the same conditions prevail. Moreover, the EC does not see in which way the Panel has taken the "nature of this ruling"

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190 Cf. EC SOS, para. 135-140; EC Comments on Brazil's Reply to the Panel's Question No. 132. On the compatibility of Mercosur with Article XXIV, cf. in more detail below para. 382.

191 Panel Report, para. 7.283.

into account in its findings. It is not contested that before the Mercosur Arbitral Tribunal in the dispute between Uruguay and Brazil, Brazil had not defended the import ban imposed by it on grounds related to the protection of human life and health.[192] As the EC had explained during the Panel proceedings, the fact that Brazil invokes such grounds now against the EC, whereas it did not do so in the dispute against Uruguay, must be regarded as arbitrary, or even capricious.[193]

331. The Panel dismissed this argument by stating that it did not "consider that it was in a position to assess in detail the choice of arguments by Brazil in the Mercosur proceedings or to second-guess the outcome of the case in the light of Brazil's litigation strategy".[194] If the Panel was not able to assess the outcome of the dispute between Uruguay and Brazil in the light of the arguments presented by Brazil, then it is not clear how it can conclude that this ruling provided a reasonable basis for Brazil to introduce discrimination in the application of its ban. Overall, the Panel's approach is profoundly contradictory, and its references to the "nature of the ruling" must be regarded as empty.

332. Finally, the Panel also relied on the explanation by Brazil that the introduction of the Mercosur exemption was the only course of action available to it for implementation of the ruling.[195] As the EC explained during the Panel proceedings,[196] this statement is manifestly incorrect. The Mercosur Arbitral Tribunal did not oblige Brazil to discriminate between its Mercosur partners and other WTO Members; it merely obliged Brazil to lift the ban for its Mercosur partners. Brazil could therefore equally have implemented the ruling by lifting the ban for all third countries.

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192 Cf. Panel Report, para. 7.275.

193 EC SOS, para. 96.

194 Panel Report, para. 7.276.

195 Panel Report, para. 7.280.

196 EC FWS, para. 72.

333. For all these reasons, the Panel's findings, in paragraphs 7.270 to 7.284 of the report, that the Mercosur exemption does not constitute arbitrary discrimination, must therefore be reversed.

C. The Panel erred by finding that unjustifiable discrimination could only exist if imports under the exemption have taken place in such amounts as to significantly undermine the objectives of the ban

334. In its report, the Panel found that Brazil's commitments under Mercosur did not mean that the exemption must necessarily be justified.[197] Therefore, the Panel continued by examining whether the application of the measure was such as to constitute "unjustifiable discrimination".

335. In this context, the Panel first notes that the Mercosur exemption entails that the importation of retreaded tyres from Mercosur countries may take place. The Panel equally notes that this also includes tyres which have been retreaded in Mercosur countries using used tyres imported from other WTO Members, including the EC.[198]

336. The Panel goes on to argue that, if such imports were to take place in such amounts that the achievement of the objective of the measure at issue would be significantly undermined, the Mercosur exemption would constitute unjustifiable discrimination.[199] However, the Panel claims that at the time of its examination, volumes of imports of retreaded tyres had not reached a level which could be regarded as significant.[200] In support, the Panel refers to the fact that imports of retreaded tyres from other Mercosur countries had increased tenfold since 2002, from 200 to 2,000 tons. The Panel compares this number to the imports of

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197 Panel Report, para. 7.285. The EC that notes that the Panel did not find that Brazil's obligations under Mercosur rendered the discrimination justifiable. The EC agrees on this point. In any event, the EC can refer to the arguments it has set out in the previous section concerning the existence of arbitrary discrimination.

198 Panel Report, para. 7.286.

199 Panel Report, para. 7.287.

200 Panel Report, para. 7.288.

retreaded tyres from the EC, which in the last year prior to the adoption of the ban had amounted to 14,000 tons (while worldwide imports were 17,600 tonnes).

337. By assessing the existence of unjustifiable discrimination on the basis of import volumes, the Panel applies a test which has no basis in the text of Article XX GATT, and no support in the case law of the Appellate Body, or of previous panels. By basing its conclusions on a finding devoid of any basis in WTO law, the Panel has committed an egregious error of law. At the same time, its findings, if adopted by the DSB, would diminish the rights of the EC under the covered agreements, contrary to Article 3.2 DSU.

338. The EC submits that the volumes of actual imports which have entered Brazil under the Mercosur exemption are irrelevant for answering the question whether this exemption constitutes arbitrary or unjustifiable discrimination. As the Panel had noted correctly, the Mercosur exemption is an integral part of the manner in which the import ban is applied by Brazil.[201] It is further noted that this exemption is not limited; in particular, there are no quantitative restrictions which would limit the import volumes from other Mercosur countries to "insignificant" amounts.

339. Accordingly, the volume of imports under the Mercosur exemption has nothing to do with the way in which the exemption is applied. The exemption is applied by the Brazilian authorities in the most straightforward manner: all imports from other Mercosur countries will be allowed, whereas all imports from other WTO Members are banned. Accordingly, the specific volume of imports in a given year from other Mercosur countries is not related to the application of the ban or the exemption, but rather to economic factors relating to supply and demand, including also the production capacity of retreaders in other Mercosur countries.

