

BRAZIL – MEASURES AFFECTING IMPORTS OF RETREADED TYRES

AB-2007-4

Report of the Appellate Body

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CASES CITED IN THIS REPORT

Short Title	Full case title and citation
<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
<i>Brazil – Retreaded Tyres</i>	Panel Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/R, circulated to WTO Members 12 June 2007
<i>Canada – Dairy</i>	Appellate Body Report, <i>Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products</i> , WT/DS103/AB/R, WT/DS113/AB/R and Corr.1, adopted 27 October 1999, DSR 1999:V, 2057
<i>Canada – Wheat Exports and Grain Imports</i>	Appellate Body Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, 2739
<i>Chile – Price Band System (Article 21.5 – Argentina)</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS207/AB/RW, adopted 22 May 2007
<i>Dominican Republic – Import and Sale of Cigarettes</i>	Appellate Body Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, 7367
<i>Dominican Republic – Import and Sale of Cigarettes</i>	Panel Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/R, adopted 19 May 2005, as modified by Appellate Body Report, WT/DS302/AB/R, DSR 2005:XV, 7425
<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243
<i>EC – Asbestos</i>	Panel Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/R and Add.1, adopted 5 April 2001, as modified by Appellate Body Report, WT/DS135/AB/R, DSR 2001:VIII, 3305
<i>EC – Bed Linen (Article 21.5 – India)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, 965
<i>EC – Export Subsidies on Sugar</i>	Appellate Body Report, <i>European Communities – Export Subsidies on Sugar</i> , WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005, DSR 2005:XIII, 6365
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
<i>EC – Sardines</i>	Appellate Body Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3359
<i>EC – Selected Customs Matters</i>	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R, adopted 11 December 2006
<i>EC – Tube or Pipe Fittings</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, 2613
<i>Japan – Agricultural Products II</i>	Appellate Body Report, <i>Japan – Measures Affecting Agricultural Products</i> , WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, 277
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97

Short Title	Full case title and citation
<i>Japan – Apples</i>	Appellate Body Report, <i>Japan - Measures Affecting the Importation of Apples</i> , WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, 4391
<i>Korea – Alcoholic Beverages</i>	Appellate Body Report, <i>Korea – Taxes on Alcoholic Beverages</i> , WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, 3
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
<i>Korea – Various Measures on Beef</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, 5
<i>Korea – Various Measures on Beef</i>	Panel Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/R, WT/DS169/R, adopted 10 January 2001, as modified by Appellate Body Report, WT/DS161/AB/R, WT/DS169/AB/R, DSR 2001:I, 59
<i>Mexico – Taxes on Soft Drinks</i>	Appellate Body Report, <i>Mexico – Tax Measures on Soft Drinks and Other Beverages</i> , WT/DS308/AB/R, adopted 24 March 2006
<i>Turkey – Textiles</i>	Appellate Body Report, <i>Turkey – Restrictions on Imports of Textile and Clothing Products</i> , WT/DS34/AB/R, adopted 19 November 1999, DSR 1999:VI, 2345
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779
<i>US – Corrosion-Resistant Steel Sunset Review</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3
<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R and Corr.1, adopted 20 April 2005, DSR 2005:XII, 5663
<i>US – Gambling</i>	Panel Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/R, adopted 20 April 2005, as modified by Appellate Body Report, WT/DS285/AB/R, DSR 2005:XII, 5797
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
<i>US – Line Pipe</i>	Panel Report, <i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i> , WT/DS202/R, adopted 8 March 2002, as modified by Appellate Body Report, WT/DS202/AB/, DSR 2002:IV, 1473
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, 3257
<i>US – Section 301 Trade Act</i>	Panel Report, <i>United States – Sections 301-310 of the Trade Act of 1974</i> , WT/DS152/R, adopted 27 January 2000, DSR 2000:II, 815
<i>US – Section 337 Tariff Act</i>	GATT Panel Report, <i>United States Section 337 of the Tariff Act of 1930</i> , L/6439, adopted 7 November 1989, BISD 36S/345

Short Title	Full case title and citation
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
<i>US – Shrimp (Article 21.5 – Malaysia)</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia</i> , WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6481
<i>US – Shrimp (Article 21.5 – Malaysia)</i>	Panel Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia</i> , WT/DS58/RW, adopted 21 November 2001, upheld by Appellate Body Report, WT/DS58/AB/RW, DSR 2001:XIII, 6529
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
ABR	Associação Brasileira do Segmento de Reforma de Pneus (Brazilian Association of the Retreading Industry)
ABR Report	Report of the ABR on tyre retreading activities in Brazil, 26 May 2006 (Exhibit BRA-95)
CONAMA	Conselho Nacional do Meio Ambiente (National Council for the Environment of the Ministry of the Environment)
CONAMA Resolution 258/1999	CONAMA Resolution No. 258 of 26 August 1999 (Exhibits BRA-4 and EC-47)
CRTA	Committee on Regional Trade Agreements
DSB	Dispute Settlement Body
DSU	<i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i>
Enabling Clause	<i>GATT 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, L/4903, 28 November 1979, BISD 26S/203</i>
GATS	<i>General Agreement on Trade in Services</i>
GATT 1994	<i>General Agreement on Tariffs and Trade 1994</i>
Import Ban	Prohibition imposed by Brazil on imports of retreaded tyres
INMETRO	Instituto Nacional de Metrologia, Normalização e Qualidade Industrial (National Institute for Metrology, Standardization and Industrial Quality)
LAFIS	LAFIS Consultoria, Análises Sectoriais e de Empresas
MERCOSUR or Mercosur	Mercado Común del Sur (Southern Common Market) – a regional trade agreement between Brazil, Argentina, Uruguay, and Paraguay, founded in 1991 by the Treaty of Asunción, amended and updated by the 1994 Treaty of Ouro Preto
MERCOSUR exemption	Exemption from the Import Ban afforded by Brazil to imports of retreaded tyres originating in MERCOSUR countries
OECD	Organisation for Economic Co-operation and Development
Panel Report	Panel Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i>
Portaria SECEX 8/2000	Portaria SECEX No. 8 of 25 September 2000 (Exhibits BRA-71 and EC-26)
Portaria SECEX 14/2004	Portaria No. 14 of the SECEX, dated 17 November 2004 (Exhibits BRA-84 and EC-29)
SECEX	Secretaria de Comércio Exterior (Secretariat of Foreign Trade of the Brazilian Ministry of Development, Industry, and Foreign Trade)

Abbreviation	Description
<i>Understanding on Article XXIV of the GATT 1994</i>	<i>Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994</i>
<i>Working Procedures</i>	<i>Working Procedures for Appellate Review, WT/AB/WP/5, 4 January 2005</i>
WTO	World Trade Organization

WORLD TRADE ORGANIZATION
APPELLATE BODY

**Brazil – Measures Affecting Imports of
Retreaded Tyres**

European Communities, *Appellant*
Brazil, *Appellee*

Argentina, *Third Participant*
Australia, *Third Participant*
China, *Third Participant*
Cuba, *Third Participant*
Guatemala, *Third Participant*
Japan, *Third Participant*
Korea, *Third Participant*
Mexico, *Third Participant*
Paraguay, *Third Participant*
Separate Customs Territory of Taiwan, Penghu,
Kinmen, and Matsu, *Third Participant*
Thailand, *Third Participant*
United States, *Third Participant*

AB-2007-4

Present:

Abi-Saab, Presiding Member
Baptista, Member
Taniguchi, Member

I. Introduction

1. The European Communities appeals certain issues of law and legal interpretations developed in the Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres* (the "Panel Report").¹ The Panel was established to consider a complaint by the European Communities concerning the consistency of certain measures imposed by Brazil on the importation and marketing of retreaded tyres² with the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994").

¹WT/DS332/R, 12 June 2007.

²Retreaded tyres are used tyres that are reconditioned for further use by stripping the worn tread from the skeleton (casing) and replacing it with new material in the form of a new tread, and sometimes with new material also covering parts or all of the sidewalls. (See Panel Report, para. 2.1) Retreaded tyres can be produced through different methods, all indistinctively referred to as "retreading". These methods are: (i) top-capping, which consists of replacing only the tread; (ii) re-capping, which entails replacing the tread and part of the sidewall; and (iii) remoulding, which consists of replacing the tread and the sidewall including all or part of the lower area of the tyre. (See *ibid.*, para. 2.2) The retreaded tyres covered in this dispute are classified under subheadings 4012.11 (motor cars), 4012.12 (buses and lorries), 4012.13 (aircraft), and 4012.19 (other types) of the *International Convention on the Harmonized Commodity Description and Coding System*, done at Brussels, 14 June 1983. In contrast, used tyres are classified under subheading 4012.20. New tyres are classified under heading 4011. (See *ibid.*, para. 2.4)

2. Before the Panel, the European Communities claimed that Brazil imposed a prohibition on the importation of retreaded tyres, notably by virtue of Article 40 of Portaria No. 14 of the Secretaria de Comércio Exterior ("SECEX") (Secretariat of Foreign Trade of the Brazilian Ministry of Development, Industry, and Foreign Trade), dated 17 November 2004 ("Portaria SECEX 14/2004")³, and that this prohibition was inconsistent with Article XI:1 of the GATT 1994.⁴ The European Communities also contended that certain Brazilian measures providing for the imposition of fines on the importation of retreaded tyres, and on the marketing, transportation, storage, keeping, or warehousing of imported retreaded tyres⁵, were similarly inconsistent with Article XI:1 or, alternatively, Article III:4 of the GATT 1994.⁶ In addition, the European Communities made claims under Article III:4 of the GATT 1994 in respect of certain state measures prohibiting the marketing of, and/or imposing disposal obligations on the importers of, imported retreaded tyres.⁷ Finally, the European Communities challenged the exemption from the import prohibition on retreaded tyres and associated fines provided by Brazil to retreaded tyres originating in countries of the Mercado Común

³Exhibits BRA-84 and EC-29 submitted by Brazil and the European Communities, respectively, to the Panel. Article 40 of Portaria SECEX 14/2004 reads as follows:

Article 40 – An import license will not be granted for retreaded and used tires, whether as a consumer product or feedstock, classified under NCM code 4012, except for remoulded tires, classified under NCM codes 4012.11.00, 4012.12.00, 4012.13.00 and 4012.19.00, originating and proceeding from the MERCOSUR Member States under the Economic Complementation Agreement No. 18.

(See Panel Report, para. 2.7)

⁴*Ibid.*, paras. 3.1 and 7.1.

⁵Article 47-A of Presidential Decree 3.179 of 21 September 1999, as amended by Article 1 of Presidential Decree 3.919 of 14 September 2001, provides:

Importing used or recycled tires:

Fine of R\$ 400.00 (four hundred reais) per unit.

Sole paragraph: The same penalty shall apply to whosoever trades, transports, stores, keeps or maintains in a depot a used or recycled tire imported under such conditions.

(*Ibid.*, para. 2.10 (referring to Exhibit BRA-72 submitted by Brazil to the Panel); see also Exhibit EC-34 submitted by the European Communities to the Panel)

⁶Panel Report, paras. 3.1 and 7.358.

⁷*Ibid.*, para. 7.391. The measures of the State of Rio Grande do Sul are identified in paragraphs 2.11 and 2.12 of the Panel Report.

del Sur ("MERCOSUR") (Southern Common Market).⁸ The European Communities contended that these exemptions were inconsistent with Articles I:1 and XIII:1 of the GATT 1994.⁹

3. Brazil did not contest that the prohibition on the importation of retreaded tyres and associated fines were *prima facie* inconsistent with Article XI:1¹⁰; or that state measures prohibiting the marketing of, and/or imposing disposal obligations on the importers of, imported retreaded tyres were *prima facie* inconsistent with Article III:4¹¹; or that the exemptions from both the import prohibition and associated fines afforded to retreaded tyres imported from MERCOSUR countries were *prima facie* inconsistent with Articles I:1 and XIII:1 of the GATT 1994.¹² Instead, Brazil submitted that the prohibition on the importation of retreaded tyres and associated fines, and state measures restricting the marketing of imported retreaded tyres, were all justified under Article XX(b) of the GATT 1994.¹³ Brazil contended that the fines associated with the import prohibition on retreaded tyres were justified also under Article XX(d) of the GATT 1994.¹⁴ Brazil further maintained that the exemption from the import prohibition and associated fines afforded to imports of *remoulded* tyres from MERCOSUR countries was justified under Articles XX(d) and XXIV of the GATT 1994.¹⁵

⁸The exemption from the import prohibition afforded to MERCOSUR countries is provided in Article 40 of Portaria SECEX 14/2004 (see *supra*, footnote 3) and applies exclusively to remoulded tyres, a subcategory of retreaded tyres. (See Panel Report, footnote 1440 to para. 7.265) The exemption from the fines associated with the import prohibition on retreaded tyres is provided in Article 1 of Presidential Decree 4.592 of 11 February 2003 (Exhibit BRA-79 submitted by Brazil to the Panel), and exempts imports of all categories of retreaded tyres originating in MERCOSUR countries from the fines provided in Article 47-A of Presidential Decree 3.179, as amended, in the following terms:

Article 1: Article 47-A of Decree 3.179 of 21 September 1999 shall apply with the addition of the following paragraph, and the current sole paragraph shall be renumbered as (1):

paragraph (2) – Imports of retreaded tyres classified under heading MCN 4012.1100, 4012.1200, 4012.1300 and 4012.1900, originating in the MERCOSUR member countries under Economic Complementation Agreement No. 18 shall be exempt from payment of the fine referred to in this Article.

(See *supra*, footnote 5; see also Panel Report, para. 2.16)

⁹Panel Report, para. 7.448.

¹⁰*Ibid.*, paras. 7.2 and 7.359. Brazil did not acknowledge any inconsistency of the fines with Article III:4 of the GATT 1994. (See *ibid.*, para. 7.359)

¹¹*Ibid.*, para. 7.392.

¹²*Ibid.*, para. 7.449.

¹³*Ibid.*, paras. 7.2, 7.217, 7.359, and 7.392.

¹⁴*Ibid.*, para. 7.359.

¹⁵*Ibid.*, para. 7.449.

4. The Panel Report was circulated to Members of the World Trade Organization (the "WTO") on 12 June 2007. The Panel found that the import prohibition on retreaded tyres was inconsistent with Article XI:1 and not justified under Article XX of the GATT 1994.¹⁶ In its analysis, the Panel found that the import prohibition on retreaded tyres was provisionally justified as "necessary to protect human, animal or plant life or health" under Article XX(b).¹⁷ However, the Panel also found that the importation of used tyres under court injunctions resulted in the import prohibition on retreaded tyres being applied by Brazil in a manner that constituted both "a means of unjustifiable discrimination [between countries] where the same conditions prevail"¹⁸ and "a disguised restriction on international trade"¹⁹, within the meaning of the chapeau of Article XX of the GATT 1994.

5. The Panel found further that the fines associated with the import prohibition on retreaded tyres were inconsistent with Article XI:1 and not justified under either paragraph (b) or (d) of Article XX of the GATT 1994.²⁰ The Panel also determined that state law restrictions on the marketing of imported retreaded tyres and associated disposal obligations were inconsistent with Article III:4 and not justified under Article XX(b) of the GATT 1994.²¹ The Panel exercised judicial economy with respect to the European Communities' claims that the exemption from the import prohibition and associated fines afforded to retreaded tyres imported from MERCOSUR countries was inconsistent with Articles I:1 and XIII:1 of the GATT 1994, and with respect to Brazil's related defence under Articles XX(d) and XXIV of the GATT 1994.²² The Panel accordingly recommended that the Dispute Settlement Body (the "DSB") request Brazil to bring those measures found to be inconsistent into conformity with its obligations under the GATT 1994.²³

6. At its meeting on 10 August 2007, the DSB agreed to a joint request by Brazil and the European Communities to extend the time period for adoption of the Panel Report until no later than 20 September 2007.²⁴ On 3 September 2007, the European Communities notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to Article 16.4 of the *Understanding on Rules and Procedures*

¹⁶Panel Report, paras. 7.357 and 8.1(a)(i) and (ii).

¹⁷*Ibid.*, para. 7.215.

¹⁸*Ibid.*, para. 7.310; see also para. 7.306.

¹⁹*Ibid.*, para. 7.349.

²⁰*Ibid.*, para. 8.1(b). The Panel did not rule on the European Communities' alternative claim that the fines associated with the prohibition on the importation of retreaded tyres were inconsistent with Article III:4 of the GATT 1994. (See *ibid.*, para. 7.364)

²¹*Ibid.*, para. 8.1(c).

²²*Ibid.*, paras. 7.456 and 8.2.

²³*Ibid.*, para. 8.4.

²⁴WT/DS332/8, 31 July 2007. The minutes of the DSB meeting are set out in WT/DSB/M/237.

Governing the Settlement of Disputes (the "DSU"), and filed a Notice of Appeal²⁵ pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").²⁶ On 10 September 2007, the European Communities filed an appellant's submission.²⁷ On 28 September 2007, Brazil filed an appellee's submission.²⁸ On the same day, Argentina, Australia, Japan, Korea, the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu, and the United States each filed a third participant's submission.²⁹ Also on 28 September 2007, China, Cuba, Guatemala, Mexico, and Thailand each notified its intention to appear at the oral hearing as a third participant.³⁰ On 5 October 2007, Paraguay notified its intention to appear at the oral hearing as a third participant.³¹

7. On 28 September 2007, the Appellate Body received an *amicus curiae* brief from the Humane Society International. On 11 October 2007, the Appellate Body further received an *amicus curiae* brief submitted jointly by a group of nine non-governmental organizations.³² The Appellate Body Division hearing the appeal did not find it necessary to take these *amicus curiae* briefs into account in rendering its decision.

8. The oral hearing in this appeal was held on 15 and 16 October 2007. The participants and the third participants, with the exception of Argentina, China, Guatemala, Mexico, Paraguay, and Thailand, made oral statements. The participants and the third participants responded to questions posed by the Members of the Division hearing the appeal.

²⁵WT/DS332/9, 3 September 2007 (attached as Annex I to this Report).

²⁶WT/AB/WP/5, 4 January 2005.

²⁷Pursuant to Rule 21 of the *Working Procedures*.

²⁸Pursuant to Rule 22 of the *Working Procedures*.

²⁹Pursuant to Rule 24(1) of the *Working Procedures*.

³⁰Pursuant to Rule 24(2) of the *Working Procedures*.

³¹Pursuant to Rule 24(4) of the *Working Procedures*.

³²These non-governmental organizations are: Associação de Combate aos Poluentes (ACPO), Brazil; Associação de Proteção ao Meio Ambiente de Cianorte (APROMAC), Brazil; Centro de Derechos Humanos y Ambiente (CEDHA), Argentina; Center for International Environmental Law (CIEL), United States and Switzerland; Conectas Direitos Humanos, Brazil; Friends of the Earth Europe, Belgium; The German NGO Forum on Environment and Development, Germany; Justiça Global, Brazil; and Instituto O Direito por Um Planeta Verde, Brazil.

II. Arguments of the Participants and the Third Participants

A. *Claims of Error by the European Communities – Appellant*

1. The Necessity Analysis

9. The European Communities claims that the Panel erred in finding that the import prohibition on retreaded tyres imposed by Brazil (the "Import Ban") was necessary to protect human, animal, or plant life or health, within the meaning of Article XX(b) of the GATT 1994. The European Communities requests the Appellate Body to reverse this finding and to find, instead, that the Import Ban is not "necessary" within the meaning of Article XX(b).

10. The European Communities' claims of error are directed at three distinct aspects of the Panel's necessity analysis: first, the Panel's finding that the Import Ban contributed to the realization of its stated objective; secondly, the Panel's finding that there were no reasonably available alternatives to the Import Ban; and thirdly, the Panel's alleged failure to conduct the process of weighing and balancing the relevant factors and the alternatives that was required to determine whether the Import Ban was "necessary" under Article XX(b). The arguments advanced by the European Communities in relation to each of these claims of error are addressed in turn.

(a) The Contribution Analysis

11. The European Communities argues that the Panel erred in finding that the Import Ban contributed to the protection of human, animal, or plant life or health. The European Communities maintains that the Panel "applied an erroneous legal standard"³³ by examining whether the Import Ban could make, or *could have* made, a contribution to the protection of human life or health, rather than establishing the *actual* contribution of the measure to its objective. By applying a standard of potential contribution, rather than one of actual contribution, the Panel acted inconsistently with the case law of the Appellate Body³⁴, which requires the Panel to have assessed the extent of the contribution made by the Import Ban to the reduction of waste tyres arising in Brazil. The European Communities reasons that "no meaningful weighing and balancing is possible"³⁵ absent a proper determination of the extent of the contribution made by the measure, and that, for necessity to be demonstrated, the contribution required is "more than mere suitability", it must be "verifiable and significant".³⁶ In this case, assessing the contribution of the measure to the achievement of its stated

³³European Communities' appellant's submission, para. 166.

³⁴*Ibid.*, para. 169 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 164).

³⁵*Ibid.*, para. 171.

³⁶*Ibid.*, para. 172.

goals involved assessing whether the Import Ban reduced the number of waste tyres in Brazil. The European Communities does not see how this could have been done in any way *other than* through quantification, and stresses that this is *not* a case involving scientific uncertainty about the existence of risks. Rather, that "[t]he very indirect nature of the alleged risks attributed to imported retreaded tyres should have called for a particularly diligent examination of the contribution made by the ban to the reduction of the number of waste tyres arising in Brazil."³⁷

12. In addition, the European Communities claims that the Panel did not make an objective assessment of the facts of the case, as required by Article 11 of the DSU, in determining the contribution of the Import Ban to the realization of the ends pursued by it. The European Communities asserts that the Panel ignored significant facts and arguments in its analysis, and failed to conduct an overall assessment of the evidence, instead, referring to the evidence before it in a selective and distorted manner.

13. According to the European Communities, in concluding that it had "no reason to believe that new tyres sold in Brazil are low-quality tyres"³⁸ that were not capable of being retreaded, the Panel ignored evidence that demonstrated "the existence ... of low-quality non-retreadable tyres"³⁹ in Brazil. The Panel's finding that "at least some domestic used tyres are being retreaded in Brazil"⁴⁰ is based exclusively on a statement contained in a report by the Associação Brasileira do Segmento de Reforma de Pneus (the "ABR") (Brazilian Association of the Retreading Industry) (the "ABR Report")⁴¹ and on Technical Note 001/2006 of the Instituto Nacional de Metrologia, Normalização e Qualidade Industrial ("INMETRO") (National Institute for Metrology, Standardization and Industrial Quality).⁴² The European Communities submits that the Panel failed to consider that the former is directly contradicted by a second report by the ABR⁴³, or to discount the evidentiary value of the latter

³⁷European Communities' appellant's submission, para. 177. For the European Communities, the indirect nature of the alleged risk distinguishes this case from *EC – Asbestos*, as the factual context of this case does not concern the evaluation of risk in quantitative or qualitative terms. Rather, it concerns the quantification of the contribution of the measure to achieving its stated objective. (See *ibid.*, para. 175)

³⁸*Ibid.*, para. 183 (quoting Panel Report, para. 7.137).

³⁹*Ibid.* (referring to Exhibits EC-15 and EC-67 to EC-71 submitted by the European Communities to the Panel; European Communities' oral statement at the first Panel meeting, para. 28; and European Communities' response to Question 11 posed by the Panel, Panel Report, pp. 254-255).

⁴⁰Panel Report, para. 7.136.

⁴¹European Communities' appellant's submission, para. 186 (referring to the report of the ABR on tyre retreading activities in Brazil, 26 May 2006 (Exhibit BRA-95 submitted by Brazil to the Panel), para. 6)).

⁴²Exhibit BRA-163 submitted by Brazil to the Panel.

⁴³European Communities' appellant's submission, para. 187 (referring to the report of the ABR on the reformed tyres sector in Brazil, 23 June 2006 (Exhibit BRA-157 submitted by Brazil to the Panel), para. 6)).

given that it was issued during the course of the Panel proceedings and contradicts the earlier INMETRO Technical Note 83/2000.⁴⁴

14. Moreover, the European Communities contends that the Panel ignored evidence that contradicted its findings regarding the retreadability of used tyres in Brazil, namely, a study by the consultancy LAFIS⁴⁵, and the fact that domestic retreaders have sought court injunctions to obtain the right to import used tyres for further retreading in Brazil. The European Communities also denounces the Panel's references to measures that Brazil might adopt in the future (such as more frequent automotive inspections), emphasizing that the question of whether the Import Ban contributed to the achievement of its stated objective had to be determined at the time of the establishment of the Panel, and speculation about future events is not a sufficient basis for an objective assessment of the facts.

(b) Alternatives to the Import Ban

15. The European Communities argues that the Panel committed multiple errors in holding that there were no reasonably available alternatives to the Import Ban that would ensure the same level of protection of human life and health. The European Communities points out that it presented two categories of alternative measures: measures to reduce the *accumulation* of waste tyres; and measures to improve the *management* of waste tyres.

16. In the view of the European Communities, the Panel improperly excluded measures to ensure a better implementation and enforcement of the import ban on *used* tyres from its analysis of possible alternatives to the Import Ban on *retreaded* tyres. The most relevant and obvious alternative that would allow Brazil to prevent the risks associated with the accumulation of waste tyres would be to put an end to the importation of used tyres. Thus, the European Communities insists, the Panel should have analyzed this alternative irrespective of whether it also considered the implementation of the import ban on used tyres as part of its analysis under the chapeau of Article XX.

17. The European Communities adds that the Panel incorrectly defined as "alternatives" to the Import Ban only measures that avoid the generation of waste tyres specifically from imported retreaded tyres. Such a narrow definition of "alternatives" wrongly links the notion of alternative measures to the *means* (avoidance or non-generation of waste tyres) employed by the measure at issue

⁴⁴European Communities' appellant's submission, paras. 188 and 189; Exhibit EC-45 submitted by the European Communities to the Panel.