340. The EC would note that the level of imports in a given year may be subject to strong fluctuations, and for this reason also is entirely inadequate for the purposes of assessing the compatibility of a measure with Article XX GATT. As the Panel noted, imports from other Mercosur countries increased tenfold between 2002 and 2004. There is no reason why imports might not again increase in the future. This

[201] Panel Report, para. 7.238.

is reflected in the conclusions of the Panel, in which it finds that although the exemption has the "potential" to undermine the objectives of the ban, as of the time of the Panel's ruling, it has not yet been shown to do so.[202]

341. In fact, it is highly likely that if the Panel report were adopted as it currently stands, imports of retreaded tyres form other Mercosur countries into Brazil would increase sharply. In reaction to the publication of the Panel report, as well as renewed efforts by the Brazilian authorities to curb the importation of used tyres, several Brazilian retreaders have announced that they will move part or all of their production to Paraguay (**Exhibits EC-A-1 and EC-A-2**). In preparation of this move, the Brazilian retreaders appear to have obtained guarantees from the Paraguayan authorities that Paraguay will not ban the importation of used tyres needed by the retreaders as input for their production.

342. These latest developments provide a clear illustration of the unsustainable nature of the Panel's conclusion. The Panel provides an incentive for the production of retreaded tyres to be relocated to other Mercosur countries which do no impede the importation of used tyres. In fact, the relocation of this production was to be predicted under these circumstances, given that Brazilian retreaders cannot find retreadable casings in Brazil. This production in other Mercosur countries, which will in large part be made with used tyres imported from the EC, will then be legally re-exported to Brazil. In this way, the discrimination against EC exports will continue unimpeded, whereas the alleged objectives of the ban will equally not be achieved. The main effects would thus be additional unjustified trade distortion and employment dislocation.

343. These developments show that the findings of the Panel are not only wrong in substance, but also do not contribute to a definitive settlement of the dispute. On the basis of the Panel's reasoning, any increase in imports from Mercosur may lead to disagreements between the parties as to whether the exemption is still compatible with the chapeau, as (incorrectly) interpreted by the Panel. It appears that such a result is not compatible with Article 3.3 DSU, according to which the

[202] Panel Report, para. 7.355.

prompt settlement of disputes is essential for the effective functioning of the WTO.

344. Essential, however, is the fact that the Panel's view legally incorrect, and incompatible with the case law of the Appellate Body. In *US – Gambling*, the Appellate Body ruled that the United States failed to satisfy the requirements of the "chapeau" of Article XIV GATS because the relevant US law allowed the "possibility" of exempting certain domestic suppliers of remote betting services from the prohibition of internet gambling.[203] Contrary to the Panel in the present case, the Appellate Body did not attach importance to the "volume" of services traded under this exemption, and to how that volume compared with the volume of online gambling services offered by Antigua and Barbuda or, in fact, all other WTO Members cumulatively.

345. The Appellate Body has also confirmed repeatedly that WTO Members must be able to challenge the legislation of WTO Members as such, rather than as applied. In *US – Corrosion Resistant Steel Sunset Review*, the Appellate Body explained this possibility in particular with the need to protect the security and predictability needed to conduct future trade and to avoid a multiplicity of litigation against individual instances of application:[204]

> In addition, in GATT and WTO dispute settlement practice, panels have frequently examined measures consisting not only of particular acts applied only to a specific situation, but also of acts setting forth rules or norms that are intended to have general and prospective application. In other words, instruments of a Member containing rules or norms could constitute a "measure", irrespective of how or whether those rules or norms are applied in a particular instance. This is so because the disciplines of the GATT and the WTO, as well as the dispute settlement system, are intended to protect not only existing trade but also the security and predictability needed to conduct future trade. This objective would be frustrated if instruments setting out rules or norms inconsistent with a Member's obligations could not be brought before a panel once they have been adopted and irrespective of any particular instance of application of such rules or norms. It would also lead to a multiplicity of litigation if instruments embodying rules or norms could not be challenged as such, but

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203 Appellate Body Report, *US – Gambling*, para. 369.

204 Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82.

> only in the instances of their application. Thus, allowing claims against measures, as such, serves the purpose of preventing future disputes by allowing the root of WTO-inconsistent behaviour to be eliminated.

346. However, this goal of providing security and predictability, as well as of avoiding a multiplicity of future disputes by "allowing the root of WTO-consistent behaviour to be eliminated", is directly contradicted by the Panel's approach. Even though recognizing the potential of discrimination implicit in the Mercosur exemption, the Panel does not "eliminate" this root of WTO-compatibility. As a consequence, the parties would be encouraged to restart WTO litigation in reaction to each significant change in export volumes.

347. In this context, it is also noteworthy that the Panel itself has declared its legal conclusion as being extremely time-bound.[205] If Mercosur imports were to increase, the "significance" question could receive a different answer from the Panel, and the import ban would in certain years (or months?) be justified under Article XX, while not in others. This would depend purely on the market factors that determine import volumes and their origins. Obviously, since trade data are available only for the past, the legal assessment could only be made *a posteriori*. Legal obligations under the WTO Agreement however also exist for WTO Members in the present and in the future, as does the need to protect security and predictability.

348. The EC would add that it also does not understand on which basis the Panel has qualified the amount of 2,000 tonnes of tyres (approximately 200,000 passenger car tyres) as "insignificant". The Panel has based its conclusion in this regard on a comparison to the volume of imports from the EC before the imposition of the ban, i.e. 14,000 tons. However, the Panel does not provide any explanation as to why 14,000 tons would be a significant number, while 2,000 tons is not. In the absence of any explanation in this regard, the Panel's approach can only be characterised as arbitrary.

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[205] Panel Report, paras. 7.290 and 7.289: "as of the time of the panel's ruling".

349. The EC also notes that the Panel's approach is in stark contrast to the Panel's findings regarding the contribution of the measure to the reduction of the number of waste tyres in Brazil.[206] In the context of the contribution analysis, the Panel did not require any quantification of the contribution the ban makes to the reduction of the number of waste tyres. In other words, even a minimal reduction in the number of waste tyres through the ban was sufficient for the Panel to conclude that the ban was "necessary" within the meaning of Article XX (b) GATT. Thus, it is entirely possible that the contribution of the ban to the reduction of waste tyres is smaller than the number of imports from Mercosur countries under the Mercosur exemption.

350. What is more, the ratio between past EC imports (14,000 tonnes, accounting for the majority of the worldwide imports of 17,600 tonnes) and 2004 Mercosur imports was in the order of one to seven. One must presume that if the latter were considered not to significantly undermine the objective of the import ban, the same would not apply to a hypothetical exemption of EC imports – otherwise there would be no justification for the discrimination even under the panel's logic. The ratio between the amount of additional waste tyres, if any, and the overall annual quantity of waste tyres (around 40 million), however, is bound to be several orders of magnitude smaller. Thus, the Panel should have considered the importation of retreaded tyres from the EC to also not undermine the assumed objective of the ban. As it becomes apparent, the Panel's approach is internally contradictory. For all the above reasons, the Panel's approach to the issue of quantities of waste tyres and import volumes is internally inconsistent.

351. The flawed nature of the Panel's approach can also be illustrated by considering an example where a WTO Member imports identical quantities of a product from seven other WTO Members. Under the Panel's logic, the Article XX *chapeau* would permit this WTO Member to ban imports from six of these seven Members, and continue to take in imports from the seventh. The latter would not "significantly" undermine its objective, and the discrimination between countries

[206] Cf. above, para. 167 et seq.

where the same conditions prevail would be "justifiable". To the EC, it seems obvious that such discrimination is precisely what the *chapeau* is meant to outlaw.

352. For all these reasons, the Appellate Body should reverse the Panel's findings in paragraphs 7.270 to 7.289 of the Panel Report, and find that the Mercosur exemption constitutes arbitrary and unjustifiable discrimination between countries where the same conditions prevail.

VI. THE PANEL ERRED BY FINDING THAT THE IMPORTS OF USED TYRES DO NOT CONSTITUTE ARBITRARY DISCRIMINATION, AND THAT THEY CONSTITUTE UNJUSTIFIED DISCRIMINATION ONLY TO THE EXTENT THAT THEY SIGNIFICANTLY UNDERMINE THE OBJECTIVES OF THE BAN

353. The Panel found that the fact that used tyres are imported into Brazil under court injunctions for the purpose of being retreaded in Brazil constitutes unjustifiable discrimination between countries where the same conditions prevail. The EC agrees with this finding. However, in reaching this finding, the Panel made a number of other findings which are erroneous, and which reflect the legal errors committed by the Panel in the treatment of the Mercosur exemption under the chapeau of Article XX GATT. First, the Panel found wrongly that the importation of used tyres under court injunctions did not constitute arbitrary discrimination.[207] Second, the Panel erred by finding that the imports of used tyres constitute unjustified discrimination only to the extent that they significantly undermine the objectives of the ban.[208]

A. The Panel erred by finding that the imports of used tyres do not constitute arbitrary discrimination

354. There is no disagreement between the parties that large amounts of used tyres have been imported into Brazil in past years for the purpose of retreading in past years. There is also no disagreement that these importations were made possible by injunctions continuously granted by Brazilian courts in actions against the

[207] Panel Report, para. 7.292-7.294.

[208] Panel Report, para. 7.296, 7.306.

Brazilian ban on the importation of used tyres, on the basis that these used tyres constituted an indispensable raw material for Brazilian retreaders which was not available inside Brazil.

355. In its later analysis, the Panel itself considers that the large-scale importations of used tyres have the effect of significantly undermining the objectives of the ban.[209] However, when considering whether the imports constitute arbitrary discrimination, the Panel surprisingly reaches a different result. The Panel simply states that "nothing in the evidence before us suggests that the decisions of the Brazilian courts granting these injunctions were capricious or unpredictable".[210] Then, the Panel explains that "the decision of the Brazilian administrative authorities to comply with the preliminary injunctions does not seem irrational or unpredictable either".[211]

356. These findings once again illustrate the Panel's overly restrictive approach to the notion of arbitrary discrimination. The Panel seems to believe that no action is arbitrary as long as there is some cause or reason explaining it, for instance the domestic law that requires judges to grant interim relief to protect retreaders against irreparable damage. The fact that these reasons may have nothing to do with the underlying objective of the ban, or that they may even directly contradict this ban, in the eyes of the Panel does not seem to suffice for qualifying a measure as arbitrary.