⁴⁵*Ibid.*, para. 190 (referring to the report by LAFIS, "Auto Parts and Vehicles: Tyres", 20 April 2006 (Exhibit EC-92 submitted by the European Communities to the Panel), p. 11). This study indicates that, in Brazil, the overall rate of retreading for all types of vehicles is 9.9 per cent.

to achieve its objective, rather than to the objective itself. Available alternatives to the Import Ban are not, therefore, as the Panel found, limited to non-generation measures, but include any alternatives that would allow Brazil to attain the stated objective of the Import Ban, namely, the protection of life and health from mosquito-borne diseases and from tyre fire emissions. In the European Communities' view, the Panel's narrow conception of "alternative" resulted in the erroneous rejection of several alternatives that were capable of achieving this objective, such as measures to improve the domestic retreading and retreadability of tyres, the collection and disposal scheme imposed by the Conselho Nacional do Meio Ambiente ("CONAMA") (National Council for the Environment of the Ministry of the Environment), and measures relating to the management of waste tyres, such as co-incineration.

18. The European Communities points to two additional errors in the Panel's conception of alternative measures. First, the Panel refused to consider as alternatives measures that could be "cumulative rather than substitutable"⁴⁶ with the Import Ban. For the European Communities, a measure that is cumulative or complementary to the Import Ban is capable of achieving the same objective as the ban and, therefore, is an alternative that must be taken into account. Secondly, in examining the CONAMA scheme and co-incineration of waste tyres, the Panel did not inquire whether the proposed options exist and are reasonably available, but, instead, examined whether those options are actually being employed.

19. Moreover, the European Communities argues that the Panel erred by excluding as alternatives a correct and complete implementation of certain state measures merely on the basis that these measures have already been implemented in Brazil. Specifically, the European Communities submits that evidence before the Panel demonstrated that Brazil neither implements correctly the obligations under the CONAMA scheme, nor enforces properly its collection and disposal system. Therefore, a better enforcement of the CONAMA scheme is an alternative that would be more effective than the Import Ban in reducing risks associated with tyre waste. The Panel also erroneously ignored the European Communities' contention that collection and disposal programmes, such as Paraná Rodando Limpo⁴⁷ should be adopted by all states in Brazil.

20. The European Communities also challenges the Panel's findings that most of the material recycling alternatives it proposed could not constitute reasonably available alternatives to the Import Ban because they "are only capable of disposing [of] a small ... number of waste tyres".⁴⁸ The case law of the Appellate Body regarding Article XX(b) does not require that one single alternative

⁴⁶European Communities' appellant's submission, para. 225 (quoting Panel Report, para. 7.169).

⁴⁷See Exhibit EC-49 submitted by the European Communities to the Panel.

⁴⁸European Communities' appellant's submission, para. 238 (referring to Panel Report, paras. 7.201, 7.205, and 7.206). (underlining omitted)

measure achieve the same objective as the challenged measure. Therefore, the Panel erred in rejecting several alternative measures on the grounds that, taken individually, each measure did not fully attain the objective of the challenged measure. The European Communities also considers that the Panel erred in its analysis by requiring alternatives to be capable of dealing with the management of *all* waste tyres in Brazil, rather than with the number of waste tyres attributable to imported *retreaded* tyres.

21. Finally, the European Communities submits that the Panel's factual findings regarding reasonably available alternatives were not based on an objective assessment of the facts, as required by Article 11 of the DSU. More specifically, the Panel's rejection of landfilling of waste tyres as an alternative to the Import Ban was based on evidence related exclusively to landfilling of *whole* tyres, when the only alternative proposed was the landfilling of *shredded* tyres, and the Panel did not take into account legislation that permits the landfilling of shredded tyres in Brazil. As regards controlled stockpiling, the Panel erred in rejecting this alternative on the grounds that stockpiling does not dispose of waste tyres, and that it entails some risk to human health and the environment. As recognized in the *Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal*⁴⁹, controlled stockpiling is a disposal operation that is used for temporary storage. It is a crucial element in managing waste tyres, and the mere fact that it does not avoid *all* the risks that the Import Ban seeks to eliminate does not mean that it could not be an alternative. Regarding co-incineration, the European Communities argues that the Panel relied on evidence on co-incineration activities in countries other than Brazil⁵⁰, and failed to require Brazil to explain why unused capacity in its existing incineration facilities could not be used to burn more waste tyres as an available alternative to the Import Ban. The European Communities adds that the Panel's finding that co-incineration "may potentially pose health risks to humans"⁵¹ is based on outdated evidence that does not represent the current state of the art on energy recovery.

22. The European Communities contends further that the Panel's rejection of material recycling as an alternative to the Import Ban is also not based on an objective assessment of the facts. The Panel disregarded evidence presented by the European Communities and, instead, relied on a brief paper by an unidentified organization, which related to a single material recycling application—civil engineering—to conclude that "it is not clear that these [material recycling] applications are entirely

⁴⁹Adopted 1989; entry into force 1992 (Exhibit EC-24 submitted by the European Communities to the Panel).

⁵⁰European countries and the United States. See also Panel Report, footnote 1339 to para. 7.192.

⁵¹European Communities' appellant's submission, para. 262 (quoting Panel Report, para. 7.192).

safe".⁵² The European Communities adds that the Panel's conclusion that material recycling alternatives, such as civil engineering and rubber asphalt, would not be "reasonably" available due to their prohibitive costs was based on evidence adduced exclusively in relation to a single material recycling application—devulcanization.

23. Finally, the European Communities claims that the Panel failed to analyze one of the possible alternative measures identified by the European Communities, and which has already been adopted by Brazil—the National Dengue Control Programme⁵³—and that this failure constitutes a violation of Article 11 of the DSU.

(c) The Weighing and Balancing Process

24. The European Communities claims that the Panel failed to conduct the process of weighing and balancing the relevant factors and the alternatives that was required in order to determine whether the Import Ban was "necessary" under Article XX(b) of the GATT 1994. For the European Communities, weighing and balancing involves, first, an individual assessment of each element (importance of the objective pursued; trade restrictiveness of the measure; contribution of the measure to the achievement of the objective) and, then, a consideration of the role and relative importance of each element together with the other elements, for the purposes of deciding whether the challenged measure is necessary to achieve the relevant objective. The Panel, however, failed to weigh properly the trade restrictiveness of the Import Ban. Because the Panel incorrectly analyzed the extent of the contribution of the Import Ban to the reduction in the number of waste tyres and, indirectly, to the protection of human life and health, the Panel was also incapable of properly weighing and balancing this contribution against any of the other elements. The Panel failed to consider that the risks addressed by the Import Ban were not directly linked to retreaded tyres but to the waste they eventually turn into, and that the level of such risks depends on how waste tyres are managed and disposed of. Thus, the Panel failed to acknowledge the indirect, uncertain, and relative contribution of the Import Ban to its stated objective and, in turn, failed to limit the weight afforded to this element in the weighing and balancing process.

⁵²European Communities' appellant's submission, para. 274 (referring to Panel Report, para. 7.208). The European Communities also criticizes the Panel for reaching its finding on high costs of rubber asphalt applications on the basis of a piece of evidence describing this application as a "promising outlet for recycled rubber because rubberised asphalt lasts longer than conventional asphalt". (*Ibid.*, para. 279 (quoting Panel Report, footnote 1367 to para. 7.205, in turn quoting the report of the Organisation for Economic Co-operation and Development ("OECD"), Working Group on Waste Prevention and Recycling, ENV/EPOC/WGWPR(2005)3/FINAL, 26 September 2005 (Exhibit EC-16 submitted by the European Communities to the Panel)))

⁵³Brazil's Ministry of Health National Dengue Control Programme (NDCP), adopted 24 July 2002 (Exhibit EC-93 submitted by the European Communities to the Panel).

25. The European Communities contends that the Panel based its weighing and balancing exercise on its flawed analysis of reasonably available alternatives. The Panel also failed to take proper account of the trade restrictiveness of the Import Ban in the weighing and balancing exercise. The Panel focused on non-generation measures, and overlooked the considerable advantages of sound waste tyre collection and disposal schemes, including the fact that the implementation of the CONAMA scheme is less trade restrictive than the Import Ban. The Panel conducted an individual analysis of possible alternatives, did not really carry out a global assessment, and discarded measures that have already been implemented without verifying the extent of implementation. In sum, asserts the European Communities, the Panel did not conduct a proper weighing and balancing of the relevant elements and alternatives, but, rather, a superficial analysis that repeated all of the errors it had already made in its assessment of the necessity of the Import Ban.

26. For all of the above reasons, the European Communities requests the Appellate Body to reverse the Panel's finding that the Import Ban was "necessary" to protect human, animal, or plant life or health, within the meaning of Article XX(b) of the GATT 1994. Should the Appellate Body accept this request, the European Communities further requests the Appellate Body to find that the Import Ban is not "necessary" within the meaning of Article XX(b) of the GATT 1994.

2. The Chapeau of Article XX of the GATT 1994

(a) The MERCOSUR Exemption

27. The European Communities claims that the Panel erred in finding that the exemption from the Import Ban on imports of retreaded tyres from MERCOSUR countries (the "MERCOSUR exemption") did not constitute arbitrary or unjustifiable discrimination or a disguised restriction on international trade and was not, therefore, contrary to the chapeau of Article XX of the GATT 1994. These findings were based on a "confused" analysis "marred by serious errors of law".⁵⁴ In particular, the European Communities emphasizes that the fact that Brazil introduced the MERCOSUR exemption in order to comply with its obligations under MERCOSUR does not preclude a finding of "arbitrary" discrimination. The European Communities argues further that the volume of imports from MERCOSUR countries is irrelevant to the analysis of whether that exemption constitutes arbitrary or unjustifiable discrimination. The European Communities requests the Appellate Body to reverse this finding and to find, instead, that the MERCOSUR exemption results in the Import Ban being applied inconsistently with the chapeau of Article XX.

⁵⁴European Communities' appellant's submission, para. 304.

28. For the European Communities, the "arbitrary" discrimination and the "unjustifiable" discrimination mentioned in the chapeau of Article XX are closely related. Both require discrimination to be explained through convincing, reasonable, and rational arguments. What is arbitrary and unjustifiable discrimination must, in the view of the European Communities, be established in relation to the objective of the measure at issue and the conditions prevailing in the countries concerned. At the same time, the notions of "arbitrary" and "unjustifiable" are not identical: "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."⁵⁵

29. The European Communities submits that, in its analysis, the Panel wrongly defined "arbitrary" discrimination as being limited to "capricious", "unpredictable", or "random" discrimination.⁵⁶ This definition failed to take into account the object and purpose of Article XX, as well as the context provided by the close link between "arbitrary discrimination" and "unjustifiable discrimination". The European Communities adds that this definition would deprive arbitrary discrimination of its useful value, because "few actions of governments are ever entirely 'random' or 'capricious'."⁵⁷ The chapeau of Article XX expresses "requirements of good faith, and requires a delicate balancing of the interests of the Member invoking an exception ... and the rights of other Members".⁵⁸ The European Communities contends that the Panel's approach, however, was not consistent with the required balancing of interests, because it would allow discrimination "on the basis of purely extraneous factors which have nothing to do with the objectives of the measure"⁵⁹, as long as the discrimination is not random or capricious.

30. According to the European Communities, whether a measure involves arbitrary discrimination can only be determined by taking into account the objective of the measure in respect of which Article XX is invoked. A measure will not be arbitrary if it "appears as reasonable, predictable and foreseeable"⁶⁰ in the light of that objective.

⁵⁵European Communities' appellant's submission, para. 310 (referring to European Communities' first written submission to the Panel, para. 152).

⁵⁶Panel Report, paras. 7.272, 7.280, and 7.281.

⁵⁷European Communities' appellant's submission, para. 316.

⁵⁸*Ibid.*, para. 319 (referring to Appellate Body Report, *US – Shrimp*, paras. 158 and 159, where the Appellate Body also found that the "rigidity" and "inflexibility" of certain certification requirements introduced by the United States constituted "arbitrary discrimination").

⁵⁹*Ibid.*, para. 319.

⁶⁰*Ibid.*, para. 321.

31. It follows, according to the European Communities, that the Panel erred in finding that the MERCOSUR exemption did not constitute arbitrary discrimination because it had been introduced in response to a ruling of a MERCOSUR arbitral tribunal. The MERCOSUR exemption does not further, and has the potential of undermining, the stated objective of the measure (the protection of life and health from risks arising from mosquito-borne diseases and tyre fires), and for this reason must be regarded as unreasonable, contradictory, and thus arbitrary. For the European Communities, allowing a Member's obligations under other international agreements to render discrimination consistent with the chapeau of Article XX would seriously undermine the effectiveness of the chapeau. The fact that the chapeau of Article XX prohibits discrimination "between countries where the same conditions prevail" provides further support for the European Communities' interpretation, because whether the same conditions prevail in different countries is an objective question, not a question of legal obligations *vis-à-vis* another country. It is thus "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".⁶¹

32. As regards the Panel's attempt to buttress its reasoning by referring to Article XXIV of the GATT 1994 and the "'nature' of Mercosur as an agreement"⁶² within the meaning of that provision, the European Communities submits that agreements justified under Article XXIV would not entitle Members to discriminate in the application of Article XX measures, because Article XXIV:8(a)(i) and (b) explicitly excludes measures that are justified under Article XX from the requirement to eliminate restrictive regulations of commerce with respect to substantially all the trade within a customs union or free trade area. The European Communities further criticizes the Panel for not verifying whether MERCOSUR is a customs union that complies with the requirements of Article XXIV of the GATT 1994.

33. The European Communities points to two additional flaws in the Panel's reasoning: its statement that it took into account "the nature of the ruling on the basis of which Brazil has acted"⁶³; and the Panel's reliance on Brazil's statement that the MERCOSUR exemption was "the only course of action available to it"⁶⁴ to implement the ruling. The nature of the ruling on the basis of which Brazil has acted is irrelevant for the determination of whether the MERCOSUR exemption constitutes arbitrary discrimination. Moreover, before the MERCOSUR tribunal, Brazil chose not to defend the Import Ban by invoking an exception clause related to the protection of human life and health, and

⁶¹European Communities' appellant's submission, para. 325.

⁶²*Ibid.*, para. 329.

⁶³*Ibid.*, para. 330 (referring to Panel Report, para. 7.283).

⁶⁴*Ibid.*, para. 332 (referring to Panel Report, para. 7.280).

thus the fact that it invoked such grounds in this dispute must be regarded as arbitrary. The European Communities further submits that the MERCOSUR tribunal did not oblige Brazil to discriminate between its MERCOSUR partners and other WTO Members, because Brazil could have implemented the arbitral ruling by lifting the Import Ban with respect to all third countries.

34. The European Communities argues further that the Panel erred in finding that unjustifiable discrimination could arise only if imports under the MERCOSUR exemption were to take place in such amounts that the achievement of the objective of the Import Ban would be significantly undermined. By assessing the existence of unjustifiable discrimination on the basis of import volumes, the Panel applied a test that has no basis in the text of Article XX and finds no support in WTO case law. The European Communities adds that, if adopted by the DSB, this finding would diminish its rights under the covered agreements, contrary to Article 3.2 of the DSU.

35. The European Communities submits that import volumes under the MERCOSUR exemption are irrelevant for determining whether this exemption constitutes arbitrary or unjustifiable discrimination. The specific volume of imports from MERCOSUR countries in a given year is not related to the manner in which the Import Ban is applied, but rather dependent upon economic factors relating to supply and demand. Moreover, this volume can fluctuate significantly from year to year, and may be more likely to do so if the Panel's finding stands, given that it creates an incentive to shift retreaded tyre production to MERCOSUR countries, especially to those that do not restrict the importation of used tyres. Thus, reasons the European Communities, in addition to being incorrect, the Panel's findings increase the likelihood of future litigation on whether increases in imports from MERCOSUR countries have rendered the exemption inconsistent with the chapeau. This is not consistent with Article 3.3 of the DSU, which provides that the prompt settlement of disputes "is essential for the effective functioning of the WTO".⁶⁵

36. According to the European Communities, the Panel's approach is also inconsistent with the Appellate Body Report in *US – Gambling*, where "the Appellate Body did not attach importance to the 'volume' of services traded under [that] 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."⁶⁶ The Panel's approach also goes against Appellate Body reports confirming the right of Members to challenge measures, *as such*, and the need to protect the security and predictability of the multilateral trading system that underpins that right.⁶⁷ Yet, under the Panel's

⁶⁵European Communities' appellant's submission, para. 343.

⁶⁶*Ibid.*, para. 344 (referring to Appellate Body Report, *US – Gambling*, para. 369).

⁶⁷*Ibid.*, para. 345 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82).

approach, the question of which volumes of imports would be regarded as "significant" for purposes of the chapeau of Article XX would ultimately depend on market factors, and could be assessed only *ex post* based on data relating to trade flows.

37. The European Communities also contests the Panel's conclusions that the MERCOSUR exemption did not constitute "a disguised restriction on international trade" within the meaning of the chapeau of Article XX. Like its finding on unjustifiable discrimination, the Panel's finding was based on the rationale that MERCOSUR imports have not been significant in volume. Thus, submits the European Communities, the Panel's finding on a disguised restriction on international trade is equally erroneous. The European Communities fails to understand how the Panel could characterize the imports under the MERCOSUR exemption, increasing tenfold since 2002 from 200 to 2,000 tons of tyres per year by 2004, as "insignificant".⁶⁸

38. For these reasons, the European Communities requests the Appellate Body to reverse the Panel's finding that the MERCOSUR exemption did not constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, within the meaning of the chapeau of Article XX, and to find, instead, that the MERCOSUR exemption results in the Import Ban being applied inconsistently with the requirements of that provision.

(b) Imports of Used Tyres

39. With respect to the Panel's analysis of imports of used tyres under the chapeau of Article XX, the European Communities supports the Panel's conclusion that such imports constituted unjustifiable discrimination between countries where the same conditions prevail, but challenges several other findings made by the Panel in this part of its analysis. Specifically, the European Communities contends that the Panel erred, first, in finding that the imports of used tyres through court injunctions did not result in arbitrary discrimination and, secondly, in finding that such imports constituted unjustifiable discrimination and a disguised restriction on international trade only to the extent that they occurred in such amounts as to significantly undermine the objective of the Import Ban.

40. For the European Communities, the Panel adopted an overly restrictive approach to the notion of "arbitrary discrimination", in considering that action is not arbitrary as long as there is some cause or reason to explain it. What is arbitrary must be decided in the light of the stated objective of the measure. The European Communities reasons that, because, from the perspective of the protection of human life or health, there is no difference between, on the one hand, a retreaded tyre produced in the

⁶⁸European Communities' appellant's submission, para. 348.

European Communities and, on the other hand, a retreaded tyre produced in Brazil from a casing imported from the European Communities, the importation of used tyres through court injunctions must be regarded as constituting arbitrary discrimination. The European Communities adds that the Panel's attempt to distinguish between, on the one hand, the actions of Brazilian courts in granting injunctions allowing imports of used tyres and, on the other hand, the compliance of administrative authorities with those injunctions, is ill-founded. A WTO Member must assume responsibility for the acts of all the branches of its government. The contradiction between the actions of the branches of the Brazilian government that have allowed the importation of used tyres, and those that ban the importation of retreaded tyres, must be regarded as arbitrary behaviour on the part of Brazil.

41. The European Communities also submits that the Panel erred in finding that the imports of used tyres under court injunctions resulted in unjustifiable discrimination only to the extent that they significantly undermined the objective of the Import Ban. In analyzing whether imports of used tyres under court injunctions were inconsistent with the chapeau of Article XX, the Panel applied the same quantitative approach that it had incorrectly applied when assessing the MERCOSUR exemption under that provision. The European Communities refers to the arguments it advanced in relation to the MERCOSUR exemption to explain why the volumes of imports are irrelevant for purposes of determining the consistency of a measure with the chapeau of Article XX.

42. The European Communities observes further that the court injunctions effectively exempt Brazilian retreaders from the import ban on used tyres, because they do not contain any temporal or quantitative limitations. Thus, the Panel's quantitative approach engenders uncertainty for the implementation of the Panel Report and is not in accordance with the prompt settlement of the dispute as required by Article 3.3 of the DSU. The Panel characterized imports of 10.5 million used tyres into Brazil in 2005 as "significant", but failed to identify the threshold below which imports of used tyres would no longer be "significant". The European Communities adds that, for the same reasons adduced in relation to unjustifiable discrimination, the Panel erred in finding that the imports of used tyres through court injunctions resulted in the Import Ban being applied in a manner that constitutes a disguised restriction on international trade only to the extent that these imports occurred in such quantities that they significantly undermined the objective of the Import Ban.

43. For all these reasons, the European Communities requests the Appellate Body to reverse the Panel's finding that imports of used tyres under court injunctions did not constitute arbitrary discrimination under the chapeau of Article XX, and constituted unjustifiable discrimination or a disguised restriction on international trade under the terms of this provision only to the extent that those imports significantly undermined the objective of the Import Ban. The European Communities requests the Appellate Body to find, instead, that imports of used tyres under court injunctions result

in the Import Ban being applied inconsistently with all of the requirements of the chapeau of Article XX of the GATT 1994.

3. Conditional Appeal

44. Should the Appellate Body not find, as requested by the European Communities, that the MERCOSUR exemption results in the Import Ban being applied inconsistently with the chapeau of Article XX, then the European Communities conditionally appeals the Panel's decision to exercise judicial economy with respect to its separate claims that the MERCOSUR exemption is inconsistent with Articles I:1 and XIII:1 of the GATT 1994. In such circumstances, the European Communities requests the Appellate Body to reverse the Panel's decision to exercise judicial economy with respect to these claims and to complete the legal analysis and find that the MERCOSUR exemption is inconsistent with Articles I:1 and XIII:1, and not justified under Articles XX(d) and XXIV of the GATT 1994.

(a) The Panel's Exercise of Judicial Economy

45. The European Communities submits that, in declining to rule on the European Communities' claims under Articles I.1 and XIII:1 of the GATT 1994, the Panel exercised "false judicial economy" and did not provide a positive resolution to the dispute as required by Articles 3.3, 3.4, and 3.7 of the DSU.⁶⁹ In the light of the Panel's finding that the Import Ban was inconsistent with the chapeau of Article XX only to the extent that imports of used tyres were occurring in amounts that significantly undermined the objective of the Import Ban, Brazil was under no obligation to remove the MERCOSUR exemption *per se*. Therefore, the Panel should have addressed the European Communities' claims that the MERCOSUR exemption *per se* is incompatible with Articles I:1 and XIII:1.

(b) Completing the Legal Analysis

46. The European Communities submits that there are sufficient factual findings of the Panel and uncontested facts on record for the Appellate Body to complete the legal analysis and find that the MERCOSUR exemption is incompatible with Articles I:1 and XIII:1, and is not justified under Articles XX(d) and XXIV of the GATT 1994. The European Communities recalls that Brazil did not contest that the MERCOSUR exemption constitutes a violation of Articles I:1 and XIII:1. Therefore, the only question to be addressed by the Appellate Body is whether this measure can be justified under Articles XX(d) and XXIV.

⁶⁹European Communities' appellant's submission, para. 375.

(c) The MERCOSUR Exemption and Article XXIV of the GATT 1994

47. The European Communities argues that the MERCOSUR exemption is not justified under Article XXIV of the GATT 1994, because it does not satisfy the two conditions identified by the Appellate Body in its Report in *Turkey – Textiles*.⁷⁰ First, Brazil failed to demonstrate that MERCOSUR complies with the conditions of Article XXIV:8(a) and 5(a) of the GATT 1994. As explained extensively in the European Communities' submissions to the Panel, Brazil failed to demonstrate that MERCOSUR has achieved a liberalization of "substantially all"⁷¹ the trade within MERCOSUR, as required by Article XXIV:8(a)(i). The European Communities contends that trade in the automotive and sugar sectors has not been entirely liberalized within MERCOSUR, and highlights that "the automotive sector alone accounts for approximately 29%"⁷² of trade within MERCOSUR. In addition, according to the European Communities, exceptions to MERCOSUR's common external tariff "currently concern up to 10% of the tariff lines"⁷³ applicable to external trade, and individual MERCOSUR countries "maintain export duties and 'other regulations of commerce' on trade with third countries that are not common to all Mercosur countries."⁷⁴

48. The European Communities adds that Brazil failed to demonstrate that MERCOSUR complies with the requirement in Article XXIV:5(a) of the GATT 1994 that duties and other restrictive regulations of commerce are not to be on the whole more restrictive than the general incidence of these measures prior to the creation of MERCOSUR, in particular, as regards non-tariff measures. Indeed, emphasizes the European Communities, the measure at issue in this dispute illustrates that MERCOSUR countries continue to adopt such non-tariff measures.

49. Secondly, the European Communities maintains that Brazil has not shown that the MERCOSUR exemption was necessary for the formation of MERCOSUR. Nothing in the reasoning of the Appellate Body Report in *Turkey – Textiles* suggests that this condition would not apply to cases such as this one where a restriction is first imposed on all goods, and then subsequently removed only for goods originating in the customs union. Moreover, the European Communities considers that "Article XXIV would be turned into an almost limitless exception, which would allow

⁷⁰European Communities' appellant's submission, para. 381 (referring to Appellate Body Report, *Turkey – Textiles*, para. 58).

⁷¹*Ibid.*, para. 383.

⁷²*Ibid.*

⁷³*Ibid.*, para. 384 (referring to Committee on Trade and Development, "Examination of the Southern Common Market (MERCOSUR) Agreement", WT/COMTD/1/Add.17, 9 June 2006 (Exhibit EC-121 submitted by the European Communities to the Panel), p. 2).

⁷⁴*Ibid.*

parties to a customs union to take any measure derogating from WTO obligations"⁷⁵ if WTO Members were not required to demonstrate that the measure was necessary for the formation of the customs union in question.