357. As in the case of the Mercosur exemption, this restrictive reasoning must be rejected. What is arbitrary must be decided in the light of the stated objectives of the measure, i.e. the protection of life and health from risk. As the Panel had noted itself, from the point of view of human life or health, there can be no difference between a retreaded tyre produced in the EC, and a retreaded tyre produced in Brazil from a casing imported from the EC.[212] On this basis, the importation of

209 Panel Report, para. 7.295 et seq.

210 Panel Report, para. 7.293.

211 Idem.

212 Panel Report, para. 7.242.

used tyres under court injunctions must be regarded as constituting arbitrary discrimination.

358. The Panel seeks to avoid this conclusion by drawing a distinction between the actions of Brazilian courts, on the one hand, and the compliance by the Brazilian administrative authorities with the court injunctions, on the other. However, this distinction is ill-founded. As the Panel itself notes in its later analysis, a WTO Member must assume responsibility for the acts of all its branches of government.[213] Accordingly, the obvious contradiction between the actions branches of the Brazilian government that have allowed the importation of used tyres, and those who ban the importation of retreaded tyres, must be regarded as arbitrary behaviour on the part of Brazil.

359. Accordingly, the Appellate Body should reverse paras. 7.292 to 7.294, and find that the importation of used tyres into Brazil under court injunctions constitutes arbitrary discrimination within the meaning of Article XX GATT.

B. The Panel erred by finding that the imports of used tyres constitute unjustified discrimination only to the extent that they significantly undermine the objectives of the ban

360. In its subsequent analysis, the Panel finds that the imports of used tyres under Court injunctions constitute unjustifiable discrimination. However, applying the same quantitative approach to the chapeau of Article XX GATT as it did when discussing the Mercosur exemption, the Panel qualifies this finding by stating that the unjustifiable discrimination exists "since used tyre imports have been taking place under the court injunctions in such amounts that the achievement of the ban is being significantly undermined".[214]

361. As the EC has already explained in relation to the treatment of the Mercosur exemption, the question of export volumes is of no relevance under the chapeau of

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213 Panel Report, para. 7.305 (with reference to the Appellate Body Report in *US – Shrimp*, para. 173).

214 Panel Report, para. 7.306.

Article XX GATT. In this regard, the EC can therefore refer to its earlier arguments.[215]

362. As in the case of the Mercosur exemption, the effects of the court injunctions on the application of the measure should have been examined without any reference to import volumes. Such an examination would also have been entirely possible. As the EC had shown during the Panel proceedings, numerous retreaders in Brazil are, and continue to be, in the possession of injunctions allowing them to import used tyres for the purpose of retreading. These injunctions, which are res judicata, do not contain any limitations in terms of temporal validity, nor in terms of quantities that may be imported.[216] Accordingly, they amount to an effective exemption of Brazilian retreaders from the import ban on used tyres.

363. The Panel's reliance on import volumes also has serious implications for the implementation of the Panel report. The Panel notes that imports of used tyres into Brazil had amounted in 2005 to 10,5 million tyres, and qualifies this as significant. However, the question is where is the threshold below which the imports of used tyres would no longer be significant. For instance, would the injunctions no longer constitute unjustifiable discrimination if the importations fell below 5 million tyres, or 1 million tyres? The EC fails to see any basis on which such a decision could be taken. Moreover, the EC would have to keep monitoring the amount of used tyres imported by Brazil, since Brazil may or may not be in compliance with its WTO obligations depending on the number of used tyres it imports in a given period. Also, the EC could always do this only for a past period, and thus never be assured of Brazil's WTO compliance in the present and the future. Obviously, such a result would not be in accordance with the objective of the prompt settlement of dispute set out in Article 3.3 DSU.

364. For these reasons, the Appellate Body should reverse the Panel's finding, in para. 7.296 and 7.306 of the report, that the imports of used tyres constitute unjustified discrimination only to the extent that they significantly undermine the objectives

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215 Cf. above para. 337 et seq.

216 Cf. EC SWS, para. 89; EC Comment on Brazil's Reply to the Panel's Question No. 92.

of the ban, and find that the importations of used tyres under court injunctions constitute arbitrary and unjustifiable discrimination within the meaning of Article XX GATT.

VII. THE PANEL ERRED BY FINDING THAT THE MERCOSUR EXEMPTION DOES NOT CONSTITUTE A DISGUISED RESTRICTION ON INTERNATIONAL TRADE, AND THAT THE IMPORTS OF USED TYRES CONSTITUTE A DISGUISED RESTRICTION ONLY TO THE EXTENT THAT IMPORTS ARE TAKING PLACE IN SUCH QUANTITIES THAT THEY SIGNIFICANCTLY UNDERMINE THE OBJECTIVES OF THE BAN

365. The Panel also considers whether the Mercosur exemption and the imports of used tyres constitute a disguised restriction on international trade within the meaning of the chapeau of Article XX GATT.