50. The European Communities submits that the MERCOSUR exemption was not necessary for the formation of MERCOSUR. Article XXIV:8(a)(i) explicitly exempts measures consistent with Article XX from the requirement to eliminate barriers to trade with respect to substantially all the trade between the constituent members of a customs union. For this reason, it follows that Article XX cannot be invoked in order to justify the selective elimination of such trade barriers only with respect to trade within the customs union or free trade area. Nor can the MERCOSUR exemption be characterized as necessary for the formation of MERCOSUR because it was adopted several years after the conclusion of MERCOSUR.

(d) The MERCOSUR Exemption and Article XX(d) of the GATT 1994

51. The European Communities submits that the MERCOSUR exemption is also not justified under Article XX(d) of the GATT 1994. The Appellate Body found, in *Mexico – Taxes on Soft Drinks*, that the term "laws and regulations" in Article XX(d) 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".⁷⁶ However, Brazil has not demonstrated that the obligation to comply with rulings of the MERCOSUR arbitral tribunals has been incorporated into the Brazilian legal system. The European Communities suggests further that the term "securing compliance" in Article XX(d) does not mean simply "complying". Instead, "securing compliance" refers to enforcement measures where compliance is achieved by persons other than the entity "securing" the compliance. Thus, Article XX(d) does not cover Brazil's adoption of the MERCOSUR exemption. Furthermore, the MERCOSUR exemption is not "necessary" within the meaning of Article XX(d) because Brazil could have complied with the ruling of the MERCOSUR arbitral tribunal by lifting the Import Ban with respect to all third countries, rather than only its MERCOSUR partners. Finally, the European Communities submits that the MERCOSUR exemption does not fulfil the requirements of the chapeau of Article XX, because it constitutes unjustifiable and arbitrary discrimination between countries where the same conditions prevail, in particular, given that, by virtue of it, Brazil allows the imports of retreaded tyres from MERCOSUR countries even when those tyres are made from used tyres originating in the European Communities.

⁷⁵European Communities' appellant's submission, para. 392.

⁷⁶*Ibid.*, para. 402 (quoting Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 79).

B. *Arguments of Brazil – Appellee*

1. The Necessity Analysis

52. Brazil maintains that the Panel properly found that the Import Ban was "necessary" to protect human, animal, or plant life or health within the meaning of Article XX(b) of the GATT 1994, and therefore requests the Appellate Body to uphold this finding.

(a) The Contribution Analysis

53. First, Brazil argues that the Panel correctly assessed the contribution made by the Import Ban to the achievement of its objective. The paragraphs set out in Article XX focus on the measure, as such, while the chapeau focuses also on the application of the measure. Therefore, actual contribution is not relevant to the analysis under paragraph (b) of Article XX, and the Panel applied the correct legal standard in using phrases such as "can contribute" and "capable of contributing".⁷⁷ Such a standard is also particularly appropriate given that some measures—for example, environmental measures—may not have immediate effect. The Panel's approach was in line with "virtually all" other cases that have examined a measure's contribution under paragraphs (b) and (d) of Article XX of the GATT 1994 or under Article XIV of the *General Agreement on Trade in Services* (the "GATS").⁷⁸ This is the case whether the risk sought to be avoided is direct or indirect. Brazil adds that the need to undertake the weighing and balancing exercise also illustrates that the European Communities cannot be correct. If a panel were required to assess the extent of a measure's actual contribution, it would have to do the same for alternative measures in order to compare them. Yet, this is impossible, because an alternative measure is one that has not yet been realized. That the Panel was not, as the European Communities claims, required to quantify the Import Ban's contribution to reducing waste tyre volumes is confirmed in the Appellate Body Report in *EC – Asbestos*, where the Appellate Body held that "a risk may be evaluated either in quantitative or *qualitative* terms".⁷⁹ Brazil also expresses its understanding that, according to existing case law, if the measure can make a contribution to its objective, and no reasonably available alternatives exist, then the measure is "necessary".

54. In addition, Brazil argues that the Panel acted consistently with its duty under Article 11 of the DSU in finding that the Import Ban contributed to the achievement of its objective. The Panel relied on numerous studies and reports, which provided it with more than a sufficient basis to find that

⁷⁷Brazil's appellee's submission, para. 74 (referring to Panel Report, paras. 7.118 and 7.142).

⁷⁸*Ibid.*, para. 77 (referring to Panel Report, *US – Gambling*, para. 6.494; Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.217; Panel Report, *Korea – Various Measures on Beef*, para. 658; and GATT Panel Report, *US – Section 337 Tariff Act*, para. 5.31).

⁷⁹*Ibid.*, para. 81 (quoting Appellate Body Report, *EC – Asbestos*, para. 167). (emphasis added by Brazil)

tyres used in Brazil are retreadable and are being retreaded. The Panel referred to the ABR Report⁸⁰ and INMETRO Technical Note 001/2006⁸¹ merely as examples of such reports and studies. In addition, the Panel's reliance on INMETRO Technical Note 001/2006, rather than on an earlier INMETRO note, was justified, because it is well established that a panel may rely on evidence that post-dates the panel's establishment, and because Brazil had explained why it was not appropriate for the Panel to rely on the earlier INMETRO note. The mere fact that the Panel did not describe its conclusions on each piece of evidence—or respond to each of the European Communities' objections—does not mean that it did not consider the evidence. The European Communities may disagree with the weight the Panel assigned to the various factual elements before it, but there is no indication that the Panel exceeded its discretion as the trier of fact.

55. As regards numerous other arguments raised by the European Communities, Brazil identifies evidence that provides support for the Panel's findings that retreaded tyres have a shorter lifespan than new tyres and that new tyres are retreadable and are being retreaded in Brazil, and asserts that the Panel did not, as the European Communities claims, base its findings on speculation about future events. Brazil also emphasizes that imports of used tyres under court injunctions and imports of retreaded tyres under the MERCOSUR exemption are extraneous to the Import Ban and do not properly form part of the "necessity" analysis.

(b) Alternatives to the Import Ban

56. Brazil contends that the Panel correctly determined that none of the measures suggested by the European Communities constituted a reasonably available alternative to the Import Ban. As a preliminary matter, Brazil contends that the European Communities' appeal on this issue is premised on a mistaken understanding of Brazil's chosen level of protection. Brazil is *not* seeking to reach a fixed level of health and safety, or only to protect against mosquito-borne diseases and tyre fire emissions (accumulation risks). Rather, it seeks to reduce accumulation, transportation, and disposal risks associated with the generation of waste tyres in Brazil *to the maximum extent possible*. Because the Panel's finding of fact correctly identified the level of protection sought by Brazil, and the European Communities, in its appeal, does not challenge this finding under Article 11 of the DSU, the European Communities' claims of error regarding reasonably available alternatives fall outside the scope of appellate review.

⁸⁰*Supra*, footnote 41.

⁸¹*Supra*, footnote 42.

57. Taking account of the proper definition of its chosen level of protection (including against disposal risks), Brazil asserts that the Panel properly recognized that stockpiling, landfilling, co-incineration, and material recycling all present risks to human health and the environment. The Panel also correctly dismissed a better enforcement of the import ban on used tyres as an alternative to the Import Ban, because such a measure would not allow Brazil to reduce the number of additional waste tyres generated by imported short-lifespan retreaded tyres. Brazil also rejects the European Communities' assertion that the Panel applied an incorrect definition of "alternative", because, for Brazil, an alternative must allow a Member to achieve its chosen level of protection, and that level requires a reduction to the maximum extent possible of risks arising from waste tyre accumulation, transportation, and disposal risks. Because the Panel correctly defined Brazil's level of protection, it was also correct to consider that other complementary measures to reduce the overall number of waste tyres were not "alternatives" to the Import Ban on retreaded tyres. Brazil adds that, contrary to the European Communities' claims on appeal, the Panel did not require a single alternative measure to achieve fully the desired objective, did not refuse to consider the proposed alternatives collectively, and did not focus on whether options were actually being employed instead of whether they were reasonably available.

58. Furthermore, Brazil argues that the Panel's findings on the availability of alternative measures rested on an objective assessment of the facts, as required by Article 11 of the DSU. According to Brazil, the Panel based its finding that disposal of waste tyres presents serious health and environmental risks on an extensive factual record. The evidence on record fully supports the Panel's finding that landfilling of *both* whole and shredded waste tyres presents human health and environmental risks. Brazil also argues that the Panel's reference to the fact that the European Communities prohibits landfilling was relevant, because the health and environmental objectives listed in the European Communities' Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste⁸² mirror Brazil's objective. Furthermore, the Brazilian legislation that allowed landfilling, and which the European Communities claims the Panel should have taken into account, was a temporary measure adopted in a single Brazilian state to combat a significant increase in dengue cases. That legislation does not demonstrate that landfilling is safe, but only that, in those circumstances, the short-term need to combat dengue was more pressing.

⁸²Exhibit BRA-42 submitted by Brazil to the Panel.

59. In relation to stockpiling, Brazil submits that the evidence on record, including a study by the California Environmental Protection Agency⁸³, supports the Panel's finding that stockpiling presents human health and environmental risks. Furthermore, the European Communities itself acknowledges that "'controlled stockpiling is *not a final disposal operation*' but merely 'temporary storage.'"⁸⁴ As regards co-incineration, the evidence on record fully supports the Panel's finding that incineration of waste tyres presents risks to human health, that toxic emissions from the incineration of tyres cannot be eliminated, and that these emissions are higher than those generated by the burning of conventional fuels. In the light of these acknowledged risks, it would not have made sense, as the European Communities now argues, for the Panel to have required Brazil to provide evidence on co-incineration in Brazil rather than in other countries, or to use increased co-incineration as an alternative. The Panel acted within its discretion in determining the weight attributed to several reports that the European Communities considers outdated and, in any event, the evidence relied upon by the Panel is not as "outdated", nor is the evidence cited by the European Communities as "recent", as the European Communities claims on appeal. The Appellate Body, therefore, should reject the European Communities' attempts to have it second-guess the Panel's appreciation of the evidence.

60. In relation to material recycling, Brazil submits that the Panel did not consider only civil engineering in reaching its findings on alternative measures. The Panel also considered evidence related to rubber asphalt, use of rubber granulates, and devulcanization. Nor did the Panel base its finding that material recycling applications could not dispose of existing volumes of waste tyres on evidence of devulcanization alone. Instead, contends Brazil, the Panel cited documents suggesting that material recycling applications *collectively* lacked adequate disposal capacity.

(c) The Weighing and Balancing Process

61. Brazil asserts that the Panel properly weighed and balanced the relevant factors and proposed alternatives in determining that the Import Ban was "necessary" within the meaning of Article XX(b) of the GATT 1994, and that the European Communities' appeal on this point amounts to mere disagreement with the Panel's exercise of its discretion in determining which evidence to rely upon in support of its findings. The Panel expressly recognized that the Import Ban is highly trade restrictive, but rejected the European Communities' argument that this fact alone precluded a finding that the ban was "necessary". Instead, the Panel properly recognized that there may be circumstances in which a highly restrictive measure is nonetheless necessary and, in the process of weighing and balancing,

⁸³California Environmental Protection Agency (US), Integrated Waste Management Board, "Increasing the Recycled Content in New Tyres" (May 2004) (Exhibit BRA-59 submitted by Brazil to the Panel).

⁸⁴Brazil's appellee's submission, para. 154 (quoting European Communities' appellant's submission, para. 255). (emphasis added by Brazil)

identified the specific circumstances of this case that led it to such a conclusion. With respect to the question of contribution, Brazil recalls its position that Article XX(b) does not require a party to quantify the measure's contribution to the objective pursued. In any event, the Import Ban's contribution is substantial "because it reduced imports of retreaded tyres from 18,455 tons in 1999 to 1,727 tons in 2005 (over 90 percent)."⁸⁵ Brazil also argues that, because imports of retreaded tyres, by definition, increase the amount of waste tyres in Brazil, the relationship between the Import Ban and Brazil's goal of reducing waste tyre risks to the maximum extent possible is both direct and certain.

2. The Chapeau of Article XX of the GATT 1994

(a) The MERCOSUR Exemption

62. Brazil argues that the Panel correctly held that the MERCOSUR exemption did not result in the Import Ban being applied in a manner that constituted "arbitrary or unjustifiable" discrimination or "a disguised restriction on international trade" within the meaning of the chapeau of Article XX of the GATT 1994. Accordingly, Brazil requests the Appellate Body to reject the European Communities' claims of error and to uphold the Panel's findings in this respect.

63. Brazil asserts that the Panel properly interpreted the meaning of the word "arbitrary" in the chapeau of Article XX, in accordance with the customary rules of interpretation of public international law. The Panel took into account the ordinary meaning of the word, along with both the context and the object and purpose of the chapeau of Article XX, as well as previous panel and Appellate Body reports. On this basis, the Panel interpreted the word "arbitrary" "as lacking a reasonable basis and requiring the need to convincingly explain the rationale of the measure".⁸⁶

64. Brazil disputes the European Communities' assertion that what constitutes arbitrary discrimination must be determined in relation to the objective of the measure. The specific contents of the measure at issue, including its policy objective, must be examined under the exceptions listed in the paragraphs of Article XX. The chapeau of Article XX, in turn, requires panels to examine whether the measure at issue is applied reasonably, in a manner that does not result in an abusive exercise of a Member's right to pursue its policy objective. Brazil emphasizes that the European Communities' interpretation would impermissibly narrow the scope of the chapeau of Article XX and limit the flexibility that Members have to protect legitimate values under that provision. Brazil adds that, in any event, in this case the Panel did consider imports under the MERCOSUR exemption in relation to the objective of the measure at issue when it determined that, at the time of its examination,

⁸⁵Brazil's appellee's submission, para. 177 (referring to Panel Report, para. 4.54; and Brazil's response to Question 40 posed by the Panel, Panel Report, p. 270).

⁸⁶*Ibid.*, para. 191 (referring to Panel Report, paras. 7.260, 7.273, and 7.283).

volumes of retreaded tyres imported under the MERCOSUR exemption did not significantly undermine the objective of the Import Ban. Furthermore, reasons Brazil, it would *not* have been reasonable or rational, in the light of the objective of the Import Ban, for Brazil to have implemented the MERCOSUR ruling by abolishing the ban altogether, as the European Communities suggests.

65. Brazil considers that the Panel correctly found that the discrimination resulting from the MERCOSUR exemption was not arbitrary. In Brazil's view, even under the European Communities' definition of "arbitrary", the following considerations identified by the Panel demonstrate that the MERCOSUR exemption did not amount to arbitrary discrimination: (i) Brazil introduced the exemption only after a dispute settlement tribunal established under MERCOSUR ruled that the ban violated Brazil's obligations under MERCOSUR; (ii) the MERCOSUR ruling was adopted in the context of an agreement intended to liberalize trade that is expressly recognized in Article XXIV of the GATT 1994; (iii) agreements of the type recognized by Article XXIV inherently provide for discrimination; (iv) Brazil had an obligation under international law to implement the ruling by the MERCOSUR tribunal; (v) Brazil applied the MERCOSUR ruling in the most narrow way possible, that is, by exempting imports of a particular kind of retreaded tyres (remoulded) from the application of the ban; and (vi) it was not reasonable for Brazil to implement the MERCOSUR ruling with respect to imports from all sources, because doing so would have forced Brazil to abandon its policy objective and its chosen level of protection. The Panel appropriately determined that these circumstances provided a rational basis for enacting the MERCOSUR exemption. Brazil rejects as a "blatant misrepresentation"⁸⁷ the European Communities' argument that the Panel's finding necessarily implies that mere compliance with any international agreement would exclude the existence of arbitrary discrimination, particularly given that the Panel expressly stated that its finding was limited to the "specific circumstances of the case".⁸⁸ Furthermore, the European Communities' systemic concerns in this respect are contrary to the well-established precept under general international law that "bad faith on the part of States is not to be presumed"⁸⁹, and it is "absurd"⁹⁰ to suggest that a WTO Member would conclude an agreement under Article XXIV for purposes of circumventing the requirements of the chapeau of Article XX.

66. Brazil also submits that the Panel correctly concluded that the legal standard under the chapeau of Article XX is different from the legal standard under Article XXIV. As Brazil argued

⁸⁷Brazil's appellee's submission, para. 209.

⁸⁸*Ibid.*, para. 210 (quoting Panel Report, para. 7.283).

⁸⁹*Ibid.*, para. 213. (footnote omitted)

⁹⁰*Ibid.*, para. 214.

before the Panel, a measure that does not meet the requirements of Article XXIV can nevertheless meet the requirements of the chapeau of Article XX.

67. Brazil considers that the Panel correctly found that the operation of the MERCOSUR exemption has not resulted in the Import Ban being applied in a manner that would constitute unjustifiable discrimination. Brazil has difficulty understanding the European Communities' objections to the Panel's analysis since the European Communities itself argues that what constitutes arbitrary or unjustifiable discrimination must be established in relation to the objective of the measure at issue, and the Panel did precisely that. The Panel determined how Brazil's policy objective of reducing unnecessary generation of tyre waste to the maximum extent possible was being affected by imports of retreaded tyres under the MERCOSUR exemption. The level of imports and their effect on the objective of the Import Ban were relevant, in particular, because the chapeau of Article XX focuses on the application of the measure at issue. Brazil also explains that the level of imports could not rise to a level that would undermine the objective of the Import Ban in the future, because Resolution No. 38 of the Câmara de Comércio Exterior (Chamber of Foreign Trade) of 22 August 2007⁹¹ established annual limits on the number of retreaded tyres that can be imported into Brazil from MERCOSUR countries. According to Brazil, these import volumes "correspond roughly" to the import volumes that the Panel found "were not significant".⁹²

68. Brazil considers that the European Communities' reference to the right of Members to challenge measures, as such, is misplaced. The chapeau of Article XX requires an examination of the manner in which a measure is being applied, and this will "rarely" be based on "immutable, static situations".⁹³ The European Communities' challenge to the Panel's finding that 2,000 tons of retreaded tyres is "insignificant" is similarly without merit. According to Brazil, it is worth noting that the level of 2,000 tons is only one seventh of the 14,000 tons previously imported from the European Communities and, in any event, the Panel's finding that 2,000 tons is not a significant amount is a factual finding that cannot be revisited on appeal.

69. In addition, Brazil submits that the Panel's finding that the MERCOSUR exemption did not result in the Import Ban being applied in a manner that constitutes "a disguised restriction on international trade" under the chapeau of Article XX is legally sound, and refers to its arguments before the Panel in support of this position.

⁹¹Exhibit BRA-175 submitted by Brazil to the Appellate Body.

⁹²Brazil's appellee's submission, para. 225 (referring to Panel Report, para. 7.288).

⁹³*Ibid.*, para. 229.

(b) Imports of Used Tyres

70. Brazil submits that the Panel committed no error in the analytical approach it adopted in determining whether imports of used tyres under court injunctions resulted in the Import Ban being applied in a manner that constituted "arbitrary discrimination", "unjustifiable discrimination", or "a disguised restriction on international trade" within the meaning of the chapeau of Article XX of the GATT 1994. Brazil requests the Appellate Body to reject the European Communities' claims of error and to uphold the Panel's findings that the imports of used tyres did not constitute "arbitrary discrimination" and constituted "unjustifiable discrimination" or "a disguised restriction on international trade" within the meaning of that provision only to the extent that import volumes of used tyres "significantly undermined" the objective of the Import Ban.

71. Brazil argues that the Panel correctly found that the imports of used tyres under court injunctions did not result in the Import Ban being applied in a manner that constituted "arbitrary discrimination". The Panel was satisfied, on the basis of the evidence before it, that there was a rational basis for the importation of used tyres. Furthermore, as it did in the context of the MERCOSUR exemption, the Panel did analyze whether the imports of used tyres significantly undermined the objective of the Import Ban—that is, it took the very approach advocated by the European Communities. The Panel did *not*, as the European Communities now claims, draw a distinction between the actions of certain Brazilian courts granting injunctions and the compliance by Brazilian administrative authorities with those court injunctions. Brazil also rejects the European Communities' allegation that there is a contradiction between the actions of different branches of the Brazilian government. Rather, insists Brazil, the Import Ban, the court injunctions, and the enforcement of the injunctions by the customs authorities were the result of the operation of the Rule of Law. "There is nothing unpredictable, irrational, abnormal, unreasonable, or even illegal in the conduct of Brazil's legislative, executive, or judiciary branches."⁹⁴

72. With respect to the Panel's analysis of "unjustifiable discrimination", Brazil submits that it was appropriate for the Panel to consider the level of imports of used tyres. For the same reasons that Brazil articulated with respect to the MERCOSUR exemption, the effect that the volume of imports of used tyres had on Brazil's ability to achieve its policy objective was relevant to the Panel's analysis of unjustifiable discrimination. Brazil points out the inconsistencies in the European Communities' arguments, which, on the one hand, criticize the Panel for taking into account the effects of import volumes on Brazil's ability to achieve its policy objective, and, on the other hand, insist that arbitrary and unjustifiable discrimination can be established only when analyzed in relation to the objective of

⁹⁴Brazil's appellee's submission, para. 245.

the measure at issue. Brazil disputes the European Communities' assertion that the Panel's analysis of the volume of imports involves uncertainty for implementation of its report. According to Brazil, monitoring of a WTO Member's compliance is an integral part of the dispute settlement mechanism, and there are various examples of cases where panels made findings that were based on facts and circumstances that were potentially subject to change.⁹⁵

73. Finally, Brazil argues that the Panel correctly considered the volume of imports of used tyres as part of its determination that the Import Ban was being applied in a manner that constituted "a disguised restriction on international trade", and refers to the arguments it made before the Panel in support of this position.

3. The European Communities' Conditional Appeal

(a) The Panel's Exercise of Judicial Economy

74. Brazil considers that the Panel was justified in deciding to exercise judicial economy with respect to the European Communities' separate claims that the MERCOSUR exemption was inconsistent with Articles I:1 and XIII:1 and not justified under Articles XX(d) and XXIV of the GATT 1994. In the light of the Panel's finding that the Import Ban was inconsistent with Article XI:1 of the GATT 1994, a separate finding in relation to an exemption to the Import Ban was not necessary to secure a positive resolution of the dispute. The MERCOSUR exemption could not exist in the absence of the Import Ban, which had previously been found to be inconsistent with the GATT 1994. The allegedly limited basis for the Panel's finding of inconsistency under Article XI:1 is not relevant, because Article 3.7 of the DSU "does not distinguish between different *degrees* of solutions".⁹⁶ Brazil also distinguishes the facts of this case from those in *EC – Export Subsidies on Sugar*, on the basis that "the remedies under the GATT and the DSU for a violation of Article XI (found by the Panel) are no different from the remedies for a violation of Article XIII or I."⁹⁷ Furthermore, the very condition on which the European Communities appeals the Panel's exercise of judicial economy contradicts its contention that separate rulings under Article I:1 and Article XIII:1 were necessary. According to Brazil, by conditioning its appeal on a finding by the Appellate Body that the MERCOSUR exemption does not result in the Import Ban being applied inconsistently with Article XX, the European Communities is implicitly recognizing that a finding that the Import Ban is

⁹⁵See Brazil's appellee's submission, para. 253 (referring to Panel Report, *US – Section 301 Trade Act*, paras. 7.131-7.136, 7.170, 7.179, and 7.185; and Panel Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 6.1).

⁹⁶*Ibid.*, para. 268. (original emphasis)

⁹⁷*Ibid.*, para. 269.

not justified under Article XX renders unnecessary findings on its separate claims under Articles I:1 and XIII:1.

(b) Completing the Legal Analysis

75. In the event the Appellate Body were to reverse the Panel's decision to exercise judicial economy, Brazil submits that the Appellate Body does not have a sufficient basis on which to complete the analysis of the European Communities' claims that the MERCOSUR exemption is inconsistent with Articles I:1 and XIII:1, and with respect to Brazil's related defences under Articles XXIV and XX(d) of the GATT 1994. There are neither undisputed facts nor factual findings by the Panel concerning the consistency of MERCOSUR with Article XXIV:5(a) and 8(a) of the GATT 1994 or the justification of the MERCOSUR exemption under Article XX(d). Brazil specifically contests, as it did before the Panel, assertions made by the European Communities regarding intra-MERCOSUR liberalization of the automotive and sugar sectors, as well as with respect to alleged exceptions to the common external tariff. In addition, the European Communities' claims under Articles XIII:1 and I:1, and Brazil's related defence under Article XXIV, are not suitable for completion of the analysis, because they are not closely related to the provisions examined by the Panel, and because they involve novel legal issues that have not been explored in depth by the parties. Brazil cites as examples of such unexplored issues the questions of what constitutes "substantially all the trade" under Article XXIV:8(a)(i) and what constitutes "substantially the same duties and other regulations of commerce" under Article XXIV:8(a)(ii).

(c) The MERCOSUR Exemption and Article XXIV of the GATT 1994

76. In the event the Appellate Body considers it can complete the analysis with respect to the separate claims made by the European Communities in relation to the MERCOSUR exemption, Brazil submits that this measure is justified under Article XXIV of the GATT 1994.

77. Brazil argues that it submitted sufficient evidence before the Panel to make a *prima facie* case that MERCOSUR meets the requirements of Article XXIV:5(a) and 8(a). In particular, Brazil submitted the results of calculations made by the Secretariat for MERCOSUR and the WTO Secretariat showing that the duties and other regulations of commerce applied at the time of MERCOSUR's formation (1995), and in 2006, were not "on the whole" higher or more restrictive than those applied prior to its formation. Brazil further suggests there is evidence on record demonstrating that "substantially all the trade" between constituent members of MERCOSUR has been liberalized, and that MERCOSUR countries maintain substantially the same duties and other regulations of commerce on trade *vis-à-vis* third countries, thus complying with the requirements of Article XXIV:8(a). Brazil notes in this regard that, before the Panel, it incorporated by reference all

of the documents submitted by MERCOSUR members to the Committee on Regional Trade Agreements (the "CRTA").