366. In this regard, the Panel follows an almost identical reasoning to the one developed in respect of the existence of unjustifiable discrimination. On this basis, the Panel finds that the Mercosur exemption does not constitute a disguised restriction on international trade since imports have not been significant,[217] and that the imports of used tyres constitute a disguised restriction only to the extent that imports are taking placed in such quantities that they significantly undermine the objectives of the ban.[218]

367. For the same reasons as set out above regarding the existence of unjustifiable discrimination, the EC considers the Panel's reliance on import volumes for the purposes of determining compatibility with the chapeau of Article XX GATT to be erroneous.

368. For these reasons, the EC submits that the Appellate Body should reverse paras. 7.349 and 7.351 to 7.355 of the Panel report, and find that the Mercosur exemption and the imports of used tyres under injunctions amount to a disguised restriction on trade.

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[217] Panel Report, para. 7.349, 7.355.

[218] Panel Report, para. 7.354-7.355.

VIII. CONDITIONAL APPEAL: THE PANEL ERRED BY FAILING TO ADDRESS THE EC'S CLAIM UNDER ARTICLES XIII: 1 AND I:1 GATT

369. Before the Panel, the EC also claimed that the Mercosur exemption was incompatible with Articles XIII:1 and I:1 GATT. Brazil did not contest this violation, but argued that this violation was justified under Articles XXIV and XX (d) GATT.[219]

370. In its Report, the Panel decided to exercise judicial economy, and therefore did not address the claim.[220] The EC considers that this decision was in error. Given the very limited basis of the Panel's finding of violation regarding the ban, a finding concerning the EC's claims under Article XIII:1 and I:1 GATT would have been necessary to ensure a complete resolution of the dispute.

371. In the hypothesis that the Appellate Body should not find, as requested by the EC in the earlier sections of this submission, that the Mercosur exemption as such already leads to the incompatibility of the ban with the chapeau of Article XX GATT, the EC asks the Appellate Body to reverse the Panel's decision to exercise judicial economy with respect to the EC's claims under Article XIII:1 and I:1 GATT. Moreover, in this event, the EC asks the Appellate Body to complete the analysis by the Panel, and find that the Mercosur exemption is incompatible with Article XIII:1 and I:1 GATT, and that Brazil has failed to demonstrate that they are justified by Articles XX(d) or XXIV.

A. The Panel erred by deciding to exercise judicial economy

372. According to the case law of the Appellate Body, a Panel is not necessarily obliged to address all claims raised by a party. In particular, a Panel may decide to exercise judicial economy when addressing a particular claim is not necessary to ensure a positive resolution of the dispute in accordance with Article 3.3, 3.4 and 3.7 DSU.[221]

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219 Panel Report, para. 7.449.

220 Panel Report, para. 7.456, 8.2.

221 Appellate Body Report, *US – Wool Shirts and Blouses*, pp. 18-19.

373. However, the discretion of Panels to exercise judicial economy is not without limits. As the Appellate Body has decided, a Panel may not decline to rule on claims if a ruling on these claims is necessary to secure a complete resolution of the dispute. These limitations on a Panel's power to exercise judicial economy were explained by the Appellate Body in *Australia – Salmon*:[222]

> The principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. This aim is to resolve the matter at issue and "to secure a positive solution to a dispute". To provide only a partial resolution of the matter at issue would be false judicial economy. A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings "in order to ensure effective resolution of disputes to the benefit of all Members.

374. Reference can also be made to the findings of the Appellate Body in *EC – Sugar*, where the Appellate Body clarified that findings which a Panel might be called upon to make pursuant to Article 11 DSU could also relate to implementation.[223] On this basis, the Appellate Body found that a Panel exercises false economy if, by declining to rule on a particular claim, it deprives the complaining party of a particular remedy.[224]

375. In the present case, the Panel exercised "false judicial economy" within the meaning of the case law of the Appellate Body. The Panel exercised judicial economy purely on the grounds that it "had already found that the import prohibition as well as the fines are inconsistent with Article XI:1 and are not justified under Article XX (b)".[225]

376. However, the Panel failed to take into consideration the very narrow basis on which it had found that the import prohibition (and the fines) were incompatible with Article XX GATT. Since the Panel found an incompatibility with the chapeau

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222 Appellate Body Report, *Australia – Salmon*, para. 223; cf. equally Appellate Body Report, *Japan – Agricultural Products II*, para. 111.

223 Appellate Body Report, *EC – Sugar*, para. 331.

224 Appellate Body Report, *EC – Sugar*, para. 335.

225 Panel Report, para. 7.455.

of Article XX GATT only to the extent that imports of used tyres are occurring in amounts which significantly undermine the ban, Brazil might implement the report by reducing the level of imports of used tyres to below a "significant" level while maintaining the ban in place. At the same time, since the Panel had not found the Mercosur exemption to be incompatible with the chapeau of Article XX GATT, Brazil might also maintain this exemption in place, provided that imports under that exemption do not rise above a "significant" level.

377. The Panel's findings therefore do not require the removal of the Mercosur exemption. Therefore, the Panel should have addressed the EC's claim that this exemption as such is incompatible with Article XIII:1 and I:1 GATT. It should be noted in this context that according to the settled case law of the Appellate Body,[226] the EC is entitled to challenge this exemption, which is contained in a legislative instrument, "as such". Therefore, the question of the volumes of imports occurring under this exemption - which the Panel wrongly took into account in deciding the compatibility of the ban with the chapeau of Article XX GATT - cannot affect the EC's entitlement to challenge the compatibility of the exemption with Brazil's WTO obligation "as such".

378. For these reason, the Appellate Body should reverse the Panel's decision, set out in paras 7.453 to 7.456 and 8.2 of the Report, to exercise judicial economy in respect of the EC's claims under Articles XIII:1 and I:1 GATT.

B. The Appellate Body should find that the Mercosur exemption is incompatible with Articles XIII:1 and I:1 GATT

379. On this basis, the Appellate Body should complete the legal analysis of the Panel and find that the Mercosur exemption is incompatible with Articles XIII:1 and I:1 GATT, and is not justified under Articles XXIV GATT and XX (d) GATT. The Appellate Body may complete the legal analysis of the Panel if there are findings of the Panel and uncontested facts on the record which are sufficient for the

[226] Appellate Body Report, *US – 1916 Act*, para. 60-61; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82.

Appellate Body to do so.[227] The EC submits that in respect of the EC's claim under Articles XIII:1 and I:1 GATT, including the exceptions of Articles XX(d) and XXIV invoked by Brazil in this relation, this is the case.

380. It is not contested that the Mercosur exemption constitutes a violation of Articles XIII:1 and I:1 GATT.[228] The only question to be addressed is therefore whether the exemption could be justified, as claimed by Brazil, on the basis of Articles XXIV or XX (d) GATT. The EC submits that this is not the case.

1. The exemption is not justified by Article XXIV GATT

381. As the EC set out during the Panel proceedings,[229] in order for a measure to be justified under Article XXIV:5 of the GATT, in accordance with the case law of the Appellate Body in *Turkey – Textiles*, the defending party must fulfil two conditions: first, it must demonstrate that the measure is introduced upon the formation of a customs union that fully meets the requirements of Article XXIV:8(a) and 5(a) 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.[230]

(a) Brazil has failed to demonstrate that Mercosur is in accordance with the requirements of Article XXIV:8(a) and 5(a) GATT

382. As regards the first condition, it is for Brazil, as the party invoking these provisions, to establish that the conditions of the exception are met. During the Panel proceedings, Brazil limited itself to asserting, without offering any further proof or argument, that these conditions are met by Mercosur.[231] In contrast, the

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227 Appellate Body Report, *Australia – Salmon*, para. 117-118.

228 Panel Report, para. 7.449.

229 EC FWS, para. 206 - 207; EC SWS, para. 216.

230 Appellate Body Report, *Turkey – Textiles*, para. 46, 58.

231 Brazil's FWS, para. 169.

EC demonstrated, during the Panel proceedings, that, on a number of points, there are numerous important and open questions as to Mercosur's compliance with the conditions of Article XXIV:8(a) and 5(a) GATT. For a detailed discussion, the EC can refer to its submissions during the Panel proceedings, which have not been rebutted by Brazil.[232] At this stage, the EC would merely wish to recall the following points.

383. 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 been entirely liberalised within Mercosur.[233] 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, Brazil has failed to demonstrate that Mercosur has achieved a liberalisation of "substantially all" intra-Mercosur trade as required by Article XXIV:8 (a) (i) GATT.

384. 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.[234] 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, Brazil has failed to demonstrate that Mercosur member States currently apply substantially the same duties and other regulations of commerce on trade with third countries.

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232 Cf. EC SWS, para. 217 et seq.; EC SOS, para. 135-140; EC Closing Statement at the second substantive meeting with the Panel, paras. 42-46; EC Comments on Brazil's Reply to the Panel's Question No. 132.

233 Cf. WT/COMTD/1/Add.17, p. 3 (Exhibit EC-121).

234 Cf. WT/COMTD/1/Add.17, p. 2 (Exhibit EC-121).

385. 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 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 import tariff rates prepared by the WTO Secretariat.[235] 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.

386. Since Brazil, as the Party bearing the proof in this respect, has not demonstrated that Mercosur is in accordance with Article XXIV:8 (a) and 5(a) GATT, it has failed to establish a prima facie case that Mercosur is compliant with these provisions. Accordingly, the Appellate Body should conclude that Brazil has failed to demonstrate that Mercosur is in accordance with the requirements of Article XXIV:8 (a) and 5(a) GATT, and on that basis, reject Brazil's defence.

(b) Brazil has not shown that the Mercosur exemption is necessary for the formation of the customs union

387. Second, Brazil must show that without the exclusion of Mercosur members from the import ban, the formation of Mercosur would have been prevented. In this respect, two legal questions arose during the Panel proceedings. First, Brazil contested that it was obliged to establish that the Mercosur exemption is necessary for the formation of Mercosur. Second, the question arose whether an exemption from a measure which allegedly is necessary for the purpose of protecting human life and health can be necessary for the formation of a customs union.