78. Brazil contends that the European Communities has failed to rebut Brazil's *prima facie* demonstration that MERCOSUR is consistent with the requirements of Article XXIV:5 and 8. The fact that the CRTA and the Committee on Trade and Development did not reach the conclusion that MERCOSUR is in compliance with Article XXIV does not suggest that MERCOSUR is inconsistent with Article XXIV, in particular, because Members' measures are presumed WTO-consistent until sufficient evidence is presented to prove the contrary, and because the CRTA has only once concluded that a regional trade agreement was compatible with the GATT 1994.

79. In addition, Brazil maintains that the European Communities failed to substantiate its claims that MERCOSUR was inconsistent with Article XXIV. Although the European Communities asserts that the automotive and sugar sectors within MERCOSUR have not been fully liberalized, this is contradicted by the evidence it submitted to the Panel. According to Brazil, evidence before the Panel demonstrated that "the automotive sector has been the subject of continuing and progressive liberalization [and that] bilateral agreements between Mercosur members have already led, in practice, to duty-free trade in almost 100 percent of the commerce in the auto sector."⁹⁸ Brazil suggests further that the sugar sector alone cannot prevent compliance with the requirement under Article XXIV:8(a)(i) that "substantially all the trade" between the constituent territories be liberalized, because it "accounts for less than 0.001 percent of the total [trade]".⁹⁹ As regards the European Communities' assertion that there are exceptions to MERCOSUR's common external tariff, Brazil submits that the evidence on record demonstrates that MERCOSUR "applies a common external tariff to products in over 90 percent of the tariff lines and has a specific timetable in place to cover the remaining categories of products by 2008."¹⁰⁰ Brazil also rejects the European Communities' assertion that MERCOSUR does not meet the requirement under Article XXIV:5(a) that non-tariff barriers on trade with third countries not be "*on the whole* ... more restrictive"¹⁰¹, noting that the only example provided by the European Communities is the Import Ban itself. According to Brazil, a single measure cannot constitute sufficient evidence to show that MERCOSUR does not meet the requirements of Article XXIV:5(a).

⁹⁸Brazil's appellee's submission, para. 295 (referring to Panel Report, para. 4.391; and WT/COMTD/1/Add.17, *supra*, footnote 73, p. 3).

⁹⁹*Ibid.* (referring to Committee on Trade and Development, "Examination of the Southern Common Market (MERCOSUR) Agreement", WT/COMTD/1/Add.16, 16 May 2006 (Exhibit BRA-170 submitted by Brazil to the Panel), para. 14; and WT/COMTD/1/Add.17, *supra*, footnote 73, p. 3).

¹⁰⁰*Ibid.*, para. 296 (referring to Brazil's response to Question 132 posed by the Panel, Panel Report, pp. 360-361, in turn citing WT/COMTD/1/Add.17, *supra*, footnote 73, p. 2).

¹⁰¹*Ibid.*, para. 297. (emphasis added by Brazil)

80. Moreover, Brazil contends that the Appellate Body's decision in *Turkey – Textiles* cannot be read as requiring Brazil to demonstrate that the MERCOSUR exemption was introduced upon the formation of a customs union, and that its formation would have been prevented if it were not allowed to introduce such a measure. The analytical approach adopted by the Appellate Body in *Turkey – Textiles* should not be applied in the present dispute, because the MERCOSUR exemption does not impose new restrictions against third countries but, rather, eliminates restrictive regulations between the parties to the customs union.¹⁰² Furthermore, Brazil contends that a Member should not be allowed to demonstrate the necessity of its measure *only* as of the time a customs union is formed, because such customs unions and the integration of their members evolve and deepen over time.

81. Brazil also rejects the European Communities' argument that the fact that the text of Article XXIV:8(a)(i) exempts Article XX measures from the requirement to eliminate duties and other restrictive regulations of commerce demonstrates that the MERCOSUR exemption was not necessary for the formation of MERCOSUR. Such an interpretation would require the members of the customs union to exempt Article XX measures from internal liberalization, "lest they are later challenged by third countries for discrimination and not permitted to invoke Article XXIV to justify those measures."¹⁰³ Moreover, the Appellate Body has explained that "the terms of [Article XXIV:8(a)(i)] offer 'some flexibility' to the constituent members of a customs union when liberalizing their internal trade".¹⁰⁴ This flexibility in Article XXIV permits Brazil to eliminate the Import Ban in respect of MERCOSUR countries while maintaining it in respect of non-MERCOSUR countries. Brazil also emphasizes that the MERCOSUR exemption was not introduced pursuant to its obligations under Article XXIV:8(a)(i), but was rather the result of its unsuccessful attempt to defend the Import Ban before a MERCOSUR arbitral tribunal.

(d) The MERCOSUR Exemption and Article XX(d) of the GATT 1994

82. Should the Appellate Body decide to complete the analysis of the European Communities' claims under Articles I:1 and XIII:1 of the GATT 1994, Brazil submits that it should find the MERCOSUR exemption to be justified under Article XX(d) of the GATT 1994.

¹⁰²For Brazil, *US – Line Pipe* is a more apposite case in the factual context of this dispute. (See Brazil appellee's submission, para. 301 (referring to Panel Report, *US – Line Pipe*, paras. 7.147 and 7.148))

¹⁰³*Ibid.*, para. 307.

¹⁰⁴*Ibid.*, para. 308 (quoting Appellate Body Report, *Turkey – Textiles*, para. 48).

83. Brazil submits that the Panel correctly interpreted and applied the term "to secure compliance" in Article XX(d), in contrast to the European Communities' interpretation that a state "secures compliance" within the meaning of Article XX(d) only when it enforces rules or regulations as regards other actors, and not when it secures its own compliance with the laws or regulations of its domestic legal system. Moreover, the Appellate Body's interpretation of Article XX(d) in *Mexico – Taxes on Soft Drinks* made no such distinction. Rather, the Appellate Body's interpretation of the text of Article XX(d) makes clear that domestic laws or regulations that ensure compliance by a state with its obligations are within the scope of that provision. Brazil also contends that it has incorporated the obligation to comply with rulings of MERCOSUR tribunals into its domestic law, and that evidence to that effect exists in the record.

84. Lastly, Brazil contends that the MERCOSUR exemption is "necessary" within the meaning of Article XX(d). Brazil argues that it could not have complied with the ruling of the MERCOSUR tribunal by simply exempting all third countries from the Import Ban, as the European Communities suggests it should have done, because this would have forced Brazil to abandon its policy objective of reducing unnecessary generation of tyre waste to the maximum extent possible.

C. *Arguments of the Third Participants*

85. Pursuant to Rule 24(2) and (4) of the *Working Procedures*, China, Cuba, Guatemala, Mexico, Paraguay, and Thailand chose not to file a third participant's submission but attended the oral hearing. Cuba, in its statement at the oral hearing, expressed its agreement with the Panel's findings that the Import Ban was necessary to reduce the exposure of human, animal, or plant life or health to risks arising from waste tyres. Cuba also emphasized the importance of the principle of sustainable development and environment preservation policies, and recalled that waste tyre management presents a challenge in particular for developing countries, given the significant environmental and economic costs it involves.

1. Argentina

86. Argentina agrees with the Panel's finding that the Import Ban contributed to the protection of human life and health within the meaning of Article XX(b) of the GATT 1994. Argentina submits that the Panel's necessity analysis was consistent with the case law of the Appellate Body, and that "the Panel's reasoning relie[d] on facts brought to its attention by the parties."¹⁰⁵ The Panel correctly rejected the European Communities' contention that the Import Ban did not contribute to reducing the number of waste tyres, based on its conclusion that "the direct effect of [the Import Ban] is to compel

¹⁰⁵ Argentina's third participant's submission, para. 14.

consumers of imported retreaded tyres to switch either to retreaded tyres produced domestically or to new tyres."¹⁰⁶ If the direct effect of the Import Ban were to impede additional imports of retreaded tyres with a shorter lifespan than new tyres, then it would fulfil Brazil's objective of avoiding generation and accumulation of waste tyres. Argentina underscores further that the Panel was not required to quantify the contribution of the Import Ban to the realization of the objective pursued.¹⁰⁷

87. Argentina submits that the Panel was correct in concluding that the objective of protecting human health and life against life-threatening diseases "is both vital and important in the highest degree".¹⁰⁸ The Panel correctly found that the alternative measures identified by the European Communities aimed at reducing the number of waste tyres and at improving the management of waste tyres in Brazil, but not at preventing the generation of waste tyres to the maximum extent possible. Argentina also agrees with the Panel's finding that "the promotion of domestic retreading and enhanced retreadability of locally used tyres in Brazil would not lead to the reduction in the number of waste tyres additionally generated by 'imported short-lifespan retreaded tyres'".¹⁰⁹ For Argentina, the measures identified by the European Communities did not constitute alternatives that could be applied as a substitute for the Import Ban in preventing the generation of waste tyres to the maximum extent possible. Lastly, Argentina concludes that the Panel did not err in finding that there were no reasonably available alternatives to the Import Ban that would ensure the same level of protection to human life and health sought by Brazil.

2. Australia

88. Australia submits that the Panel erred in finding that the Import Ban was "necessary" within the meaning of Article XX(b) of the GATT 1994. Article XX(b) should be interpreted so as to maintain the careful balance between the rights and obligations of WTO Members to secure their trade interests and the rights of Members to impose measures necessary to protect human, animal, or plant life or health. In Australia's view, the Panel incorrectly balanced these factors in making its findings on necessity.

¹⁰⁶Argentina's third participant's submission, para. 16 (quoting Panel Report, para. 7.134).

¹⁰⁷*Ibid.*, para. 18 (referring to Appellate Body Report, *EC – Asbestos*, para. 167).

¹⁰⁸*Ibid.*, para. 26 (referring to Panel Report, para. 7.111).

¹⁰⁹*Ibid.*, para. 24 (quoting Panel Report, para. 7.168).

89. Australia notes that the Panel, in identifying the measure at issue, should have considered the MERCOSUR exemption in relation to a breach of Article XI:1 of the GATT 1994. Australia encourages the Appellate Body to treat the Import Ban and the MERCOSUR exemption "as an 'integrated whole'"¹¹⁰ under Article XX(b).

90. Moreover, although the Appellate Body stated that a "necessary" measure is significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution", the Panel applied a definition of "necessary" that is closer to "making a contribution" than to "indispensable".¹¹¹ The Panel correctly considered the relative importance of the interests or values pursued by the Import Ban, but did not correctly examine the contribution of the measure to the realization of the ends pursued by it. The Panel also failed to consider adequately the restrictive impact of the Import Ban when conducting the weighing and balancing process. If the measure is properly identified as including both the Import Ban and exemptions to that ban, it is then more appropriate to determine first whether such a measure, in its totality, is necessary in the context of Article XX(b), taking into account the potential restrictive impact on international commerce, among other factors.

91. In relation to the Panel's assessment of alternative measures, Australia submits that the Panel did not properly weigh and balance possible alternatives, because it incorrectly identified the ends pursued by the measure, incorrectly limited its consideration of alternatives to those available "in reality"¹¹², and failed to consider potential alternatives cumulatively rather than only on an individual basis. Australia also argues that the Panel incorrectly excluded a better enforcement of the import ban on used tyres as an alternative measure to the Import Ban. For Australia, there is no basis in Appellate Body case law for excluding from the necessity analysis alternatives that relate to the manner in which the relevant measure is implemented in practice. The Panel also applied an incorrect definition of "alternatives" when limiting its analysis to those measures seeking to avoid the accumulation of waste tyres generated from imported retreaded tyres. Finally, Australia disagrees with the Panel's reasoning that "complementary" measures were not "alternative" measures, because they could not be directly substituted for the Import Ban. Although the Panel recognized that a combination of measures may be appropriate where different alternatives are complementary in addressing the risk, in practice, the Panel evaluated each individual alternative measure in isolation.

¹¹⁰Australia's third participant's submission, para. 5 (referring to Appellate Body Report, *EC – Asbestos*, para. 64).

¹¹¹*Ibid.*, para. 6 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 161).

¹¹²*Ibid.*, para. 20.

92. Australia argues further that the Panel erred in finding that the MERCOSUR exemption did not constitute arbitrary or unjustifiable discrimination within the meaning of the chapeau of Article XX of the GATT 1994. In defining "arbitrary" as "motivated by capricious or unpredictable reasons", the Panel placed too much emphasis on dictionary definitions and reduced the term to "inutility".¹¹³ Consistent with the Appellate Body's statement in *US – Shrimp* that "the precise meaning of the terms in the chapeau [of Article XX] may shift 'as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ'"¹¹⁴, the Panel should have considered the specific factual situation that was before it. Australia adds that, although it accepts that compliance with an international agreement "could be considered as a factor by a panel in deciding whether discrimination was 'arbitrary'"¹¹⁵, this approach requires panels to "make a judgement on the status and validity of action under the agreement".¹¹⁶

93. With respect to the Panel's finding that unjustifiable discrimination occurs only to the extent that the objective of the Import Ban has been significantly undermined by a significant amount of imports, Australia submits that the Panel may have created a new test for the consideration of unjustifiable discrimination under the chapeau of Article XX. Australia recognizes that a measure with no real impact in practice may not constitute arbitrary or unjustifiable discrimination, but maintains that the import into Brazil of 2,000 tons of retreaded tyres per year would not appear to be insignificant or without practical impact. If the Appellate Body upholds the Panel's approach, the European Communities potentially would be forced to commence a new dispute under the DSU, either under Article 21.5 or under a newly constituted panel, in the event that imports of retreaded tyres from MERCOSUR countries increase to a level that would undermine the achievement of the objective of the Import Ban. Such re-litigation of essentially the same dispute would not ensure the prompt settlement of the dispute, as provided for in Article 3.3 of the DSU.

94. Finally, Australia considers that, for the same reasons as those presented in relation to the MERCOSUR exemption, the Panel erred in finding that the Brazilian court injunctions that permitted the importation of used tyres were not arbitrary.

¹¹³Australia's third participant's submission, para. 38 (referring to Appellate Body Report, *US – Gasoline*, p. 23, DSR 1996:I, 3, at 21; and Appellate Body Report, *Canada – Dairy*, para. 133).

¹¹⁴*Ibid.*, para. 39 (referring to Appellate Body Report, *US – Shrimp*, para. 159).

¹¹⁵*Ibid.*, para. 42.

¹¹⁶*Ibid.*

3. Japan

95. Japan argues that what constitutes "arbitrary or unjustifiable discrimination" under the chapeau of Article XX of the GATT 1994 relates to the manner in which a challenged measure is applied and should not be defined in relation to the objective of that measure. The objective of a measure is relevant only to the determination of whether it falls under one of the paragraphs of Article XX, and not as an element to justify the measure's compatibility with the chapeau of that provision. The ordinary meaning of the term "arbitrary" indicates that an arbitrary discrimination test should focus primarily on *subjective* elements (such as motivations) in assessing the manner in which the measure is applied. As for the term "unjustifiable", the Panel correctly concluded that it suggests the "need to be able to 'defend' or convincingly explain the rationale for any discrimination in the application of the measure."¹¹⁷ According to Japan, Members can reasonably provide such convincing explanation of the rationale based on *objective* elements, since they are considered to be easier to validate.

96. In addition, Japan agrees with the Panel that the importation of used tyres under court injunctions did not constitute arbitrary discrimination under the chapeau of Article XX, because the Panel focused on *subjective* elements in evaluating the manner of application of the Import Ban. For Japan, the administrative authority is obliged to follow a court order (where the authority has challenged it before the courts without success), and has no discretion not to obey it. Therefore, whether acts of all branches of a government are "arbitrary" usually needs to be examined in relation to the pertinent decision-making processes. In this case, the Panel correctly found that the actions of the Brazilian courts and those of Brazilian administrative authorities were not arbitrary. Japan adds that it does not necessarily follow that the government as a whole acted in an arbitrary manner just because acts of its different branches contradict each other.

97. Japan next submits that the Panel was incorrect in assessing whether "unjustifiable discrimination" arose from the MERCOSUR exemption and from imports of used tyres under court injunctions on the basis of import volumes. Although import volumes may be a relevant factor in determining whether the application of a measure constitutes unjustifiable discrimination, import volumes are subject to strong fluctuation due to economic factors, and are therefore an inadequate benchmark for purposes of determining the consistency of a measure with the chapeau of Article XX. According to Japan, import volumes constitute a "vague threshold"¹¹⁸ that would lead to disagreements between the parties as to the consistency of the measure in the implementation stage.

¹¹⁷Japan's third participant's submission, para. 11 (quoting Panel Report, para. 7.260).

¹¹⁸*Ibid.*, para. 25.

Japan suggests that Brazil's disposal capacity is a more reasonable threshold, because it is directly related to the reduction in the amount of waste tyre accumulation in Brazil. Japan adds that Brazil's disposal capacity is more easily quantifiable and less prone to fluctuation due to supply and demand than to import volumes.

98. Finally, Japan submits that the Panel erroneously exercised judicial economy with respect to the European Communities' claims that the MERCOSUR exemption was inconsistent with Articles I:1 and XIII:1 of the GATT 1994. The Panel should have examined these claims, because the European Communities had set out, in its panel request, claims that the MERCOSUR exemption as a specific measure was inconsistent with these GATT provisions. Japan considers that a panel's discretion in exercising judicial economy must not adversely affect the appropriateness of the recommendations and rulings of the DSB, which are key to the full and satisfactory settlement of a dispute.¹¹⁹ In this case, the Panel's exercise of judicial economy prevented the satisfactory settlement of the matter, because the Panel's findings required Brazil to rectify the Import Ban only in relation to imports of used tyres under court injunctions, but did not necessarily require Brazil to address the measure's inconsistency in relation to the MERCOSUR exemption.

4. Korea

99. Korea submits that the Panel erred in concluding that the Import Ban was capable of contributing to the achievement of its objective. Korea agrees with the Panel that "there is no requirement that there be a precise measurement of the health risk involved".¹²⁰ However, Korea distinguishes the facts in *EC – Asbestos* from the facts in this dispute, because the measure at issue in *EC – Asbestos* "was a ban on the use of the product and the qualitative linkage was of the product to cancer"¹²¹, while in the present dispute there is no inherent danger in the product itself. In particular, when unlimited domestic production and importation from MERCOSUR countries are permitted, the statement that "numerical precision" is not required can be abused as "an excuse for any lack of effort in assessing degrees of risk".¹²² In Korea's view, Brazil failed to demonstrate what amount of waste tyre reduction is optimal for achieving Brazil's objective and its chosen level of protection and how the limitations introduced by the Import Ban relate to any such level.

¹¹⁹Japan's third participant's submission, paras. 31-32 (referring to Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133; and Appellate Body Report, *EC – Export Subsidies on Sugar*, paras. 330-335).

¹²⁰Korea's third participant's submission, para. 8 (referring to Panel Report, paras. 7.118 and 7.119).

¹²¹*Ibid.*, para. 9.

¹²²*Ibid.*

100. For Korea, the Panel's finding that the Import Ban was "capable of contributing to the overall reduction of the amount of waste tyres"¹²³ amounts to a violation of Article 11 of the DSU. It is unclear what the Panel understood as "capable of contributing", and the Panel should have quantified the extent of the actual contribution of the Import Ban to the achievement of its objective, particularly in the light of its subsequent finding that a quantity of 2,000 tons of retreaded tyres imported under the MERCOSUR exemption did not "significantly" undermine the objective of the measure.

101. Korea agrees with the Panel that Members can choose the level of protection they consider appropriate. However, the measure in question does not relate directly to the reduction of mosquito-borne diseases and tyre fire emissions. Rather, it is "derivative" and relates to the reduction in the number of waste tyres, which may have a "knock-on effect"¹²⁴ on the reduction of mosquito-borne diseases and tyre fire emissions. However, in Korea's view, the Panel failed to assess properly the relationship of the Import Ban to its stated goal of safeguarding human health through the reduction of waste tyres. For Korea, without a better assessment of whether or not the Import Ban actually results in a reduction of the accumulation of waste tyres, one cannot establish a measurable link (or, indeed, any link) to the stated health goal. Therefore, Korea reasons, "some sort of metric, even if not a precise one"¹²⁵, would have been necessary for the Panel to determine the contribution of the Import Ban to the achievement of its objective. Korea considers that the European Communities provided a number of alternatives to the Import Ban, any of which individually or in combination would provide less trade-restrictive measures in achieving the stated goal.

102. Korea argues further that the Panel erred in finding that the MERCOSUR exemption did not result in the Import Ban being applied in a manner inconsistent with the chapeau of Article XX of the GATT 1994. First, Korea agrees with the Panel that the ordinary meaning of the word "arbitrary" includes the "elements of capricious, unpredictable and inconsistent".¹²⁶ However, the Panel assessed the MERCOSUR exemption only in the light of the meaning of the terms "capricious" and "unpredictable". According to Korea, the term "inconsistent" informs the whole meaning of "arbitrary".¹²⁷ This is significant, because the MERCOSUR exemption is not capricious, or unpredictable. However, the Import Ban and the MERCOSUR exemption certainly were "inconsistent" in the light of the underlying justification, that is, the protection of humans from mosquito-borne diseases and tyre fire emissions. For Korea, there is no logical way of distinguishing

¹²³Korea's third participant's submission, para. 10.

¹²⁴*Ibid.*, para. 11.

¹²⁵*Ibid.*, para. 12.

¹²⁶*Ibid.*, para. 19.

¹²⁷*Ibid.*, para. 20.

between retreaded tyres from a MERCOSUR country and retreaded tyres from another WTO Member in relation to the protection of human life and health objective pursued by Brazil.

103. Secondly, Korea submits that the Panel erred in finding that 2,000 tons of retreaded tyres imported from MERCOSUR countries did not significantly undermine the objective of the Import Ban. Korea asserts that the initial burden was on Brazil to establish adequately the factual link between the health goal and the measure in question, and to do so "with some certainty and demonstrability".¹²⁸ Thus, in the absence of such a benchmark provided by Brazil, the Import Ban is by definition "arbitrary", because it "may be applied or not applied in inconsistent manners without any factual or logical basis."¹²⁹ Korea argues that the Panel misinterpreted the nature of the exception provided under Article XXIV of the GATT 1994 and how it interacts with the exception under Article XX.

104. Finally, Korea argues that there was no legal basis for the Panel to find that the open-ended MERCOSUR exemption was consistent with Brazil's defence under Article XX based on the novel standard of significantly undermining the objective that the Panel had construed.¹³⁰ This reasoning implied that MERCOSUR imports could increase to some unknown level that might then significantly undermine the protection of human life and health objective stated by Brazil. Korea contends that the Panel's approach virtually invited future disputes. This is not consistent with Article 3.3 of the DSU, which provides that prompt settlement of disputes is a key element of the dispute settlement system. According to Korea, the Panel erred by attempting to make an "as applied" ruling based on transient facts, when the structure of the measure and the open-ended MERCOSUR exemption required an "as such" finding.

5. The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu

105. The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu submits that the Panel erred in its interpretation of the chapeau of Article XX of the GATT 1994, and in finding that the MERCOSUR exemption did not result in the Import Ban being applied in a manner that constituted either "arbitrary discrimination" or "a disguised restriction on international trade" within the meaning of the chapeau.

¹²⁸Korea's third participant's submission, para. 29.

¹²⁹*Ibid.*

¹³⁰*Ibid.*, para. 33.

106. The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu submits that the Panel's finding that the MERCOSUR exemption did not constitute "arbitrary discrimination between countries where the same conditions prevail" was in error, because the MERCOSUR exemption "was done unpredictably".¹³¹ In support of this argument, the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu recalls that Brazil maintained a general ban on the importation of used tyres even after the formation of MERCOSUR, when Brazil should have eliminated most of the trade barriers with other MERCOSUR countries, and that Brazil even enacted new restrictions on imports when it enacted the Import Ban. Moreover, Brazil did not invoke the protection of human life and health in its defence before the MERCOSUR arbitral tribunal, and that tribunal did not specify how Brazil should implement its ruling. Brazil itself decided to adopt the MERCOSUR exemption. For these reasons, the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu contends that "it is quite clear that no 'predictability' could be found in Brazil's trade policy, which would justify the effect of discrimination on retreaded tyres."¹³² This lack of predictability results in the discrimination introduced by the MERCOSUR exemption being "arbitrary" within the meaning of the chapeau of Article XX.

107. In addition, the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu argues that the MERCOSUR exemption should be considered arbitrary in the light of the objective of the Import Ban. It is uncontested that retreaded tyres exported from MERCOSUR countries into Brazil had the same potential to damage human life or health as retreaded tyres exported from non-MERCOSUR countries. For this reason, the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu submits that, "if the protection of human life or health necessitates Brazil adopting an import ban on retreaded tyres, a loophole in the ban would undermine Brazil's asserted objective."¹³³ The MERCOSUR exemption is just such a loophole, and the discrimination that it engenders is, therefore, arbitrary.

108. The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu argues further that the Panel erred in finding that the discrimination engendered by the MERCOSUR exemption was permissible pursuant to Article XXIV of the GATT 1994. Even assuming that MERCOSUR is consistent with Article XXIV, Article XXIV:8(a) specifically excludes measures adopted consistently with Article XX from the obligation to liberalize "substantially all the trade" within a customs union.

¹³¹Third participant's submission of the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu, para. 7.

¹³²*Ibid.*, para. 13.

¹³³*Ibid.*, para. 15.

The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu also highlights that the objectives of Articles XX and XXIV "are diametrically opposed".¹³⁴

109. The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu also argues that the Panel erred in finding that the MERCOSUR exemption did not constitute "a disguised restriction on international trade" under the chapeau of Article XX, "because the amount of imported retreaded tyres did not increase 'significantly' following [its] introduction".¹³⁵ The chapeau of Article XX does not require evidence of a disruption in trade flows for a complainant to make a case that a disguised restriction exists. The "logic"¹³⁶ of the Appellate Body's rulings in *US – Shrimp* and in *US – Gambling* was "to discourage a [WTO] Member from adopting a measure having an adverse effect on international trade."¹³⁷ Therefore, a disguised restriction on international trade should be found to exist when there is a *possibility* that it does exist. The Panel's test of "significance", in contrast, clearly lacked a legal basis.