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235 Brazil's Reply to the Panel's Question No. 75, referring to WT/COMTD/1/Add.15.

i) Brazil must show that without the exemption, the formation of the customs union would have been prevented

388. During the Panel proceedings, Brazil argued that the case law in *Turkey – Textiles* does not apply in the present case, because *Turkey – Textiles* concerned a new quantitative restriction on imports, whereas in the present case, Brazil exempted Mercosur countries from an "existing" ban on the importation of retreaded tyres.[236]

389. This argumentation is flawed. Brazil makes an unduly narrow interpretation of the Appellate Body's case law in *Turkey - Textiles*. The conditions in *Turkey – Textiles*, which are derived from the plain wording and context of Article XXIV:5 GATT, were formulated without any reference to the sequence in which the discrimination was introduced. There is therefore no indication that the Appellate Body wanted to distinguish between cases where the restriction is imposed immediately on imports, without being imposed on goods from within the customs union, and cases where the restriction is first imposed on all goods, and then lifted for goods originating in the customs union.

390. Accordingly, the sequencing of the measures which result in a discrimination between goods originating within the customs union, and goods from outside the customs union, does not change the standards applicable under Article XXIV:5 GATT. What is relevant is that in both cases, there is a difference in treatment which is incompatible with most-favoured nation obligations, and which therefore requires a justification under Article XXIV GATT.

391. Brazil has also argued that "over-extending" the analysis of *Turkey – Textiles* could be the "death knell" of regional trade liberalisation.[237] This dire warning is unwarranted. The EC does not see why it would be problematic for WTO Members to demonstrate the necessity of discrimination which results from the creation of a customs union or free trade area. Typically, this will be a reasonably straightforward exercise, given the requirement in Article XXIV:8 (a) and (b)

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236 Brazil's FWS, para. 170; Brazil's FOS, para. 71.

237 Brazil's Reply to the Panel's Question No. 78.

GATT to eliminate tariffs and other restrictive regulations of commerce on substantially all trade between the members of the customs union or free trade area. That this is different in the present case, which involves a discriminatory application of measures purportedly justified under Article XX GATT, fully confirms the usefulness of the necessity test.

392. Accordingly, the EC does not consider that applying the necessity in this sense would be the "death knell" for regional trade liberalisation. In contrast, if Brazil's argument were accepted, Article XXIV would be turned into an almost limitless exception, which would allow parties to a customs union to take any measure derogating from WTO obligations without having to demonstrate that the measure is in fact necessary for the formation of the customs union.

393. In order to justify the Mercosur exemption under Article XXIV GATT, Brazil must therefore show that this exemption was necessary in order to allow the formation of Mercosur.

ii) The Mercosur exemption was not necessary for the formation of Mercosur

394. As the EC also explained during the Panel proceedings, the exemption of Mercosur countries from the ban on the importation of retreaded tyres is not necessary to allow the formation of Mercosur.[238]

395. According to Article XXIV:4 GATT, the basic objective of a customs union is to facilitate trade between the constituent territories of the customs union, while not raising barriers to the trade with other WTO Members. This objective is reflected in Article XXIV:8 (a) (i) GATT, which requires that in principle, duties and restrictive regulations on trade should be abolished with respect to substantially all trade between the constituent members of the customs union.

396. However, Article XXIV:8 (a) (i) GATT explicitly exempts from this need to liberalise trade within the customs union a number of measures, including in

238 EC FOS, para. 125 et seq.; EC SWS, para. 232 et seq.

particular those which are justified under Article XX GATT. This means that the maintenance of restrictive regulations of commerce which are justified on the basis of Article XX GATT does not prevent the formation of a customs union. In other words, the selective abolition of such measures only as regards trade with other members of the customs union is not necessary for the formation of a customs union.

397. This is precisely where the fundamental logical contradiction of Brazil's arguments lies. If, as Brazil argued, the import ban on retreaded tyres was indeed justified as measure necessary to protect human life or health under Article XX (b) GATT, then there was no need to abolish this ban in trade with other Mercosur countries, since its maintenance was explicitly allowed by Article XXIV:8(a) GATT. If, in contrast, the ban is not justified under Article XX (b) GATT, then it should be removed for all WTO Members, and not just for other Mercosur Members.

398. During the Panel proceedings, Brazil contested this interpretation by arguing that Article XXIV:8 GATT "does not *require* or impose the obligation on customs union members to maintain trade restrictions by invoking Article XX".[239] This is correct, but beside the point. The question is not whether Article XXIV requires the maintenance of trade restrictions based on Article XX, but whether it requires their elimination. Since it does not do the latter, it can therefore also not be invoked in order to justify the selective elimination of such trade restrictions only with respect to trade with other members of the customs union or free trade area.[240]

399. The EC would recall that the necessity of the Mercosur exemption is also put into doubt by the sequencing of the measures adopted by Brazil.[241] It should be recalled that Mercosur was concluded in 1991. At this time, imports of retreaded tyres into Brazil took place both from the EC, and from other Mercosur countries.

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239 Brazil's Reply to the Panel's Question No. 80.

240 See also EC Reply to the Panel's Question No. 80.

241 Cf. already EC FOS, para. 129.

The ban on imports of retreaded tyres was adopted by Brazil only in 2000, and then partially lifted for imports from Mercosur countries in March 2002. Brazil cannot claim that the introduction of these measures, which were adopted several years after the conclusion of Mercosur, was necessary for the formation of the customs union. In fact, since at the formation of Mercosur, trade in retreaded tyres was free of any quantitative restrictions, no further measures regarding this product were necessary to allow the formation of the customs union.

400. In conclusion, the Appellate Body should find that the Mercosur exemption is not justified by Article XXIV GATT.

2. The exemption is not justified by Article XX (d) GATT

401. During the Panel proceedings, Brazil has also argued that the Mercosur exemption is justified under Article XX (d) GATT as a measure "necessary to secure compliance with laws and regulations".[242]

402. During the Panel proceedings, the EC explained that this view was legally erroneous.[243] First, the obligation to comply with the ruling of the Arbitral Tribunal is not contained in a "law or regulation" within the meaning of Article XX (d) GATT. In *Mexico – Soft Drinks*, the Appellate Body found that the term "laws and regulations" covered "rules that form part of the domestic legal system of a WTO Member, including rules deriving from international agreements that have been incorporated into the domestic legal system of a WTO Member or have direct effect according to that WTO Member's legal system".[244]

403. The obligation to comply with rulings of Mercosur Arbitral Tribunals is contained in Article 21.2 of the Protocol of Brasilia.[245] Brazil has not shown that Article 21.2 of the Protocol of Brasilia is a "law or regulation" which could be invoked or

242 Brazil's SWS, para. 184 et seq.

243 EC SWS, para. 239 et seq.; EC SOS, para. 150 et seq.

244 Appellate Body Report, *Mexico – Soft Drinks*, para. 79.

245 Exhibit BRA-90.

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.

404. 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.

405. 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. As a further practical example, the EC would not have needed a waiver for the preferential treatment it is obliged to grant to the ACP countries under the Lomé and Cotonou Agreements. In this way, the most-favoured nation principle, which the Appellate Body has referred to as a "cornerstone of the world trading system",[246] would be rendered ineffective. It is submitted that this cannot have been 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.

406. Fourth, Brazil has also not demonstrated that the Mercosur exemption was "necessary" as required by Article XX (d) GATT. Brazil could perfectly well have complied with the ruling of the Mercosur Arbitral Tribunal by simply exempting all third countries form the import ban, rather than just its Mercosur partners.

246 Appellate Body Report, *Canada – Autos*, para. 69; Appellate Body Report, *US – Section 211 of the Appropriations Act*, para. 297 ; Appellate Body Report, *EC – Tariff Preferences*, para. 101.

Accordingly, Brazil had a reasonable, and GATT-consistent alternative available which it failed to take.

407. 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.

408. Accordingly, the Mercosur exemption is not justified by Article XX (d) GATT.

409. In conclusion, the Appellate should find that the Mercosur exemption is incompatible with Article XIII:1 and Article I:1 GATT, and is not justified by Article XXIV GATT or Article XX (d) GATT.

IX. CONCLUSION

410. For the reasons set out in this submission, the EC requests the Appellate Body to:

- reverse the findings contained in paragraphs 7.103 to 7.216 of the Panel Report, and find that the import ban is not necessary within the meaning of Article XX (b) GATT;

- reverse the findings in paragraphs 7.270 to 7.289 of the Panel Report, and find that the Mercosur exemption constitutes arbitrary and unjustifiable discrimination between countries where the same conditions prevail;

- reverse the findings in paragraphs 7.292 to 7.294 of the Panel Report, and find that the importation of used tyres into Brazil under court injunctions constitutes arbitrary discrimination within the meaning of Article XX GATT;

- reverse the finding in paragraphs 7.296 and 7.307 of the Panel Report that the imports of used tyres under court injunctions constitute unjustified discrimination only to the extent that they significantly undermine the

objectives of the ban, and find that they constitute unjustifiable discrimination within the meaning of Article XX GATT;

- reverse the findings in paras. 7.349 and 7.351 to 7.355 of the Panel Report, and find that the Mercosur exemption and the imports of used tyres under injunctions constitute a disguised restriction on trade.

411. In the event that the Appellate Body should not find, as requested by the EC, that the Mercosur exemption as such leads to the incompatibility of the ban with the chapeau of Article XX GATT, the EC also asks the Appellate Body to:

- reverse the Panel's decision, set out in paras 7.453 to 7.456 and 8.2 of the Report, to exercise judicial economy in respect of the EC's claims under Articles XIII:1 and I:1 GATT;

- find that the Mercosur exemption is incompatible with Article XIII:1 and Article I:1 GATT, and is not justified by Article XXIV GATT or Article XX (d) GATT.

LIST OF EXHIBITS

Exhibit EC – A-1 Proibição de impartação leva impresas para o Paraguguai (Import ban takes companies to Paraguay), Diário de comércio, 19 July 2007

Exhibit EC – A-2 Brasileños quieren invertir en la remanufactura de cubiertas (Brazilians want to invest in tyre remanufacturing), La Nación, 17 July 2007