110. The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu adds that, as a result of the MERCOSUR exemption, "the trade flow of retreaded tyres to Brazil has been changed in a manner benefiting other MERCOSUR countries"¹³⁸, because these countries are now "able to import used tyres from non-MERCOSUR countries in the first place, retread them locally, and finally re-export retreaded tyres to Brazil."¹³⁹ The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu concludes that international trade in retreaded tyres will be distorted, and that a disguised restriction results from such trade distortion.

111. The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu further suggests that the Panel's findings in this dispute might cause confusion for WTO Members when assessing whether a specific measure is WTO-consistent, create a tendency for WTO Members to initiate a multiplicity of WTO disputes, and undermine the security and predictability needed to conduct future trade. These problems stem from the Panel's failure to provide clear criteria for determining what volume of imports or increase in import volumes would be considered "significant". Moreover, since import volumes are generally determined by supply and demand, the Panel's significance test, if adopted, would make it difficult for WTO Members, who do not have the power to control trade flows into

¹³⁴Third participant's submission of the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu, para. 21.

¹³⁵*Ibid.*, para. 23 (referring to Panel Report, para. 7.354).

¹³⁶*Ibid.*, para. 26.

¹³⁷*Ibid.* (referring to Appellate Body Report, *US – Shrimp*, paras. 166-184; and Appellate Body Report, *US – Gambling*, para. 369).

¹³⁸*Ibid.*, para. 27.

¹³⁹*Ibid.* (referring to Panel Report, para. 7.352).

their domestic markets, to adopt WTO-consistent measures or to eliminate WTO-inconsistent measures.

6. United States

112. The United States agrees with the European Communities that the manner in which the Panel considered the MERCOSUR exemption in its Article XX analysis was erroneous in a number of respects. First, the Panel erred in disregarding the MERCOSUR exemption when determining whether the Import Ban was "necessary" within the meaning of Article XX(b) of the GATT 1994. The MERCOSUR exemption is contained in Portaria SECEX 14/2004¹⁴⁰, and this was the measure found by the Panel to be inconsistent with Article XI:1 of the GATT 1994. For this reason, the Panel was obliged to determine whether Brazil had established that the same measure—Portaria SECEX 14/2004—was justified under Article XX, including by considering the aspect of the MERCOSUR exemption in its necessity analysis. The United States highlights that a single sentence of Portaria SECEX 14/2004 contains both the Import Ban and the MERCOSUR exemption. According to the United States, the Panel should have considered, in determining the contribution of the measure to the ends pursued by it, the fact that retreaded tyres continue to be imported due to the MERCOSUR exemption, and its failure to do so constituted a breach of Article 11 of the DSU.

113. However, the United States disagrees with the European Communities' apparent position that the contribution of the measure to the ends pursued must be evaluated quantitatively, or that demonstrating a contribution requires "verifiable" evidence of whether the measure "actually" contributed to the ends pursued.¹⁴¹ Article XX(b) does not contain a requirement to quantify "necessity", and both quantitative and qualitative evidence may be relevant to the necessity analysis, including the analysis of the contribution of the measure to the ends pursued.

114. The United States also argues that the Panel erred in finding that the MERCOSUR exemption did not result in the Import Ban being applied in a manner that constitutes "arbitrary or unjustifiable discrimination" or "a disguised restriction on international trade", contrary to the chapeau of Article XX. First, the Panel erred in basing its finding that the MERCOSUR exemption did not constitute arbitrary discrimination on the fact that the exemption was adopted to comply with a ruling issued by a MERCOSUR tribunal. The ruling did not prescribe any specific implementation action and, more fundamentally, the United States objects to the Panel's reference to Article XXIV in the context of the MERCOSUR ruling. The United States explains that "Article XXIV does not

¹⁴⁰See *supra*, footnote 3.

¹⁴¹United States' third participant's submission, para. 6 (referring to European Communities' appellant's submission, paras. 172-174).

'expressly recognize' *any and all* frameworks for [WTO] Members to discriminate in favor of partners in customs unions or free trade areas, but rather recognizes particular agreements that meet the conditions specified therein."¹⁴² The Panel could not have properly concluded that MERCOSUR is a type of agreement expressly recognized in Article XXIV, because it made no findings as to whether MERCOSUR meets the terms of Article XXIV.

115. Secondly, the United States maintains that the Panel erred in relying on the number of retreaded tyres imported into Brazil from MERCOSUR countries as a basis for its finding that the MERCOSUR exemption did not constitute "unjustifiable discrimination" or "a disguised restriction on international trade" under the chapeau of Article XX. The Panel found that the volume of imports from MERCOSUR countries appears not to have been "significant", but failed to offer any meaningful analysis of what volume would be "significant". The United States points out that import volumes may change, and that simple reliance on a figure "appears a dubious basis for the Panel's conclusion that the permitted imports will not 'undermine' the objective of the measure."¹⁴³ According to the United States, the chapeau of Article XX requires panels to evaluate whether unjustifiable discrimination or a disguised restriction on international trade exists, and not simply whether the discrimination that exists undermines the objective of the measure.

116. Finally, should the Appellate Body reach the European Communities' conditional appeal and decide to rule on the European Communities' separate claims that the MERCOSUR exemption is inconsistent with Articles I:1 and XIII:1 of the GATT 1994, the United States submits that Brazil may not rely on Article XXIV of the GATT 1994 as a defence. MERCOSUR has not been notified under Article XXIV as a customs union, as required by Article XXIV:7 of the GATT 1994. According to the United States, failure to notify a customs union under Article XXIV:7 does not merely render a customs union inconsistent with that paragraph; rather, pursuant to paragraph 1 of the *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994* (the "*Understanding on Article XXIV of the GATT 1994*"), such a customs union is not consistent with Article XXIV as a whole. Members that opt not to subject their customs union to the procedures set out in Article XXIV and the *Understanding on Article XXIV of the GATT 1994* or its interpretation are not entitled to invoke that provision as a defence. Moreover, the United States notes that MERCOSUR countries notified MERCOSUR pursuant to paragraph 4(a) of the *GATT 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries* (the "Enabling Clause")¹⁴⁴ rather than under Article XXIV:7(a) of the GATT 1994. The

¹⁴²United States' third participant's submission, para. 9. (original emphasis)

¹⁴³*Ibid.*, para. 11.

¹⁴⁴L/4903, 28 November 1979, BISD 26S/203.

United States argues that regional arrangements as defined under Articles 1, 2, and 3 of the Enabling Clause have different characteristics and are subject to different obligations than customs unions and free trade areas covered by Article XXIV.

III. Issues Raised in This Appeal

117. The following issues are raised in this appeal:

- (a) with respect to the Panel's analysis of "necessity" within the meaning of Article XX(b) of the GATT 1994:
 - (i) whether the Panel erred in finding that the Import Ban is "necessary" to protect human or animal life or health¹⁴⁵; and
 - (ii) whether the Panel breached its duty under Article 11 of the DSU to make an objective assessment of the facts;
- (b) with respect to the Panel's interpretation and application of the chapeau of Article XX of the GATT 1994:
 - (i) whether the Panel erred in finding that the MERCOSUR exemption has not resulted in the Import Ban being applied in a manner that is inconsistent with the chapeau¹⁴⁶; and
 - (ii) whether the Panel erred in its analysis of whether imports of used tyres under court injunctions have resulted in the Import Ban being applied in a manner that is inconsistent with the chapeau; and
- (c) if the Appellate Body does *not* find that the MERCOSUR exemption results in the Import Ban being applied in a manner that is inconsistent with the chapeau of Article XX of the GATT 1994, then:
 - (i) whether the Panel erred in exercising judicial economy in relation to the European Communities' separate claim that the MERCOSUR exemption is inconsistent with Articles I:1 and XIII:1 of the GATT 1994; and, if so

¹⁴⁵Panel Report, para. 7.215.

¹⁴⁶*Ibid.*, paras. 7.289 and 7.354.

- (ii) whether the MERCOSUR exemption is inconsistent with Articles I:1 and XIII:1 and is not justified under Article XXIV or Article XX(d) of the GATT 1994.

IV. Background and the Measure at Issue

A. *Factual Background*

118. Tyres are an integral component in passenger cars, lorries, and airplanes and, as such, their use is widespread in modern society. New passenger cars are typically sold with new tyres. When tyres need to be replaced, consumers in some countries¹⁴⁷ may have a choice between new tyres or "retreaded" tyres. This dispute concerns the latter category of tyres.¹⁴⁸ Retreaded tyres are used tyres that have been reconditioned for further use by stripping the worn tread from the skeleton (casing) and replacing it with new material in the form of a new tread, and sometimes with new material also covering parts or all of the sidewalls.¹⁴⁹ Retreaded tyres can be produced through different methods, one of which is called "remoulding".¹⁵⁰

119. At the end of their useful life¹⁵¹, tyres become waste, the accumulation of which is associated with risks to human, animal, and plant life and health.¹⁵² Specific risks to human life and health include:

¹⁴⁷We note that Brazil is not the only WTO Member that has adopted a ban on imports of retreaded tyres. According to Brazil, countries that have restricted imports of used and retreaded tyres include Argentina, Bangladesh, Bahrain, Nigeria, Pakistan, Thailand, and Venezuela. (Brazil's first submission to the Panel, para. 67) At the oral hearing, Brazil identified the following as countries that ban imports of retreaded tyres: Argentina, Morocco, Nigeria, Pakistan, Thailand, Tunisia, and Venezuela.

¹⁴⁸Retreaded tyres are classified in the *International Convention on the Harmonized Commodity Description and Coding System*, done at Brussels, 14 June 1983, under subheadings 4012.11 (motor cars), 4012.12 (buses and lorries), 4012.13 (aircraft), and 4012.19 (other types). (Panel Report, para. 2.4)

¹⁴⁹Panel Report, para. 2.1.

¹⁵⁰"Remoulding" consists of replacing the tread and the sidewall including all or part of the lower area of the tyre. The other two methods of retreading are "top-capping", which consists of replacing only the tread, and "re-capping", which entails replacing the tread and part of the sidewall. (*Ibid.*, para. 2.2)

¹⁵¹The Panel assumed that, on average, a tyre—whether new or retreaded—can be used on a passenger car for five years before it becomes a used tyre. (*Ibid.*, para. 7.128)

¹⁵²*Ibid.*, para. 7.109.

(i) the transmission of dengue, yellow fever and malaria through mosquitoes which use tyres as breeding grounds; and (ii) the exposure of human beings to toxic emissions caused by tyre fires which may cause loss of short-term memory, learning disabilities, immune system suppression, cardiovascular problems, but also cancer, premature mortality, reduced lung function, suppression of the immune system, respiratory effects, heart and chest problems.¹⁵³

Risks to animal and plant life and health include: "(i) the exposure of animals and plants to toxic emissions caused by tyre fires; and (ii) the transmission of a mosquito-borne disease (dengue) to animals."¹⁵⁴

120. Governments take actions to minimize the adverse effects of waste tyres. Policies to address "waste" include preventive measures aiming at reducing the generation of additional waste tyres¹⁵⁵, as well as remedial measures aimed at managing and disposing of tyres that can no longer be used or retreaded, such as landfilling, stockpiling, the incineration of waste tyres, and material recycling.

121. The Panel observed that the parties to this dispute have not suggested that retreaded tyres used on vehicles pose any particular risks compared to new tyres, provided that they comply with appropriate safety standards. Various international standards exist in relation to retreaded tyres, including, for example, the norm stipulating that passenger car tyres may be retreaded only once.¹⁵⁶ One important difference between new and retreaded tyres is that the latter have a shorter lifespan and therefore reach the stage of being waste earlier.¹⁵⁷

B. *The Measure at Issue*

122. Article 40 of Portaria No. 14 of the Secretaria de Comércio Exterior ("SECEX") (Secretariat of Foreign Trade of the Brazilian Ministry of Development, Industry, and Foreign Trade), dated 17 November 2004 ("Portaria SECEX 14/2004")¹⁵⁸ reads as follows:

¹⁵³Panel Report, para. 7.109. See also *ibid.*, paras. 7.53-7.83.

¹⁵⁴*Ibid.*, para. 7.112.

¹⁵⁵See the Panel's finding, in paragraph 7.100 of its Report, that "policies to address 'waste' by non-generation of additional waste are a generally recognized means of addressing waste management issues", as well as footnote 1170 thereto, detailing the evidence on which the Panel relied in reaching this conclusion.

¹⁵⁶*Ibid.*, para. 2.3.

¹⁵⁷*Ibid.*, paras. 7.129 and 7.130.

¹⁵⁸Exhibits BRA-84 and EC-29 submitted by Brazil and the European Communities, respectively, to the Panel. We note that, in November 2006, Article 40 of Portaria SECEX 14/2004 was replaced by Article 41 of Portaria SECEX No. 35 dated 24 November 2006, the text of which is identical to that of Article 40 of Portaria SECEX 14/2004. (European Communities' appellant's submission, para. 145 and footnote 18 thereto)

Article 40 – An import license will not be granted for retreaded tyres and used tyres, whether as a consumer product or feedstock, classified under NCM code 4012, except for remoulded tyres, classified under NCM codes 4012.11.00, 4012.12.00, 4012.13.00 and 4012.19.00, originating and proceeding from the Mercosur Member States under the Economic Complementation Agreement No. 18.¹⁵⁹

Article 40 of Portaria SECEX 14/2004 contains three main elements: (i) an import ban on *retreaded* tyres (the "Import Ban")¹⁶⁰; (ii) an import ban on *used* tyres; and (iii) an exemption from the Import Ban of imports of certain retreaded tyres from other countries of the Mercado Común del Sur ("MERCOSUR") (Southern Common Market), which has been referred to in this dispute as the "MERCOSUR exemption".¹⁶¹ The MERCOSUR exemption did not form part of previous regulations prohibiting the importation of retreaded tyres, notably Portaria SECEX No. 8 of 25 September 2000 ("Portaria SECEX 8/2000")¹⁶², but was introduced as a result of a ruling issued by a MERCOSUR arbitral tribunal.¹⁶³

123. This dispute concerns the Import Ban and the MERCOSUR exemption in Article 40 of Portaria SECEX 14/2004, but not the import ban on used tyres.¹⁶⁴ In its request for the establishment of a panel¹⁶⁵, the European Communities identified the Import Ban and the MERCOSUR exemption as distinct measures, and made separate claims against each of these measures. The European Communities claimed that the Import Ban was inconsistent with Article XI:1 of the GATT 1994, and

¹⁵⁹See Panel Report, para. 2.7.

¹⁶⁰Throughout this Report, reference to the "Import Ban" shall be understood as referring only to the import ban on retreaded tyres. It therefore does not include the MERCOSUR exemption, despite the fact that this exemption is contained in the same legal instrument as the Import Ban, that is, Article 40 of Portaria SECEX 14/2004.

¹⁶¹The MERCOSUR exemption applies exclusively to remoulded tyres, a subcategory of retreaded tyres, which result from the process of replacing the tread and the sidewall, including all or part of the lower area of the tyre. (See Panel Report, para. 2.74 and footnote 1440 to para. 7.265)

¹⁶²Exhibits BRA-71 and EC-26 submitted by Brazil and the European Communities, respectively, to the Panel. See also Panel Report, para. 2.8.

¹⁶³Following the adoption of Portaria SECEX 8/2000, Uruguay requested, on 27 August 2001, the initiation of arbitral proceedings within MERCOSUR. Uruguay alleged that Portaria SECEX 8/2000 constituted a new restriction of commerce between MERCOSUR countries, which was incompatible with Brazil's obligations under MERCOSUR. In its ruling of 9 January 2002, the arbitral tribunal found that the Brazilian measure was incompatible with MERCOSUR Decision CMC No. 22 of 29 June 2000, which obliges MERCOSUR countries not to introduce new *inter se* restrictions of commerce. (See Panel Report, para. 2.13; see also Exhibits BRA-103 and EC-40 submitted by Brazil and the European Communities, respectively, to the Panel) Following the arbitral award, Brazil enacted Portaria SECEX No. 2 of 8 March 2002, which eliminated the import ban for remoulded tyres originating in other MERCOSUR countries. (See Panel Report, para. 2.14; see also Exhibit BRA-78 submitted by Brazil to the Panel; see also Exhibit EC-41 submitted by the European Communities to the Panel) This exemption was incorporated into Article 40 of Portaria SECEX 14/2004.

¹⁶⁴The European Communities confirmed, in response to questioning at the oral hearing, that it has not challenged the ban on the import of *used* tyres contained in Article 40 of Portaria SECEX 14/2004.

¹⁶⁵WT/DS332/4, 18 November 2005. See also European Communities' first written submission to the Panel, para. 47.

could not be justified under Article XX of the GATT 1994.¹⁶⁶ The European Communities also made distinct claims that the MERCOSUR exemption was inconsistent with Article I:1 and Article XIII:1 of the GATT 1994, and could not be justified under either Article XXIV:5 of the GATT 1994 or the Enabling Clause.¹⁶⁷ In comments made during the interim review, Brazil stated that it had treated the Import Ban and the MERCOSUR exemption as two separate measures contained in the same legal instrument.¹⁶⁸

124. Following the approach of the parties, the Panel analyzed the claim made against the Import Ban separately from the claims made against the MERCOSUR exemption. The Panel found the Import Ban to be inconsistent with Article XI:1 of the GATT 1994.¹⁶⁹ It then turned to Brazil's related defence under Article XX(b) of the GATT 1994, stating that its analysis of Brazil's justification of the violation should focus also on the Import Ban, because this was the "specific measure" that had been found to be inconsistent with Article XI:1.¹⁷⁰ Thus, according to the Panel, its analysis of the necessity of *that* specific measure should not have taken account of "elements extraneous to the measure itself" or of situations in which the Import Ban "does *not* apply (i.e. the exemption of MERCOSUR imports)".¹⁷¹ The Panel recognized, nonetheless, that "the MERCOSUR exemption is foreseen in the very legal instrument containing the import ban".¹⁷² It then included the MERCOSUR exemption in its analysis of the chapeau of Article XX, because the chapeau involves consideration of the manner in which the specific measure to be justified (in this case, the Import Ban) is applied.

125. On appeal, the European Communities indicated, in response to questioning at the oral hearing, that the Import Ban and the MERCOSUR exemption are two aspects of a single measure—that is, Article 40 of Portaria SECEX 14/2004—and that this provision is the measure at issue. Notwithstanding this position, the European Communities does not appeal the Panel's analytical approach. More specifically, the European Communities does not contend that the Panel erred in

¹⁶⁶See, for instance, European Communities' first written submission to the Panel, paras. 89-168.

¹⁶⁷*Supra*, footnote 144. See also European Communities' first written submission to the Panel, paras. 193-222.

¹⁶⁸Panel Report, para. 6.17.

¹⁶⁹The Panel found that the prohibition of the issuance of import licences for retreaded tyres has the effect of prohibiting the importation of retreaded tyres, and is thus inconsistent with Article XI:1 of the GATT 1994. (*Ibid.*, paras. 7.14, 7.15, and 7.34) In making the finding that Portaria SECEX 14/2004 is inconsistent with Article XI:1, the Panel focused on the import prohibition; its reasoning reflects the notion that an exemption from an import ban by its nature does not constitute a prohibition or restriction.

¹⁷⁰*Ibid.*, para. 7.106.

¹⁷¹*Ibid.*, para. 7.107. (footnote omitted)

¹⁷²*Ibid.*, para. 7.237; see also para. 6.19.

identifying and separately treating as two distinct matters before it: a claim relating to the Import Ban; and a claim concerning the discrimination introduced by the MERCOSUR exemption.

126. We observe, nonetheless, that the Panel might have opted for a more holistic approach to the measure at issue by examining the two elements of Article 40 of Portaria SECEX 14/2004 that relate to retreaded tyres *together*. The Panel could, under such an approach, have analyzed whether the Import Ban in combination with the MERCOSUR exemption violated Article XI:1, and whether that *combined* measure, or the resulting partial import ban, could be considered "necessary" within the meaning of Article XX(b).¹⁷³

127. Yet, the Panel's approach reflects the manner in which the European Communities formulated its claims to the Panel, and the fact that the MERCOSUR exemption was not part of the original ban on the importation of retreaded tyres adopted by Brazil (Portaria SECEX 8/2000), but was only introduced following a ruling in 2002 by a MERCOSUR arbitral tribunal. These considerations prompt us to examine the issues appealed on the basis of the conceptual approach adopted by the Panel in defining the scope of the measure at issue, which, as indicated above, has not specifically been appealed by the European Communities.

C. *Related Measures*

128. In addition to the Import Ban, Brazil has adopted a variety of other measures which were also challenged or discussed before the Panel. Although none of these measures are directly at issue in this appeal, we consider it useful to identify them briefly.

129. Presidential Decree 3.179, as amended¹⁷⁴, provides sanctions applicable to conduct and activities harmful to the environment, and other provisions, and its Article 47-A subjects the importation, as well as the marketing, transportation, storage, keeping or warehousing, of imported used and retreaded tyres to a fine of R\$400/unit.

130. Resolution No. 258 of 26 August 1999 of the Conselho Nacional do Meio Ambiente ("CONAMA") (National Council for the Environment of the Ministry of the Environment) ("CONAMA Resolution 258/1999")¹⁷⁵, as amended by CONAMA Resolution No. 301 of 21 March

¹⁷³Indeed, two of the third participants in this appeal—Australia and the United States—suggest that the Panel should have adopted such an approach. (Australia's third participant's submission, paras. 4 and 5; United States' third participant's submission, para. 5)

¹⁷⁴See *supra*, footnote 5.

¹⁷⁵Exhibits BRA-4 and EC-47 submitted by Brazil and by the European Communities, respectively, to the Panel.

2002¹⁷⁶, created a collection and disposal scheme that makes it mandatory for domestic manufacturers of new tyres and tyre importers to provide for the safe disposal of waste tyres in specified proportions.¹⁷⁷ CONAMA Resolution 258/1999, as amended in 2002, aims to ensure the environmentally appropriate final disposal of unusable tyres. Also, by exempting domestic retreaders from disposal obligations as long as they process tyres consumed within Brazil¹⁷⁸, CONAMA Resolution 258/1999, as amended in 2002, seeks to encourage Brazilian retreaders to retread more domestically used tyres.

131. Brazilian states have also enacted measures aiming at reducing risks arising from the accumulation of waste tyres. Law 12.114 of the State of Rio Grande do Sul prohibits the commercialization of imported used tyres within its territory, which includes imported retreaded tyres, as well as retreaded tyres made in Brazil from imported casings.¹⁷⁹ A 2005 amendment to that law allows the importation and marketing of imported retreaded tyres provided that the importer proves that it has destroyed ten used tyres in Brazil for every retreaded tyre imported. In the case of imports of used tyre casings, however, the destruction of only one used tyre per imported tyre is required.¹⁸⁰ The State of Paraná has adopted Paraná Rodando Limpo, a voluntary programme to collect, *inter alia*, all existing unusable tyres currently discarded throughout the territory of Paraná.¹⁸¹

132. Finally, we note that, notwithstanding the import ban on used tyres contained in Article 40 of Portaria SECEX 14/2004, a number of Brazilian retreaders have sought, and obtained, injunctions allowing them to import used tyre casings in order to manufacture retreaded tyres from those used tyres.¹⁸² Although the Brazilian government has, within the Brazilian domestic legal system, opposed these injunctions, it has had mixed results in its efforts to prevent the grant, or obtaining the reversal, of court injunctions for the importation of used tyres.¹⁸³

¹⁷⁶Exhibit BRA-68 submitted by Brazil to the Panel.

¹⁷⁷See para. 154 and footnote 253 thereto of this Report.

¹⁷⁸Panel Report, para. 7.137.

¹⁷⁹*Ibid.*, para. 2.11.

¹⁸⁰*Ibid.*, para. 2.12.

¹⁸¹*Ibid.*, paras. 7.66, 7.174, 7.175, and 7.178.

¹⁸²*Ibid.*, paras. 7.241 and 7.92-7.305.

¹⁸³*Ibid.*, para. 7.304.

V. The Panel's Analysis of the Necessity of the Import Ban

A. *The Panel's Necessity Analysis under Article XX(b) of the GATT 1994*

133. The first legal issue raised by the European Communities' appeal relates to the Panel's finding that the Import Ban is "necessary" within the meaning of Article XX(b) of the GATT 1994.¹⁸⁴ The European Communities challenges three specific aspects of the Panel's analysis under Article XX(b). First, the European Communities contends that the Panel applied an "erroneous legal standard"¹⁸⁵ in assessing the contribution of the Import Ban to the realization of the ends pursued by it, and that it did not properly weigh this contribution in its analysis of the necessity of the Import Ban. Secondly, the European Communities submits that the Panel did not define correctly the alternatives to the Import Ban and erred in excluding possible alternatives proposed by the European Communities.¹⁸⁶ Thirdly, the European Communities argues that, in its analysis under Article XX(b), the Panel did not carry out a proper, if any, weighing and balancing of the relevant factors.¹⁸⁷ We will examine these contentions of the European Communities in turn.

1. The Panel's Analysis of the Contribution of the Import Ban to the Achievement of Its Objective

134. In the analysis of the contribution of the Import Ban to the achievement of its objective, the Panel first recalled its previous findings that, through the Import Ban, Brazil pursued the objective of reducing exposure to the risks to human, animal, and plant life and health arising from the accumulation of waste tyres, and that such policy fell within the range of policies covered by paragraph (b) of Article XX of the GATT 1994.¹⁸⁸ The Panel also found that Brazil's chosen level of protection is the "reduction of the risks of waste tyre accumulation to the maximum extent possible".¹⁸⁹ In analyzing whether the Import Ban "contributes to the realization of the policy pursued, i.e. the protection of human, animal and plant life and health from the risks posed by the accumulation of waste tyres"¹⁹⁰, the Panel examined two questions. First, the Panel sought to assess whether the Import Ban can contribute to the reduction in the number of waste tyres generated in Brazil. Secondly, the Panel sought to evaluate whether a reduction in the number of waste tyres can

¹⁸⁴Panel Report, para. 7.215.

¹⁸⁵European Communities' appellant's submission, para. 166.

¹⁸⁶*Ibid.*, para. 209.

¹⁸⁷*Ibid.*, para. 285.

¹⁸⁸Panel Report, para. 7.115.

¹⁸⁹*Ibid.*, para. 7.108. (footnote omitted)

¹⁹⁰*Ibid.*, para. 7.115.

contribute to the reduction of the risks to human, animal, and plant life and health arising from waste tyres.¹⁹¹

135. Regarding the first question, the Panel noted Brazil's explanation that the Import Ban would contribute to the achievement of the objective of reducing the number of waste tyres if imported retreaded tyres would be replaced either with domestically retreaded tyres made from tyres used in Brazil, or with new tyres capable of future retreading. The Panel began by examining the replacement of imported retreaded tyres with new tyres on Brazil's market.¹⁹² The Panel determined that "all types of retreaded tyres (i.e. for passenger car, bus, truck and aircraft) have by definition a shorter lifespan than new tyres."¹⁹³ Accordingly, the Panel reasoned that "an import ban on retreaded tyres may lead to a reduction in the total number of waste tyres because imported retreaded tyres may be substituted for by new tyres which have a longer lifespan."¹⁹⁴ The Panel verified next whether there is a link between the replacement of imported retreaded tyres with domestically retreaded tyres and a reduction in the number of waste tyres in Brazil.¹⁹⁵ If retreaded tyres are manufactured in Brazil from tyres used in Brazil, the retreading of these used tyres contributes to the reduction of the accumulation of waste tyres in Brazil by "giving a second life to some used tyres, which otherwise would have become waste immediately after their first and only life."¹⁹⁶ The Panel added that "an import ban on retreaded tyres can encourage domestic retreaders to retread more domestic used tyres than they might have done otherwise"¹⁹⁷, because it "compel[s] consumers of imported retreaded tyres to switch either to retreaded tyres produced domestically or to new tyres."¹⁹⁸ The Panel then assessed whether domestic used tyres can be retreaded in Brazil. On the basis of the evidence provided by the parties, the Panel found that "at least some domestic used tyres are being retreaded in Brazil"¹⁹⁹, that Brazil "has the production capacity to retread domestic used tyres"²⁰⁰, and that new tyres sold in Brazil have the potential to be retreaded.²⁰¹ The Panel also observed that "Article 40 of Portaria SECEX 14/2004 bans the importation of both used and retreaded tyres to Brazil" and that "the import ban on used tyres supports the effectiveness of the import ban on retreaded tyres regarding the reduction of waste

¹⁹¹Panel Report, para. 7.122.

¹⁹²*Ibid.*, paras. 7.126-7.130.

¹⁹³*Ibid.*, para. 7.130.

¹⁹⁴*Ibid.*

¹⁹⁵*Ibid.*, para. 7.132.

¹⁹⁶*Ibid.*, para. 7.133.

¹⁹⁷*Ibid.*, para. 7.134. (footnote omitted)

¹⁹⁸*Ibid.*

¹⁹⁹*Ibid.*, para. 7.136.

²⁰⁰*Ibid.*, para. 7.142.

²⁰¹*Ibid.*, para. 7.137.

tyres."²⁰² The Panel concluded that the Import Ban "is capable of contributing to the reduction of the overall amount of waste tyres generated in Brazil."²⁰³

136. The Panel then turned to the question of whether the reduction in the number of waste tyres would contribute to a reduction of the risks to human, animal, and plant life and health arising from waste tyres. For the Panel, "the very essence of the problem is the actual accumulation of waste in and of itself."²⁰⁴ The Panel added that "[t]o the extent that this accumulation has been demonstrated to be associated with the occurrence of the risks at issue, including the providing of fertile breeding grounds for the vectors of these diseases, a reduction in this accumulation, even if it does not eliminate it, can reasonably be expected to constitute a step towards the reduction of the occurrence of the diseases and the tyre fires."²⁰⁵ The Panel concluded 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.²⁰⁶

137. According to the European Communities, the Panel, in its assessment of the contribution of the Import Ban to the realization of the ends pursued by it, referred only to the potential contribution this measure might make.²⁰⁷ The European Communities argues that the Panel applied an "erroneous legal standard"²⁰⁸ in so doing, and that the Panel should have sought "to establish the actual contribution of the measure to its stated goals, and the importance of this contribution".²⁰⁹ For the European Communities, the Panel was required to determine the extent to which the Import Ban makes a contribution to the achievement of its stated objective because, otherwise, it is not possible to weigh and balance properly this contribution against other relevant factors.²¹⁰ Accordingly, the European Communities contends, the Panel erred by not quantifying the reduction of waste tyres resulting from the Import Ban.²¹¹ For the European Communities, "[t]he very indirect nature of the

²⁰²Panel Report, para. 7.139.

²⁰³*Ibid.*, para. 7.142.

²⁰⁴*Ibid.*, para. 7.146.

²⁰⁵*Ibid.*

²⁰⁶*Ibid.*, para. 7.148.

²⁰⁷European Communities' appellant's submission, para. 168.

²⁰⁸*Ibid.*, para. 166.

²⁰⁹*Ibid.*, para. 167.

²¹⁰*Ibid.*, para. 171.

²¹¹*Ibid.*, para. 174.

alleged risks attributed to imported retreaded tyres should have called for a particularly diligent examination of the contribution made by the ban to the reduction of the number of the waste tyres arising in Brazil."²¹²

138. Brazil counters that the Panel correctly assessed the contribution of the Import Ban to the achievement of its objective. Brazil argues that actual contribution is properly assessed under the chapeau of Article XX of the GATT 1994, which focuses on the application of the measure. Brazil asserts further that the Appellate Body expressly recognized, in *EC – Asbestos*, that "a risk may be evaluated either in quantitative or *qualitative* terms"²¹³ and, therefore, the Panel was under no obligation to quantify the Import Ban's contribution to the reduction in waste tyre volumes.

139. We begin by recalling that the analysis of a measure under Article XX of the GATT 1994 is two-tiered.²¹⁴ First, a panel must examine whether the measure falls under at least one of the ten exceptions listed under Article XX.²¹⁵ Secondly, the question of whether the measure at issue satisfies the requirements of the chapeau of Article XX must be considered.

140. We note at the outset that the participants do not dispute that it is within the authority of a WTO Member to set the public health or environmental objectives it seeks to achieve²¹⁶, as well as the level of protection that it wants to obtain, through the measure or the policy it chooses to adopt.²¹⁷

141. Article XX(b) of the GATT 1994 refers to measures "necessary to protect human, animal or plant life or health". The term "necessary" is mentioned not only in Article XX(b) of the GATT 1994, but also in Articles XX(a) and XX(d) of the GATT 1994, as well as in Article XIV(a), (b), and (c) of the GATS. In *Korea – Various Measures on Beef*, the Appellate Body underscored that "the word 'necessary' is not limited to that which is 'indispensable'".²¹⁸ The Appellate Body added:

²¹²European Communities' appellant's submission, para. 177.

²¹³Brazil's appellee's submission, para. 81 (quoting Appellate Body Report, *EC – Asbestos*, para. 167). (emphasis added by Brazil)

²¹⁴Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, 3, at 20. See also Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 64.

²¹⁵In other words, the policy objective of the measure at issue must fall under the range of policies covered by the paragraphs of Article XX of the GATT 1994. (See, for instance, Appellate Body Report, *US – Shrimp*, para. 149)

²¹⁶Appellate Body Report, *US – Gasoline*, p. 30, DSR 1996:I, 3, at 28.

²¹⁷Appellate Body Report, *EC – Asbestos*, para. 168.

²¹⁸Appellate Body Report, *Korea – Various Measures on Beef*, para. 161.

Measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfil the requirements of Article XX(d). But other measures, too, may fall within the ambit of this exception. As used in Article XX(d), the term "necessary" refers, in our view, to a range of degrees of necessity. At one end of this continuum lies "necessary" understood as "indispensable"; at the other end, is "necessary" taken to mean as "making a contribution to." We consider that a "necessary" measure is, in this continuum, located significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to".²¹⁹ (footnote omitted)

142. In *Korea – Various Measures on Beef*, the Appellate Body explained that determining whether a measure is "necessary" within the meaning of Article XX(d):

... involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.²²⁰

143. In *US – Gambling*, the Appellate Body addressed the "necessity" test in the context of Article XIV of the GATS. The Appellate Body stated that the weighing and balancing process inherent in the necessity analysis "begins with an assessment of the 'relative importance' of the interests or values furthered by the challenged measure"²²¹, and also involves an assessment of other factors, which will usually include "the contribution of the measure to the realization of the ends pursued by it" and "the restrictive impact of the measure on international commerce".²²²

144. It is against this background that we must determine whether the Panel erred in assessing the contribution of the Import Ban to the realization of the objective pursued by it, and in the manner in which it weighed this contribution in its analysis of the necessity of the Import Ban. We begin by identifying the objective pursued by the Import Ban. The Panel found that the objective of the Import Ban is the reduction of the "exposure to the risks to human, animal or plant life or health arising from the accumulation of waste tyres"²²³, and noted that "few interests are more 'vital' and 'important' than

²¹⁹Appellate Body Report, *Korea – Various Measures on Beef*, para. 161.

²²⁰*Ibid.*, para. 164.

²²¹Appellate Body Report, *US – Gambling*, para. 306. (footnote omitted)

²²²*Ibid.* In *Korea – Various Measures on Beef*, the Appellate Body observed that "[a] measure with a relatively slight impact upon imported products might more easily be considered as 'necessary' than a measure with intense or broader restrictive effects." (Appellate Body Report, *Korea – Various Measures on Beef*, para. 163)

²²³Panel Report, para. 7.102.

protecting human beings from health risks, and that protecting the environment is no less important."²²⁴ The Panel also observed that "Brazil's chosen level of protection is the reduction of the risks of waste tyre accumulation to the maximum extent possible."²²⁵ Regarding the trade restrictiveness of the measure, the Panel noted that it is "as trade-restrictive as can be, as far as retreaded tyres from non-MERCOSUR countries are concerned, since it aims to halt completely their entry into Brazil."²²⁶

145. We turn to the methodology used by the Panel in analyzing the contribution of the Import Ban to the achievement of its objective. Such a contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue. The selection of a methodology to assess a measure's contribution is a function of the nature of the risk, the objective pursued, and the level of protection sought. It ultimately also depends on the nature, quantity, and quality of evidence existing at the time the analysis is made. Because the Panel, as the trier of the facts, is in a position to evaluate these circumstances, it should enjoy a certain latitude in designing the appropriate methodology to use and deciding how to structure or organize the analysis of the contribution of the measure at issue to the realization of the ends pursued by it. This latitude is not, however, boundless. Indeed, a panel must analyze the contribution of the measure at issue to the realization of the ends pursued by it in accordance with the requirements of Article XX of the GATT 1994 and Article 11 of the DSU.

146. We note that the Panel chose to conduct a qualitative analysis of the contribution of the Import Ban to the achievement of its objective.²²⁷ In previous cases, the Appellate Body has not established a requirement that such a contribution be quantified.²²⁸ To the contrary, in *EC – Asbestos*, the Appellate Body emphasized that there is "no requirement under Article XX(b) of the GATT 1994 to *quantify*, as such, the risk to human life or health".²²⁹ In other words, "[a] risk may be evaluated either in quantitative or qualitative terms."²³⁰ Although the reference by the Appellate Body

²²⁴Panel Report, para. 7.108 (referring to Brazil's first written submission, para. 101).

²²⁵*Ibid.* (footnote omitted)

²²⁶*Ibid.*, para. 7.114.

²²⁷*Ibid.*, para. 7.118.

²²⁸Appellate Body Report, *Korea – Various Measures on Beef*, paras. 163 and 164; Appellate Body Report, *EC – Asbestos*, para. 172; Appellate Body Report, *US – Gambling*, para. 306; Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 70.

²²⁹Appellate Body Report, *EC – Asbestos*, para. 167. (original emphasis; footnote omitted)

²³⁰*Ibid.*

to the quantification of a risk is not the same as the quantification of the contribution of a measure to the realization of the objective pursued by it (which could be, as it is in this case, the reduction of a risk), it appears to us that the same line of reasoning applies to the analysis of the contribution, which can be done either in quantitative or in qualitative terms.

147. Accordingly, we do not accept the European Communities' contention that the Panel was under an obligation to quantify the contribution of the Import Ban to the reduction in the number of waste tyres and to determine the number of waste tyres that would be reduced as a result of the Import Ban.²³¹ In our view, the Panel's choice of a qualitative analysis was within the bounds of the latitude it enjoys in choosing a methodology for the analysis of the contribution.

148. The Panel analyzed the contribution of the Import Ban to the achievement of its objective in a coherent sequence. It examined first the impact of the replacement of imported retreaded tyres with *new tyres* on the reduction of waste. Secondly, the Panel sought to determine whether imported retreaded tyres would be replaced with *domestically retreaded tyres*, which led it to examine whether domestic used tyres can be and are being retreaded in Brazil. Thirdly, it considered whether the reduction in the number of waste tyres would contribute to a reduction of the risks to human, animal, and plant life and health.

149. The Panel's analysis was not only directed at an assessment of the current situation and the *immediate* effects of the Import Ban on the reduction of the exposure to the targeted risks. The Panel's approach also focused on evaluating the extent to which the Import Ban is likely to result in a reduction of the exposure to these risks.²³² In the course of its reasoning, the Panel made and tested some key hypotheses, including: that imported retreaded tyres are being replaced with new tyres²³³ and domestically retreaded tyres²³⁴; that some proportion of domestic used tyres are retreadable and are being retreaded²³⁵; that Brazil introduced a number of measures to facilitate the access of

²³¹European Communities, appellant's submission, para. 174.

²³²In the Panel's view, "it cannot be reasonably expected that the specific measure under consideration would entirely eliminate the risk ... or even that its impact on the actual reduction of the incidence of the diseases at issue would manifest itself very rapidly after the enactment of the measure." (Panel Report, para. 7.145)

²³³*Ibid.*, para. 7.130.

²³⁴*Ibid.*, paras. 7.133-7.135.

²³⁵*Ibid.*, para. 7.136.

domestic retreaders to good-quality used tyres²³⁶; that more automotive inspections in Brazil lead to an increase in the number of retreadable used tyres²³⁷; and that Brazil has the production capacity to retread such tyres.²³⁸ The Panel sought to verify these hypotheses on the basis of the evidence adduced by the parties and found them to be logically sound and supported by sufficient evidence. In the next Section, we will examine the European Communities' claim that the Panel failed to make an objective assessment of the facts with respect to the verification of some of these hypotheses. Assuming, for the time being, that the Panel assessed the facts in accordance with Article 11 of the DSU, it appears to us that the Panel's analysis supports its conclusion that the Import Ban is capable of making a contribution and can result in a reduction of exposure to the targeted risks.²³⁹ We have now to determine whether this was sufficient to conclude that the Import Ban is "necessary" within the meaning of Article XX(b) of the GATT 1994.

150. As the Panel recognized, an import ban is "by design as trade-restrictive as can be".²⁴⁰ We agree with the Panel that there may be circumstances where such a measure can nevertheless be necessary, within the meaning of Article XX(b). We also recall that, in *Korea – Various Measures on Beef*, the Appellate Body indicated that "the word 'necessary' is not limited to that which is 'indispensable'".²⁴¹ Having said that, when a measure produces restrictive effects on international trade as severe as those resulting from an import ban, it appears to us that it would be difficult for a panel to find that measure necessary unless it is satisfied that the measure is apt to make a material contribution to the achievement of its objective. Thus, we disagree with Brazil's suggestion that, because it aims to reduce risk exposure to the maximum extent possible, an import ban that brings a marginal or insignificant contribution can nevertheless be considered necessary.²⁴²

151. This does not mean that an import ban, or another trade-restrictive measure, the contribution of which is not immediately observable, cannot be justified under Article XX(b). We recognize that certain complex public health or environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures. In the short-term, it may prove difficult to

²³⁶Panel Report, para. 7.137.

²³⁷*Ibid.*, para. 7.138.

²³⁸*Ibid.*, para. 7.141.

²³⁹*Ibid.*, para. 7.148.

²⁴⁰*Ibid.*, para. 7.211.

²⁴¹Appellate Body Report, *Korea – Various Measures on Beef*, para. 161.

²⁴²Brazil's appellee's submission, paras. 80 and 83. According to Brazil, given its chosen level of protection to reduce the risk of waste tyre accumulation to the maximum extent possible, "[i]f the Panel finds that there are no reasonable alternatives to the measure, the measure is necessary—no matter how small its contribution—because the WTO does not second-guess the Member's chosen level of protection." (*Ibid.*, para. 80)

isolate the contribution to public health or environmental objectives of one specific measure from those attributable to the other measures that are part of the same comprehensive policy. Moreover, the results obtained from certain actions—for instance, measures adopted in order to attenuate global warming and climate change, or certain preventive actions to reduce the incidence of diseases that may manifest themselves only after a certain period of time—can only be evaluated with the benefit of time.²⁴³ In order to justify an import ban under Article XX(b), a panel must be satisfied that it brings about a material contribution to the achievement of its objective. Such a demonstration can of course be made by resorting to evidence or data, pertaining to the past or the present, that establish that the import ban at issue makes a material contribution to the protection of public health or environmental objectives pursued. This is not, however, the only type of demonstration that could establish such a contribution. Thus, a panel might conclude that an import ban is necessary on the basis of a demonstration that the import ban at issue is apt to produce a material contribution to the achievement of its objective. This demonstration could consist of quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence.

152. We have now to assess whether the qualitative analysis provided by the Panel establishes that the Import Ban is apt to produce a material contribution to the achievement of the objective of reducing exposure to the risks arising from the accumulation of waste tyres.

153. We observe, first, that the Panel analyzed the contribution of the Import Ban as initially designed, without taking into account the imports of remoulded tyres under the MERCOSUR exemption. As we indicated above, this is not the only possible approach. Nevertheless, we proceed with our examination of the Panel's reasoning on that basis for the reasons we explained earlier. In the light of the evidence adduced by the parties, the Panel was of the view that the Import Ban would lead to imported retreaded tyres being replaced with retreaded tyres made from local casings²⁴⁴, or with new tyres that are retreadable.²⁴⁵ As concerns new tyres, the Panel observed, and we agree, that retreaded tyres "have by definition a shorter lifespan than new tyres"²⁴⁶ and that, accordingly, the

²⁴³In this respect, we note that, in *US – Gasoline*, the Appellate Body stated, in the context of Article XX(g) of the GATT 1994, that, "in the field of conservation of exhaustible natural resources, a substantial period of time, perhaps years, may have to elapse before the effects attributable to implementation of a given measure may be observable." (Appellate Body Report, *US – Gasoline*, p. 21, DSR 1996:I, 3, at 20)

²⁴⁴Panel Report, paras. 7.126-7.130.

²⁴⁵*Ibid.*, paras. 7.131-7.142.

²⁴⁶*Ibid.*, para. 7.130.

Import Ban "may lead to a reduction in the total number of waste tyres because imported retreaded tyres may be substituted for by new tyres which have a longer lifespan."²⁴⁷ As concerns tyres retreaded in Brazil from local casings, the Panel was satisfied that Brazil had the production capacity to retread domestic used tyres²⁴⁸ and that "at least some domestic used tyres are being retreaded in Brazil."²⁴⁹ The Panel also agreed that Brazil has taken a series of measures to facilitate the access of domestic retreaders to good-quality used tyres²⁵⁰, and that new tyres sold in Brazil are high-quality tyres that comply with international standards and have the potential to be retreaded.²⁵¹ The Panel's conclusion with which we agree was that, "if the domestic retreading industry retreads more domestic used tyres, the overall number of waste tyres will be reduced by giving a second life to some used tyres, which otherwise would have become waste immediately after their first and only life."²⁵² For these reasons, the Panel found that a reduction of waste tyres would result from the Import Ban and that, therefore, the Import Ban would contribute to reducing exposure to the risks associated with the accumulation of waste tyres. As the Panel's analysis was qualitative, the Panel did not seek to estimate, in quantitative terms, the reduction of waste tyres that would result from the Import Ban, or the time horizon of such a reduction. Such estimates would have been very useful and, undoubtedly, would have strengthened the foundation of the Panel's findings. Having said that, it does not appear to us erroneous to conclude, on the basis of the hypotheses made, tested, and accepted by the Panel, that fewer waste tyres will be generated with the Import Ban than otherwise.

154. Moreover, we wish to underscore that the Import Ban must be viewed in the broader context of the comprehensive strategy designed and implemented by Brazil to deal with waste tyres. This comprehensive strategy includes not only the Import Ban but also the import ban on used tyres, as well as the collection and disposal scheme adopted by CONAMA Resolution 258/1999, as amended in 2002, which makes it mandatory for domestic manufacturers and importers of new tyres to provide

²⁴⁷Panel Report, para. 7.130.

²⁴⁸*Ibid.*, para. 7.141. The Panel noted that, in 2005, 33.4 million new tyres (all types included) were sold in Brazil (either domestically produced or imported) and 18.6 million retreaded tyres were produced domestically.

²⁴⁹*Ibid.*, para. 7.136.

²⁵⁰*Ibid.*, para. 7.137.

²⁵¹*Ibid.*

²⁵²*Ibid.*, para. 7.133.

for the safe disposal of waste tyres in specified proportions.²⁵³ For its part, CONAMA Resolution 258/1999, as amended in 2002, aims to reduce the exposure to risks arising from the accumulation of waste tyres by forcing manufacturers and importers of new tyres to collect and dispose of waste tyres at a ratio of five waste tyres for every four new tyres. This measure also encourages Brazilian retreaders to retread more domestic used tyres by exempting domestic retreaders from disposal obligations as long as they process tyres consumed within Brazil.²⁵⁴ Thus, the CONAMA scheme provides additional support for and is consistent with the design of Brazil's strategy for reducing the number of waste tyres. The two mutually enforcing pillars of Brazil's overall strategy—the Import Ban and the import ban on used tyres—imply that the demand for retreaded tyres in Brazil must be met by the domestic retreaders, and that these retreaders, in principle, can use only domestic used tyres for raw material.²⁵⁵ Over time, this comprehensive regulatory scheme is apt to induce sustainable changes in the practices and behaviour of the domestic retreaders, as well as other actors, and result in an increase in the number of retreadable tyres in Brazil and a higher rate of retreading of domestic casings in Brazil. Thus, the Import Ban appears to us as one of the key elements of the comprehensive strategy designed by Brazil to deal with waste tyres, along with the import ban on

²⁵³Article 3 of CONAMA Resolution 258/1999, as amended in 2002, provides:

The time periods and quantities for collection and environmentally appropriate final disposal of unusable tyres resulting from use on automotive vehicles and bicycles covered by this Regulation are as follows:

I – as of 1 January 2002: for every four new tyres produced in Brazil or imported new or reconditioned tyres, including those on imported vehicles, manufacturers and importers must ensure final disposal of one unusable tyre;

II – as of 1 January 2003: for every two new tyres produced in Brazil or imported new or reconditioned tyres, including those on imported vehicles, manufacturers and importers must ensure final disposal of one unusable tyre;

III – as of 1 January 2004:

a) for every one new tyre produced in Brazil or imported new tyre, including those on imported vehicles, manufacturers and importers must ensure final disposal of one unusable tyre;

b) for every four imported reconditioned tyres, of any type, importers must ensure final disposal of five unusable tyres;

IV – as of 1 January 2005:

a) for every four new tyres produced in Brazil or imported tyres, including those on imported vehicles, manufacturers and importers must ensure final disposal of five unusable tyres;

b) for every three imported reconditioned tyres, of any type, importers must ensure final disposal of four unusable tyres.

²⁵⁴Panel Report, para. 7.137.

²⁵⁵Leaving aside, as explained above, the imports under the MERCOSUR exemption and under court injunctions.

used tyres and the collection and disposal scheme established by CONAMA Resolution 258/1999, as amended in 2002.

155. As we explained above, we agree with the Panel's reasoning suggesting that fewer waste tyres will be generated with the Import Ban in place. In addition, Brazil has developed and implemented a comprehensive strategy to deal with waste tyres. As a *key element* of this strategy, the Import Ban is likely to bring a material contribution to the achievement of its objective of reducing the exposure to risks arising from the accumulation of waste tyres. On the basis of these considerations, we are of the view that the Panel did not err in finding that the Import Ban contributes to the achievement of its objective.

2. The Panel's Analysis of Possible Alternatives to the Import Ban

156. In order to determine whether a measure is "necessary" within the meaning of Article XX(b) of the GATT 1994, a panel must assess all the relevant factors, particularly the extent of the contribution to the achievement of a measure's objective and its trade restrictiveness, in the light of the importance of the interests or values at stake. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with its possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued. It rests upon the complaining Member to identify possible alternatives to the measure at issue that the responding Member could have taken.²⁵⁶ As the Appellate Body indicated in *US – Gambling*, while the responding Member must show that a measure is necessary, it does not have to "show, in the first instance, that there are *no* reasonably available alternatives to achieve its objectives."²⁵⁷ We recall that, in order to qualify as an alternative, a measure proposed by the complaining Member must be not only less trade restrictive than the measure at issue, but should also "preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued".²⁵⁸ If the complaining Member has put forward a possible alternative measure, the responding Member may seek to show that the proposed measure does not allow it to achieve the level of protection it has chosen and, therefore, is not a genuine alternative. The responding Member may also seek to demonstrate that the proposed alternative is not, in fact, "reasonably available".²⁵⁹ As the Appellate Body indicated in *US – Gambling*, "[a]n alternative measure may be found not to be 'reasonably available' ... where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or

²⁵⁶Appellate Body Report, *US – Gambling*, para. 311.

²⁵⁷*Ibid.*, para. 309. (original emphasis)

²⁵⁸*Ibid.*, para. 308.

²⁵⁹*Ibid.*, para. 311.

where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties."²⁶⁰ If the responding Member demonstrates that the measure proposed by the complaining Member is not a genuine alternative or is not "reasonably available", taking into account the interests or values being pursued and the responding Member's desired level of protection, it follows that the measure at issue is necessary.²⁶¹

157. Before the Panel, the European Communities put forward two types of possible alternative measures or practices: (i) measures to reduce the number of waste tyres accumulating in Brazil; and (ii) measures or practices to improve the management of waste tyres in Brazil.²⁶² The Panel examined the alternative measures proposed by the European Communities in some detail, and in each case found that the proposed measure did not constitute a reasonably available alternative to the Import Ban. Among the reasons that the Panel gave for its rejections were that the proposed alternatives were already in place, would not allow Brazil to achieve its chosen level of protection, or would carry their own risks and hazards.

158. Regarding the measures to reduce the accumulation of waste tyres, the Panel first discussed measures to encourage domestic retreading or improve the retreadability of domestic used tyres. The Panel observed that these measures had already been implemented or were in the process of being implemented²⁶³ so that the impact of these measures and the Import Ban "could be cumulative rather than substitutable".²⁶⁴ Therefore, the Panel disagreed with the European Communities that "the institution of domestic measures to encourage timely domestic retreading and to improve the retreadability of domestic used tyres would achieve the same outcome as the import ban".²⁶⁵

159. The Panel went on to discuss the European Communities' contention that Brazil should prevent imports of used tyres into Brazil through court injunctions. The Panel noted that imports of used tyres were already prohibited by law in Brazil, "so that if the 'alternative measure' proposed by the European Communities is the prohibition of used tyres, it could be said that Brazil actually already imposes that measure."²⁶⁶ Accordingly, the Panel concluded that the possible alternative measures identified by the European Communities to avoid the *generation* of waste tyres could not "apply *as a*

²⁶⁰ Appellate Body Report, *US – Gambling*, para. 308.

²⁶¹ *Ibid.*, para. 311.

²⁶² Panel Report, para. 7.159.

²⁶³ *Ibid.*, para. 7.169.

²⁶⁴ *Ibid.*

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid.*, para. 7.171.

substitute" for the Import Ban but are, rather, complementary measures that Brazil already applies, at least in part.²⁶⁷

160. Turning to alternatives aiming to improve management of waste tyres, the Panel examined, first, collection and disposal schemes and, secondly, disposal methods.

161. The European Communities referred mainly to two collection and disposal schemes.²⁶⁸ In the analysis of these schemes, the Panel recalled that "Brazil's chosen level of protection is the reduction of the risks associated with waste tyre accumulation to the maximum extent possible".²⁶⁹ According to the Panel, "insofar as the level of protection pursued by Brazil involves the 'non-generation' of waste tyres in the first place", collection and disposal schemes, such as that adopted by CONAMA Resolution 258/1999 or the Paraná Rodando Limpo²⁷⁰ programme, "would not seem able to achieve the same level of protection as the import ban".²⁷¹ The Panel also noted Brazil's concern that these collection and disposal schemes do not address or eliminate disposal risks.²⁷² The Panel concluded that these schemes cannot be considered as alternatives to the Import Ban at the level of protection sought by Brazil, because they were already implemented in Brazil and do not address the risks associated with the disposal of waste tyres.²⁷³

162. The Panel then examined the following disposal methods identified by the European Communities: (i) landfilling; (ii) stockpiling; (iii) incineration of waste tyres in cement kilns and similar facilities; and (iv) material recycling.

163. Concerning *landfilling*, the Panel found that the landfilling of waste tyres may pose the very risks Brazil seeks to reduce through the Import Ban, and for this reason cannot constitute a reasonably available alternative.²⁷⁴ For the Panel, landfilling of waste tyres poses problems, including the "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."²⁷⁵ The Panel also observed that the evidence

²⁶⁷Panel Report, para. 7.172. (original emphasis)

²⁶⁸The scheme adopted by CONAMA Resolution 258/1999, as amended in 2002, which makes it mandatory for domestic producers and importers of new tyres to provide for the safe disposal of waste tyres (or unusable tyres) in specified proportions; and a voluntary multi-sector programme called Paraná Rodando Limpo, which has been put in place in the State of Paraná. (See *supra*, footnote 253; see also *supra*, paras. 130 and 131)

²⁶⁹Panel Report, para. 7.177.

²⁷⁰See Exhibit EC-49 submitted by the European Communities to the Panel.

²⁷¹Panel Report, para. 7.177.

²⁷²*Ibid.*

²⁷³*Ibid.*, para. 7.178.

²⁷⁴*Ibid.*, para. 7.186.

²⁷⁵*Ibid.*, para. 7.183. (footnote omitted)

it examined showing the existence of such risks did not make a clear distinction between landfilling of shredded tyres (also referred to as "controlled landfilling") and landfilling of whole tyres ("uncontrolled landfilling"). Thus, for the Panel, it was not possible to conclude that landfilling of shredded tyres does not pose risks similar to those linked to other types of waste tyre landfills.²⁷⁶

164. Regarding *stockpiling*²⁷⁷, the Panel observed that this method does not "dispose of" waste tyres²⁷⁸, and added that "the evidence shows that even the so-called 'controlled stockpiling' that is to say stockpiles designed to prevent the risk of fires and pests may still pose considerable risks to human health and the environment."²⁷⁹ The Panel concluded that stockpiling did not constitute an alternative to the Import Ban.²⁸⁰

165. With respect to the *incineration* of waste tyres, the Panel found that sufficient evidence demonstrated that health risks exist in relation to the incineration of waste tyres, even if such risks could be significantly reduced through strict emission standards.²⁸¹ For the Panel, the evidence suggested that "the question still remains whether toxic chemicals emitted by incineration of waste tyres, regardless of the level of emission, may potentially pose health risks to humans."²⁸² The Panel added that, although emission levels can vary largely depending on the emission control technology, "the most up-to-date technology that can control toxic emissions to minimum levels is not necessarily readily available, mostly for financial reasons."²⁸³

166. Finally, the Panel examined *material recycling* applications. Regarding civil engineering applications using waste tyres, the Panel found that demand for these applications was fairly limited partly due to their high costs, that they are capable of disposing of only a small number of waste tyres, and that the evidence casts doubt on the safety of some of these engineering applications.²⁸⁴ With respect to rubber asphalt, the Panel found that the information showed that "the use of rubber asphalt results in higher costs."²⁸⁵ Consequently, "the demand for this technology is limited and its waste

²⁷⁶Panel Report, para. 7.184.

²⁷⁷Stockpiling consists of storing waste tyres in designated installations. (See European Communities' second written submission to the Panel, para. 104)

²⁷⁸Panel Report, para. 7.188.

²⁷⁹*Ibid.* (footnote omitted)

²⁸⁰*Ibid.*, para. 7.189.

²⁸¹*Ibid.*, para. 7.194.

²⁸²*Ibid.*, para. 7.192. (footnote omitted)

²⁸³*Ibid.*, para. 7.193. (footnotes omitted)

²⁸⁴*Ibid.*, paras. 7.201 and 7.202.

²⁸⁵*Ibid.*, para. 7.205.

disposal capacity is reduced."²⁸⁶ The Panel also noted that the use of rubber granulates in the production of certain products may dispose of only a limited amount of waste tyres.²⁸⁷ Finally, as regards devulcanization and other forms of chemical or thermal transformation, the Panel observed that, "under current market conditions, the economic viability of these options has yet to be demonstrated."²⁸⁸ In the light of these considerations, the Panel concluded that "it is not clear that material recycling applications are entirely safe"²⁸⁹, and that even if they were completely harmless, "they would not be able to dispose of a quantity of waste tyres sufficient to achieve Brazil's desired level of protection due to their prohibitive costs and thus cannot constitute a reasonably available alternative".²⁹⁰

167. On appeal, the European Communities contends that the Panel erred in its analysis of the measures or practices that were presented as possible alternatives to the Import Ban. In particular, the European Communities submits that the Panel used in its analysis an incorrect concept of "alternative". In addition, the European Communities argues that the Panel should have considered as alternatives to the Import Ban a better enforcement of the ban on imports of used tyres and of existing collection and disposal schemes.

168. Brazil asserts that the Panel was correct in finding that none of the alternative measures suggested by the European Communities constituted "reasonably available" alternatives to the Import Ban. For Brazil, the Panel correctly took account of Brazil's chosen level of protection—that is, the reduction of risks associated with the generation of waste tyres in Brazil to the maximum extent possible—in concluding that none of the alternatives suggested by the European Communities avoided the generation of additional waste tyres in the first place.

169. The Panel examined each of the measures or practices put forward by the European Communities in order to determine whether they were reasonably available alternatives in the light of the objective of the Import Ban and Brazil's chosen level of protection.²⁹¹

²⁸⁶Panel Report, para. 7.205. (footnote omitted)

²⁸⁷*Ibid.*, para. 7.206. (emphasis and footnote omitted)

²⁸⁸*Ibid.*, para. 7.207. (footnote omitted)

²⁸⁹*Ibid.*, para. 7.208.

²⁹⁰*Ibid.* (footnote omitted)

²⁹¹*Ibid.*, para. 7.152.

170. We note that the objective of the Import Ban is the reduction of the "exposure to the risks to human, animal or plant life or health arising from the accumulation of waste tyres"²⁹² and that "Brazil's chosen level of protection is the reduction of [these] risks ... to the maximum extent possible"²⁹³, and that a measure or practice will not be viewed as an alternative unless it "preserve[s] for the responding Member its right to achieve its desired level of protection with respect to the objective pursued".²⁹⁴

171. We recall that tyres—new or retreaded—are essential for modern transportation. However, at the end of their useful life, they turn into waste that carries risks for public health and the environment.²⁹⁵ Governments, legitimately, take actions to minimize the adverse effects of waste tyres. They may adopt preventive measures aiming to reduce the accumulation of waste tyres, a category into which the Import Ban falls. Governments may also contemplate remedial measures for the management and disposal of waste tyres, such as landfilling, stockpiling, incineration of waste tyres, and material recycling. Many of these measures or practices carry, however, their own risks or require the commitment of substantial resources, or advanced technologies or know-how. Thus, the capacity of a country to implement remedial measures that would be particularly costly, or would require advanced technologies, may be relevant to the assessment of whether such measures or practices are reasonably available alternatives to a preventive measure, such as the Import Ban, which does not involve "prohibitive costs or substantial technical difficulties".²⁹⁶

172. Among the possible alternatives, the European Communities referred to measures to encourage domestic retreading or improve the retreadability of used tyres, as well as a better enforcement of the import ban on used tyres and of existing collection and disposal schemes. In fact, like the Import Ban, these measures already figure as elements of a comprehensive strategy designed by Brazil to deal with waste tyres.²⁹⁷ Substituting one element of this comprehensive policy for another would weaken the policy by reducing the synergies between its components, as well as its total effect. We are therefore of the view that the Panel did not err in rejecting as alternatives to the

²⁹²Panel Report, para. 7.102.

²⁹³*Ibid.*, para. 7.108. (footnote omitted)

²⁹⁴Appellate Body Report, *US – Gambling*, para. 308. (footnote omitted)

²⁹⁵See *supra*, para. 119.

²⁹⁶Appellate Body Report, *US – Gambling*, para. 308.

²⁹⁷The Panel noted that Brazil has already implemented or is in the process of implementing measures to encourage domestic retreading or improve the retreadability of tyres. (Panel Report, para. 7.169) The Panel observed that "imports of used tyres *are* already prohibited". (*Ibid.*, para. 7.171 (original emphasis)) The Panel agreed with Brazil that "collection and disposal schemes such as Resolution CONAMA 258/1999 as amended [in 2002] and Paraná Rodando Limpo have already been implemented in Brazil". (*Ibid.*, para. 7.178)

Import Ban components of Brazil's policy regarding waste tyres that are complementary to the Import Ban.

173. We move now to the other measures or practices proposed by the European Communities as alternatives to the Import Ban.²⁹⁸ The European Communities contends that the Panel committed an error of law by applying a "narrow definition of alternative"²⁹⁹, according to which an alternative to the Import Ban is "a measure that must avoid the waste tyres arising specifically from imported retreaded tyres"³⁰⁰, or one "equal to a waste non-generation measure".³⁰¹ For the European Communities, this narrow definition differs from "the objective allegedly pursued by the challenged measure"³⁰², and resulted in the rejection of several disposal and waste management measures presented by the European Communities that should have been accepted as alternatives to the Import Ban.

174. In evaluating whether the measures or practices proposed by the European Communities were "alternatives", the Panel sought to determine whether they would achieve Brazil's policy objective and chosen level of protection³⁰³, that is to say, reducing the "exposure to the risks to human, animal or plant life or health arising from the accumulation of waste tyres"³⁰⁴ to the maximum extent possible.³⁰⁵ In this respect, we believe, like the Panel, that non-generation measures are more apt to achieve this objective because they prevent the accumulation of waste tyres, while waste management measures dispose of waste tyres only once they have accumulated. Furthermore, we note that, in comparing a proposed alternative to the Import Ban, the Panel took into account specific risks attached to the proposed alternative, such as the risk of leaching of toxic substances that might be associated to landfilling³⁰⁶, or the risk of toxic emissions that might arise from the incineration of waste tyres.³⁰⁷ In our view, the Panel did not err in so doing. Indeed, we do not see how a panel

²⁹⁸These measures or practices are the following disposal methods: landfilling; stockpiling; incineration of waste tyres; and material recycling.

²⁹⁹European Communities' appellant's submission, para. 227.

³⁰⁰*Ibid.*, para. 219. (underlining omitted)

³⁰¹*Ibid.*, para. 222.

³⁰²*Ibid.*, para. 221.

³⁰³Panel Report, para. 7.157.

³⁰⁴*Ibid.*, para. 7.102.

³⁰⁵*Ibid.*, para. 7.108. (footnote omitted) See also *ibid.*, para. 7.152:

We must therefore now consider whether any alternative measure, less inconsistent with GATT 1994, that is, less trade-restrictive than a complete import ban, would have been reasonably available to Brazil to achieve the same objective, taking into account Brazil's chosen level of protection. (footnote omitted)

³⁰⁶*Ibid.*, para. 7.183.

³⁰⁷*Ibid.*, para. 7.194.

could undertake a meaningful comparison of the measure at issue with a possible alternative while disregarding the risks arising out of the implementation of the possible alternative.³⁰⁸ In this case, the Panel examined as proposed alternatives landfilling, stockpiling, and waste tyre incineration, and considered that, even if these disposal methods were performed under controlled conditions, they nevertheless pose risks to human health similar or additional to those Brazil seeks to reduce through the Import Ban.³⁰⁹ Because these practices carry their own risks, and these risks do not arise from non-generation measures such as the Import Ban, we believe, like the Panel, that these practices are not reasonably available alternatives.

175. With respect to material recycling, we share the Panel's view that this practice is not as effective as the Import Ban in reducing the exposure to the risks arising from the accumulation of waste tyres. Material recycling applications are costly, and hence capable of disposing of only a limited number of waste tyres.³¹⁰ We also note that some of them might require advanced technologies and know-how that are not readily available on a large scale. Accordingly, we are of the view that the Panel did not err in concluding that material recycling is not a reasonably available alternative to the Import Ban.

3. The Weighing and Balancing of Relevant Factors by the Panel

176. The European Communities argues that, in its analysis of the necessity of the Import Ban, the Panel stated that it had weighed and balanced the relevant factors, but it "has not actually done it".³¹¹ According to the European Communities, although the Appellate Body has not defined the term "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."³¹² The European Communities reasons that, "since the Panel failed to establish ... the extent of the actual contribution the [Import Ban] makes to the reduction of the number of waste tyres arising in Brazil, ... it was incapable of 'weighing and balancing' this contribution against any of the other relevant factors."³¹³ In addition, the

³⁰⁸This was recognized by the Appellate Body in *EC – Asbestos*, where it stated that the risks attached to a proposed measure should be included in the exercise of comparison aiming to determine whether it is a reasonably available alternative to the measure at issue. (Appellate Body Report, *EC – Asbestos*, para. 174)

³⁰⁹Panel Report, para. 7.195; see also para. 7.186 (landfilling); para. 7.189 (stockpiling); and para. 7.194 (waste tyre incineration).

³¹⁰*Ibid.*, paras. 7.201 and 7.205-7.208.

³¹¹European Communities' appellant's submission, para. 285.

³¹²*Ibid.*, para. 284.

³¹³*Ibid.*, para. 288.

European Communities contends that "the Panel base[d] ... its 'weighing and balancing' exercise on the wrong analysis it ... made of the alternatives".³¹⁴ In sum, the European Communities argues that the Panel conducted a "superficial analysis"³¹⁵ that is not a real weighing and balancing of the different factors and alternatives, because it did not balance "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."³¹⁶

177. Brazil counters that the Panel correctly weighed and balanced the relevant factors and proposed alternatives in its necessity analysis. Brazil argues that the Panel expressly recognized that the Import Ban is highly trade restrictive, but properly weighed and balanced this factor against the other relevant factors. In relation to contribution, Brazil considers that Article XX(b) of the GATT 1994 does not require quantification, and that, in any event, the Import Ban's contribution to the reduction of imports of retreaded tyres is "substantial".³¹⁷ Brazil adds that, because imports of retreaded tyres by definition increase the amount of waste tyres in Brazil, the contribution of the Import Ban to the reduction of risks arising from waste tyres to the maximum extent possible is "both direct and certain".³¹⁸

178. We begin our analysis by recalling that, in order to determine whether a measure is "necessary" within the meaning of Article XX(b) of the GATT 1994, a panel must consider the relevant factors, particularly the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure's objective, and its trade restrictiveness. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective. This comparison should be carried out in the light of the importance of the interests or values at stake.³¹⁹ It is through this process that a panel determines whether a measure is necessary.³²⁰

³¹⁴European Communities' appellant's submission, para. 290. (underlining omitted)

³¹⁵*Ibid.*, para. 295.

³¹⁶*Ibid.*, para. 294.

³¹⁷Brazil's appellee's submission, para. 177.

³¹⁸*Ibid.*, para. 178.

³¹⁹Appellate Body Report, *US – Gambling*, para. 307.

³²⁰*Ibid.*

179. In this case, the Panel identified the objective of the Import Ban as being the reduction of the exposure to risks arising from the accumulation of waste tyres. It assessed the importance of the interests underlying this objective. It found that risks of dengue fever and malaria arise from the accumulation of waste tyres and that the objective of protecting human life and health against such diseases "is both vital and important in the highest degree".³²¹ The Panel noted that the objective of the Import Ban also relates to the protection of the environment, a value that it considered—correctly, in our view—important.³²² Then, the Panel analyzed the trade restrictiveness of the Import Ban and its contribution to the achievement of its objective. It appears from the Panel's reasoning that it considered that, in the light of the importance of the interests protected by the objective of the Import Ban, the contribution of the Import Ban to the achievement of its objective outweighs its trade restrictiveness. This finding of the Panel does not appear erroneous to us.³²³

180. The Panel then proceeded to examine the alternatives to the Import Ban proposed by the European Communities. The Panel explained that some of them could not be viewed as alternatives to the Import Ban because they were complementary to it and were already included in Brazil's comprehensive policy.³²⁴ Next, the Panel compared the other alternatives proposed by the European Communities—landfilling, stockpiling, incineration, and material recycling—with the Import Ban, taking into consideration the specific risks associated with these proposed alternatives. The Panel concluded from this comparative assessment that none of the proposed options was a reasonably available alternative to the Import Ban.

181. The European Communities argues that the Panel failed to make a proper collective assessment of all the proposed alternatives, a contention that does not stand for the following reasons. First, the Panel did refer to its collective examination of these alternatives in concluding that "none of these, either individually *or collectively*, would be such that the risks arising from waste tyres in Brazil would be safely eliminated, as is intended by the current import ban."³²⁵ Secondly, as noted by

³²¹Panel Report, para. 7.210. (footnote omitted)

³²²*Ibid.*, para. 7.112.

³²³*Supra*, paras. 150-155.

³²⁴For example, measures to encourage domestic retreading and improve the retreadability of domestic used tyres, a better implementation of the import ban on used tyres, and a better implementation of existing collection and disposal schemes. See also Panel Report, paras. 7.169, 7.171, and 7.178.

³²⁵*Ibid.*, para. 7.214. (emphasis added)

the Panel and discussed above, some of the proposed alternatives are not real substitutes for the Import Ban since they complement each other as part of Brazil's comprehensive policy.³²⁶ Finally, having found that other proposed alternatives were not reasonably available or carried their own risks, these alternatives would not have weighed differently in a collective assessment of alternatives.

182. In sum, the Panel's conclusion that the Import Ban is necessary was the result of a process involving, first, the examination of the contribution of the Import Ban to the achievement of its objective against its trade restrictiveness in the light of the interests at stake, and, secondly, the comparison of the possible alternatives, including associated risks, with the Import Ban. The analytical process followed by the Panel is consistent with the approach previously defined by the Appellate Body.³²⁷ The weighing and balancing is a holistic operation that involves putting all the variables of the equation together and evaluating them in relation to each other after having examined them individually, in order to reach an overall judgement. We therefore do not share the European Communities' view that the Panel did not "actually" weigh and balance the relevant factors³²⁸, or that the Panel made a methodological error in comparing the alternative options proposed by the European Communities with the Import Ban.

183. In the light of all these considerations, we are of the view that the Panel did not err in the manner it conducted its analysis under Article XX(b) of the GATT 1994 as to whether the Import Ban was "necessary to protect human, animal or plant life or health".

B. *The Panel's Necessity Analysis and Article 11 of the DSU*

184. The European Communities claims that the Panel breached its duties under Article 11 of the DSU in its analysis of the "necessity" of the Import Ban under Article XX(b) of the GATT 1994. In particular, the European Communities submits that the Panel failed to make an objective assessment of the facts in its assessment of the contribution of the Import Ban to the achievement of its objective, and in its examination of the proposed alternatives.

³²⁶Panel Report, para. 7.213.

³²⁷Appellate Body Report, *Korea – Various Measures on Beef*, para. 164; Appellate Body Report, *EC – Asbestos*, para. 172; Appellate Body Report, *US – Gambling*, para. 306; Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 70.

³²⁸European Communities' appellant's submission, para. 285.

1. Article 11 of the DSU and the Panel's Analysis of the Contribution of the Import Ban to the Achievement of Its Objective

185. We recall that Article 11 requires a panel to conduct "an objective assessment of the matter before it, including an objective assessment of the facts of the case". This assessment implies, among other things, that a panel must consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence.³²⁹

186. Within these parameters, it is generally "within the discretion of the panel to decide which evidence it chooses to utilize in making findings"³³⁰, and panels are "not required to accord to factual evidence of the parties the same meaning and weight as do the parties".³³¹ A panel is entitled "to determine that certain elements of evidence should be accorded more weight than other elements—that is the essence of the task of appreciating the evidence"³³²—and the Appellate Body "will not interfere lightly with the panel's exercise of its discretion".³³³ Thus, a participant challenging a panel's findings of fact under Article 11 of the DSU is required to demonstrate that the panel has exceeded the bounds of its discretion as the trier of facts.

187. Against this background, we turn to the contentions of the European Communities. First, the European Communities argues that there was an insufficient factual foundation for the Panel's conclusion that it had "no reason to believe that new tyres sold in Brazil are low-quality tyres" that were not capable of being retreaded³³⁴, and that the Panel ignored "substantial evidence" produced by the European Communities demonstrating the existence of "low-quality non-retreadable tyres"³³⁵ in the Brazilian market.

³²⁹Appellate Body Report, *EC – Hormones*, paras. 132 and 133. See also Appellate Body Report, *Japan – Apples*, para. 221; Appellate Body Report, *EC – Asbestos*, para. 161; Appellate Body Report, *Australia – Salmon*, para. 266; Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 170, 177, and 181; Appellate Body Report, *EC – Sardines*, para. 299; Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 125; Appellate Body Report, *Japan – Agricultural Products II*, paras. 141 and 142; Appellate Body Report, *Korea – Dairy*, para. 138; Appellate Body Report, *Korea – Alcoholic Beverages*, paras. 161 and 162; Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 313; Appellate Body Report, *US – Gambling*, para. 363; Appellate Body Report, *EC – Selected Customs Matters*, para. 258; and Appellate Body Report, *US – Carbon Steel*, para. 142.

³³⁰Appellate Body Report, *US – Carbon Steel*, para. 142 (quoting Appellate Body Report, *EC – Hormones*, para. 135).

³³¹Appellate Body Report, *Australia – Salmon*, para. 267.

³³²Appellate Body Report, *EC – Asbestos*, para. 161.

³³³Appellate Body Report, *US – Wheat Gluten*, para. 151. (footnote omitted)

³³⁴Panel Report, para. 7.137; European Communities' appellant's submission, paras. 183 and 184.

³³⁵European Communities' appellant's submission, para. 183. (footnote omitted)

188. Brazil submits that the Panel's conclusion is supported by the evidence on record and adds that high rates of retreadability in the country demonstrate that new tyres sold in Brazil "generally have [the] potential for future retreading".³³⁶

189. We observe that, in support of its position that it had "no reason to believe that new tyres sold in Brazil are low-quality tyres" that are not suitable for retreading, the Panel referred to standards applied to new tyres sold in Brazil that are "strict technical and performance standards that are based on international standards".³³⁷ The European Communities argues that potential retreadability is not an element of these standards and that, therefore, the Panel's position on the retreadability of new tyres sold in Brazil had no factual basis.³³⁸ We are not persuaded by this argument. The Panel's position was not that these standards include retreadability but, rather, that they result in a level of quality for new tyres that increases the potential for them to be retreaded.³³⁹ Thus, the Panel's finding did not lack a factual basis since there was a relationship between the standards to which the Panel referred and its conclusion that it had "no reason to believe that new tyres sold in Brazil are low-quality tyres"³⁴⁰ that are not retreadable.

190. Nor did the Panel disregard the evidence presented by the European Communities in reaching its conclusion on retreadability. To the contrary, the Panel expressly referred to various studies submitted by the European Communities in Exhibits EC-15 and EC-67 through EC-71, which related to the existence of "cheap low-quality new tyres in Brazil".³⁴¹ The Panel simply attached more weight to other pieces of evidence that were before it³⁴², as Article 11 of the DSU entitles it to do.³⁴³

191. The European Communities asserts further that the Panel relied on "arbitrarily chosen pieces of evidence" and failed to consider contradictory evidence³⁴⁴ in basing its finding that "at least some domestic used tyres are being retreaded in Brazil"³⁴⁵ exclusively on a statement contained in a report by the Associação Brasileira do Segmento de Reforma de Pneus (the "ABR") (Brazilian Association

³³⁶Brazil's appellee's submission, para. 116.

³³⁷Panel Report, para. 7.137.

³³⁸European Communities' appellant's submission, para. 184.

³³⁹Panel Report, para. 7.137.

³⁴⁰*Ibid.*

³⁴¹*Ibid.*, footnote 1252 to para. 7.137 (referring to European Communities' oral statement at the first Panel meeting, para. 28; and European Communities' response to Question 11 posed by the Panel, Panel Report, pp. 254 and 255, in turn referring to Exhibits EC-15 and EC-67 through EC-71 submitted by the European Communities to the Panel).

³⁴²*Ibid.*, para. 7.137.

³⁴³Appellate Body Report, *EC – Asbestos*, para. 161.

³⁴⁴European Communities' appellant's submission, para. 185.

³⁴⁵Panel Report, para. 7.136.

of the Retreading Industry) (the "ABR Report").³⁴⁶ According to the European Communities, the Panel neglected to consider evidence contained in a second report by the ABR³⁴⁷ that contradicted this statement.³⁴⁸ We do not find merit in this argument. The Panel relied on various studies and reports other than the ABR Report.³⁴⁹ Moreover, the Panel took into account the evidence in the second report by the ABR³⁵⁰ as the express reference it made to that report confirms.³⁵¹

192. The European Communities next charges the Panel with failing to discount the evidentiary value of Technical Note 001/2006 of the Instituto Nacional de Metrologia, Normalização e Qualidade Industrial ("INMETRO") (National Institute for Metrology, Standardization and Industrial Quality)³⁵², on the grounds that it was issued during the course of the Panel proceedings, and with neglecting to consider contradictory evidence contained in an earlier INMETRO Technical Note 83/2000.³⁵³

193. It is well settled that a panel may consider a piece of evidence that post-dates its establishment.³⁵⁴ Thus, INMETRO Technical Note 001/2006 was clearly an admissible piece of evidence. The European Communities, however, seems to suggest that the fact that INMETRO Technical Note 001/2006 post-dates the establishment of the Panel undermines its "evidentiary value", because Brazil was well aware of the significance of INMETRO Technical Note 001/2006 at that time. In our view, this amounts to an argument that the Panel should have attached more weight to one piece of evidence than to another, and does not suffice to demonstrate that the Panel exceeded the bounds of its discretion by attaching more weight to INMETRO Technical Note 001/2006—a

³⁴⁶*Supra*, footnote 41.

³⁴⁷*Supra*, footnote 43.

³⁴⁸European Communities' appellant's submission, paras. 186 and 187.

³⁴⁹For example, the Panel relied on, *inter alia*, retreadability figures for the Brazilian company Mazola Comércio (Panel Report, para. 7.135 and footnote 1236 thereto (referring to Exhibit BRA-93 submitted by Brazil to the Panel)); studies by the consultancy LAFIS and the Institute of Technological Research of the State of São Paulo (*ibid.*, footnote 1237 (referring to Exhibits EC-92 and BRA-159 submitted by the European Communities and Brazil, respectively, to the Panel)); a video by BS Colway (*ibid.*, footnote 1239 (referring to Exhibit EC-72 submitted by the European Communities to the Panel)); and retreadability figures in Brazil (*ibid.*, footnote 1241 (referring to Brazil's oral statement at the second Panel meeting, paras. 57-61; Brazil's comments on Question 107 posed by the Panel to the European Communities, Panel Report, pp. 317-323; Brazil's response to Question 117 posed by the Panel, Panel Report, pp. 332-334; and Exhibit BRA-162 submitted by Brazil to the Panel)) and in other countries (*ibid.*, footnote 1242 (referring to Brazil's first written submission to the Panel, para. 79, where Brazil provided some examples of retreadability figures for the United Kingdom, the United States, Australia, and France)). See also Brazil's response to Question 17 posed by the Panel, *ibid.*, p. 257.

³⁵⁰Exhibit BRA-157, *supra*, footnote 43.

³⁵¹See Panel Report, footnote 1238 to para. 7.135 (referring to Exhibit BRA-157, *supra*, footnote 43).

³⁵²Exhibit BRA-163 submitted by Brazil to the Panel.

³⁵³European Communities' appellant's submission, paras. 188 and 189 (referring to INMETRO Technical Note 83/2000 (Exhibit EC-45 submitted by the European Communities to the Panel)).

³⁵⁴This was confirmed by the Appellate Body in its Report, *EC – Selected Customs Matters*, at para. 188.

more recent document—than to INMETRO Technical Note 83/2000. Furthermore, the Panel did not neglect INMETRO Technical Note 83/2000. As the European Communities acknowledges³⁵⁵, the Panel expressly referred to this particular piece of evidence in its analysis.³⁵⁶

194. The European Communities further maintains that the Panel ignored evidence contained in a study by the consultancy LAFIS³⁵⁷ indicating that the rate of retreading of passenger car tyres in Brazil is below 9.99 per cent.³⁵⁸ The Panel, however, specifically considered the LAFIS study in its analysis as to whether domestic used tyres are retreadable and are being retreaded in Brazil.³⁵⁹ It also discussed the arguments presented by Brazil and the European Communities in relation to this figure.

195. The European Communities charges the Panel with "bolster[ing] its conclusions"³⁶⁰ on the retreadability of domestic casings with speculation on future measures that Brazil may take and, in particular, in stating that "mandatory inspections are taking place in Brazil and that more frequent inspections are to be expected once Bill 5979/2001 is approved".³⁶¹ However, the Panel's finding that "mandatory inspections are taking place"³⁶² was based on inspection requirements imposed by Brazil's National Code of Traffic and applicable technical standards, which were in force at the time the Panel conducted its review³⁶³, and is not vitiated by the Panel's additional reference to possible consequences of the approval of Bill 5979/2001.

196. In addition, the European Communities contends that, in analyzing the contribution of the Import Ban to the realization of the ends pursued by it, the Panel erred in failing to accord any evidentiary weight to the fact that Brazilian retreaders have sought court injunctions that permit the importation of used tyres for further retreading.³⁶⁴ The European Communities claims that the Panel engaged in a "wilful exclusion"³⁶⁵ of evidence relating to the importation of used tyres through court injunctions, even though this evidence was relevant because it demonstrates that Brazilian retreaded

³⁵⁵European Communities' appellant's submission, para. 189 and footnote 56 thereto.

³⁵⁶Panel Report, footnote 1240 to para. 7.135.

³⁵⁷European Communities' appellant's submission, para. 190 (referring to LAFIS report, *supra*, footnote 45, p. 11).

³⁵⁸*Ibid.*, para. 190.

³⁵⁹Panel Report, para. 7.135 and footnote 1237 thereto.

³⁶⁰European Communities' appellant's submission, para. 195.

³⁶¹Panel Report, para. 7.138.

³⁶²*Ibid.*

³⁶³See *ibid.*, para. 7.138 (referring to Law No. 9.503 of 23 September 1997 (National Code of Traffic) (Exhibit BRA-102 submitted by Brazil to the Panel); and Brazil's response to Question 8 posed by the European Communities).

³⁶⁴European Communities' appellant's submission, para. 191.

³⁶⁵*Ibid.*, para. 192.

tyres are produced with imported casings, and casts doubt on Brazil's position that domestic casings suitable for retreading are readily available in Brazil.³⁶⁶

197. We are not persuaded that the Panel ignored evidence relating to the importation of used tyres through court injunctions in its analysis of the contribution of the Import Ban to the realization of the ends pursued by it. The Panel acknowledged these injunctions and the arguments put forth by the European Communities in its analysis of the conflicting arguments and evidence regarding the level of retreadability of tyres in Brazil.³⁶⁷ In the end, the Panel ascribed more weight to evidence adduced by Brazil suggesting that "at least some domestic used tyres are being retreaded in Brazil"³⁶⁸ and that "domestic used tyres are suitable for retreading".³⁶⁹ It appears to us that, in proceeding in that manner, the Panel did not exceed the bounds of its discretion as the trier of facts.

198. In the light of the above considerations, we *find* that the Panel did not fail to conduct an objective assessment of the facts of the case, as required by Article 11 of the DSU, when evaluating the contribution of the Import Ban to the achievement of its objective.

2. Article 11 of the DSU and the Panel's Examination of Possible Alternatives to the Import Ban

199. The European Communities contends that, in its analysis of possible alternatives to the Import Ban, the Panel did not make an objective assessment of the facts as required by Article 11 of the DSU. The European Communities' claim of error under Article 11 is directed at the Panel's appreciation of the evidence concerning a number of disposal methods for waste tyres suggested by the European Communities as alternatives to the Import Ban, namely, landfilling, controlled stockpiling, co-incineration, and material recycling.

200. According to the European Communities, the Panel's factual findings in relation to each of these alternatives were not based on an objective assessment, because the Panel ignored important facts and arguments submitted by the European Communities and referred to the evidence before it "in a selective and distorted manner".³⁷⁰ The European Communities also charges the Panel with failing to consider one specific alternative to the Import Ban suggested by the European Communities, namely, the National Dengue Control Programme.³⁷¹

³⁶⁶European Communities' appellant's submission, paras. 192 and 193.

³⁶⁷Panel Report, para. 7.140.

³⁶⁸*Ibid.*, para. 7.136.

³⁶⁹*Ibid.*, para. 7.142.

³⁷⁰European Communities' appellant's submission, para. 247.

³⁷¹*Supra*, footnote 53.

201. Regarding the landfilling of waste tyres, the Panel reviewed the extensive evidentiary record on the risks posed by landfills of waste tyres.³⁷² In the course of its analysis of this evidence, the Panel noted the distinction made by the European Communities between "uncontrolled" and "controlled" landfills³⁷³, but observed that "the evidence on the health and environmental risks posed by landfills of waste tyres does not make a clear distinction between 'uncontrolled' and the so-called 'controlled' landfills"³⁷⁴, and that its assessment of that evidence indicated that "it [was] not possible to conclude that controlled landfills do not pose risks similar to those linked to other types of waste tyre landfills."³⁷⁵ Therefore, contrary to the European Communities' assertion that the Panel erred in basing its findings exclusively on evidence relating to uncontrolled landfilling, the Panel's conclusion that landfilling "may pose the very risks Brazil seeks to avoid through the import ban"³⁷⁶ was based on evidence that demonstrates that risks arise indistinctively from controlled and uncontrolled landfills.

202. The European Communities also suggests that the Panel erred under Article 11 in its rejection of landfilling as an alternative to the Import Ban because it did not take into account legislation allowing some landfilling of shredded tyres in Brazil. It is true that the Panel did not refer specifically to this legislation in its analysis. We note, however, that Brazil had argued that the legislation in question was exceptional, temporary, and in no way contradicted the existence or risks generally associated with landfilling.³⁷⁷ A panel enjoys discretion in assessing whether a given piece of evidence is relevant for its reasoning³⁷⁸, and is not required to discuss, in its report, each and every piece of evidence.³⁷⁹

203. We turn to the European Communities' argument that the Panel did not objectively assess the facts in observing that "stockpiling as such does not 'dispose of' waste tyres" and that controlled stockpiling "may still pose considerable risks to human health and the environment".³⁸⁰ The Panel did not, as the European Communities contends, erroneously treat stockpiling as a "final disposal

³⁷²Panel Report, para. 7.183 and footnotes 1318 and 1319 thereto (referring to Exhibits BRA-1, BRA-8, BRA-38, BRA-41, BRA-45, and BRA-58 submitted by Brazil to the Panel).

³⁷³*Ibid.*, para. 7.184.

³⁷⁴*Ibid.*

³⁷⁵*Ibid.* In particular, we observe that the evidence relating to the risk of tyre fires and to the long-term leaching of toxic chemicals referred to in paragraph 7.183 and footnote 1318 thereto of the Panel Report does not appear to distinguish between landfilling of whole tyres and landfilling of shredded tyres.

³⁷⁶*Ibid.*, para. 7.186.

³⁷⁷Brazil's appellee's submission, para. 152.

³⁷⁸See Appellate Body Report, *EC – Hormones*, para. 132.

³⁷⁹See Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 240; see also Appellate Body Report, *EC – Hormones*, para. 138.

³⁸⁰Panel Report, para. 7.188. (footnote omitted)

operation".³⁸¹ To the contrary, the Panel recognized that stockpiling is used only for temporary storage.³⁸² Moreover, the Panel's finding that stockpiling, even as an intermediate operation, carries risks of its own rested on various pieces of evidence, including a California Environmental Protection Agency study that concludes, in relation to controlled stockpiling, that "[a]ll tire and rubber storage facilities should be considered high-risk storage facilities."³⁸³

204. Regarding co-incineration, the Panel found that "Brazil has provided sufficient evidence to demonstrate that health risks exist in relation to the incineration of waste tyres, even if such risks can be significantly reduced through strict emission standards."³⁸⁴ In reaching this conclusion, the Panel relied on evidence consisting of technical studies and reports of regulatory agencies relating to activities in countries other than Brazil.³⁸⁵ The Panel acted within its margin of discretion as the trier of facts in considering that evidence relating to co-incineration activities in countries other than Brazil was relevant to the question of whether co-incineration poses health risks if used in Brazil, and in relying on that evidence.

205. With respect to material recycling applications such as civil engineering, rubber asphalt, rubber products, and devulcanization, the Panel found that it is not clear that they "are entirely safe"³⁸⁶, and that even if they were, material recycling 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 costs".³⁸⁷ The European Communities contends that both of these findings lacked a proper factual foundation.

³⁸¹European Communities' appellant's submission, para. 255.

³⁸²Panel Report, footnote 1330 to para. 7.188. The Panel referred to the *Basel Convention Technical Guidelines on the Identification and Management of Used Tyres* (1999) (Exhibit BRA-40 submitted by Brazil to the Panel), p. 12, which states, *inter alia*, that "[s]tockpiling with proper control can be used only for temporary storage before an end-of-life tyre is forwarded to a recovery operation."

³⁸³Panel Report, para. 7.189 and footnote 1331 thereto (referring to California Environmental Protection Agency (US), Integrated Waste Management Board, "Tire Pile Fires: Prevention, Response, Remediation" (2002) (Exhibit BRA-29 submitted by Brazil to the Panel)).

³⁸⁴*Ibid.*, para. 7.194.

³⁸⁵*Ibid.*, para. 7.192 and footnotes 1339-1342 thereto. In particular, the Panel referred to a report which concluded that "emissions of toxic organics ... [as a result of co-incineration of waste tyres] cannot be effectively controlled." (*Ibid.*, footnote 1339 (quoting Okopol Institut für Ökologie und Politik GmbH, "Expertise on the Environmental Risk Associated with the Co-Incineration of Wastes in the Cement Kiln 'Four E' of CBR Usine de Lixhe, Belgium" (circa 1998) (Exhibit BRA-46 submitted by Brazil to the Panel)) The Panel also pointed to evidence that demonstrated that "there is no scientific basis for [concluding] that burning waste tires in cement kilns is safe" (*ibid.* (quoting letter from Seymour I. Schwartz to the California Integrated Waste Management Board, dated 21 January 1998 (Exhibit BRA-49 submitted by Brazil to the Panel)), and that "[u]se [of waste tyres] in wet cement kilns is not an optimal environmental solution" (*ibid.* (quoting European Environment Agency, "Waste from road vehicles" (2001) (Exhibit BRA-108 submitted by Brazil to the Panel)).

³⁸⁶*Ibid.*, para. 7.208.

³⁸⁷*Ibid.*

206. The Panel stated that "*it is not clear* whether some of these engineering applications are sufficiently safe."³⁸⁸ It also expressed the view that "the evidence is *inconclusive* on whether rubber asphalt exposures are more hazardous than conventional asphalt exposures."³⁸⁹ Furthermore, the Panel did "not find evidence showing that devulcanization or other forms of chemical or thermal transformation such as pyrolysis pose substantial health or environmental risks."³⁹⁰ It is on the basis of these findings that the Panel concluded that "*it is not clear* that material recycling applications are entirely safe."³⁹¹ The Panel relied on numerous pieces of evidence to make these findings³⁹², and the European Communities has not demonstrated that this evidence cannot support the Panel's finding. Moreover, in finding that material recycling was not a reasonably available alternative to the Import Ban, the Panel relied mainly on the limited disposal capacity of these applications; safety considerations were not central to its reasoning.

207. Indeed, the Panel determined that evidence adduced in relation to civil engineering³⁹³, rubber asphalt³⁹⁴, rubber products³⁹⁵, and devulcanization³⁹⁶ suggested that each of these applications involve high costs that would significantly limit their ability "to dispose of a quantity of waste tyres sufficient to achieve Brazil's desired level of protection".³⁹⁷ The European Communities argues that the Panel erred in rejecting material recycling applications on the basis of their costs³⁹⁸, suggesting that the Panel erroneously equated *high* costs with *prohibitive* costs, when only the latter would justify a finding that a given alternative is not "reasonably available". This argument is based on an artificial

³⁸⁸Panel Report, para. 7.202. (emphasis added)

³⁸⁹*Ibid.*, para. 7.205. (footnote omitted; emphasis added)

³⁹⁰*Ibid.*, para. 7.207.

³⁹¹*Ibid.*, para. 7.208. (emphasis added)

³⁹²*Ibid.*, para. 7.202 and footnote 1359 thereto.

³⁹³*Ibid.*, para. 7.201 and footnote 1358 thereto (referring to 2006 report by the European Tyre and Rubber Manufacturers' Association (Exhibit EC-84 submitted by the European Communities to the Panel); California Environmental Protection Agency (US), Integrated Waste Management Board, "Five-Year Plan for the Waste Tire Recycling Management Program" (2003) (Exhibit BRA-36 submitted by Brazil to the Panel); and K. Cannon, "Environment; Where Mosquitoes And Tires Breed", *The New York Times*, 8 July 2001 (Exhibit BRA-130 submitted by Brazil to the Panel)).

³⁹⁴*Ibid.*, para. 7.205 and footnote 1367 thereto (referring to OECD Report, *supra*, footnote 52).

³⁹⁵*Ibid.*, para. 7.206 and footnote 1368 thereto (referring to J. Serumgard, "Internalization of Scrap Tire Management Costs: A Review of the North American Experience", in Proceedings of the Second Joint Workshop of the Secretariat of the United Nations Conference on Trade and Development (UNCTAD) and the International Rubber Study Group on Rubber and the Environment (1998) (Exhibit BRA-125 submitted by Brazil to the Panel); and Human Resources and Social Development Canada, Rubber Industry (circa 1999) (Exhibit BRA-131 submitted by Brazil to the Panel)).

³⁹⁶*Ibid.*, para. 7.207 and footnote 1371 thereto (referring to Exhibits EC-15 and EC-18 submitted by the European Communities to the Panel; and Exhibit BRA-125 submitted by Brazil to the Panel).

³⁹⁷*Ibid.*, para. 7.208.

³⁹⁸European Communities' appellant's submission, para. 278.

distinction between high and prohibitive costs. Further, in our view, this is not an issue relating to the Panel's appreciation of the evidence, but rather to its legal characterization of the facts. In any event, what disqualifies these alternatives, according to the Panel, is not their high costs as such, but the effect of these high costs in limiting the disposal capacity of these methods.

208. Finally, the European Communities claims that the Panel failed to analyze as a possible alternative measure the National Dengue Control Programme, and that this failure constitutes a violation of Article 11 of the DSU.³⁹⁹ We observe that the European Communities referred to the National Dengue Control Programme in its second written submission to the Panel in support of its contention that "authorities in Brazil seem to encourage material recycling as an alternative."⁴⁰⁰ We note further that the alternative measure identified there was material recycling, and that the National Dengue Control Programme was discussed under the subheading "Material recycling" in the European Communities' written submission merely as one example of material recycling.⁴⁰¹ Thus, the National Dengue Control Programme was not submitted by the European Communities as a distinct alternative measure but, rather, was presented as an illustration of material recycling, which the Panel discussed extensively.

209. Accordingly, we *find* that the Panel did not fail to conduct an objective assessment of the facts, as required by Article 11 of the DSU, in finding that the disposal methods for waste tyres suggested by the European Communities were not reasonably available alternatives to the Import Ban.

C. *General Conclusion on the Necessity Analysis under Article XX(b) of the GATT 1994*

210. At this stage, it may be useful to recapitulate our views on the issue of whether the Import Ban is necessary within the meaning of Article XX(b) of the GATT 1994. This issue illustrates the tensions that may exist between, on the one hand, international trade and, on the other hand, public health and environmental concerns arising from the handling of waste generated by a product at the end of its useful life. In this respect, the fundamental principle is the right that WTO Members have to determine the level of protection that they consider appropriate in a given context. Another key element of the analysis of the necessity of a measure under Article XX(b) is the contribution it brings to the achievement of its objective. A contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue. To be characterized as necessary, a measure does not have to be indispensable. However, its contribution to the achievement of the objective must be material, not merely marginal or insignificant, especially if the measure at issue is

³⁹⁹European Communities' appellant's submission, para. 280.

⁴⁰⁰European Communities' second written submission to the Panel, para. 137.

⁴⁰¹See *Ibid.*, para. 138 under subheading II.A.4 (c) iv) "Material recycling", p. 41.

as trade restrictive as an import ban. Thus, the contribution of the measure has to be weighed against its trade restrictiveness, taking into account the importance of the interests or the values underlying the objective pursued by it. As a key component of a comprehensive policy aiming to reduce the risks arising from the accumulation of waste tyres, the Import Ban produces such a material contribution to the realization of its objective. Like the Panel, we consider that this contribution is sufficient to conclude that the Import Ban is necessary, in the absence of reasonably available alternatives.

211. The European Communities proposed a series of alternatives to the Import Ban. Whereas the Import Ban is a preventive non-generation measure, most of the proposed alternatives are waste management and disposal measures that are remedial in character. We consider that measures to encourage domestic retreading or to improve the retreadability of tyres, a better enforcement of the import ban on used tyres, and a better implementation of existing collection and disposal schemes, are complementary to the Import Ban; indeed, they constitute mutually supportive elements of a comprehensive policy to deal with waste tyres. Therefore, these measures cannot be considered real alternatives to the Import Ban. As regards landfilling, stockpiling, co-incineration of waste tyres, and material recycling, these remedial methods carry their own risks or, because of the costs involved, are capable of disposing of only a limited number of waste tyres. The Panel did not err in concluding that the proposed measures or practices are not reasonably available alternatives.

212. Accordingly, having already found that the Panel did not breach its duty under Article 11 of the DSU, and in the light of the above considerations, we *uphold* the Panel's finding, in paragraph 7.215 of the Panel Report, that the Import Ban can be considered "necessary to protect human, animal or plant life or health."

VI. The Panel's Interpretation and Application of the Chapeau of Article XX of the GATT 1994

A. The MERCOSUR Exemption and the Chapeau of Article XX of the GATT 1994

213. After finding that the Import Ban was provisionally justified under Article XX(b) of the GATT 1994⁴⁰², the Panel examined whether the application of the Import Ban by Brazil satisfied the requirements of the chapeau of Article XX.

⁴⁰²Panel Report, para. 7.215.

214. The chapeau of Article XX of the GATT 1994 reads:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement ... of measures [of the type specified in the subsequent paragraphs of Article XX].

215. The focus of the chapeau, by its express terms, is on the application of a measure already found to be inconsistent with an obligation of the GATT 1994 but falling within one of the paragraphs of Article XX.⁴⁰³ The chapeau's requirements are two-fold. First, a measure provisionally justified under one of the paragraphs of Article XX must not be applied in a manner that would constitute "arbitrary or unjustifiable discrimination" between countries where the same conditions prevail. Secondly, this measure must not be applied in a manner that would constitute "a disguised restriction on international trade". Through these requirements, the chapeau serves to ensure that Members' rights to avail themselves of exceptions are exercised in good faith to protect interests considered legitimate under Article XX, not as a means to circumvent one Member's obligations towards other WTO Members.⁴⁰⁴

216. Having determined that the exemption from the Import Ban of remoulded tyres originating in MERCOSUR countries resulted in discrimination in the application of the Import Ban, the Panel examined whether this discrimination was arbitrary or unjustifiable. The Panel concluded that, as of the time of its examination, the operation of the MERCOSUR exemption had not resulted in the Import Ban being applied in a manner that would constitute "arbitrary or unjustifiable discrimination", within the meaning of the chapeau of Article XX.⁴⁰⁵ The Panel also found that the MERCOSUR exemption had not been shown "to date" to result in the Import Ban being applied in a manner that would constitute "a disguised restriction on international trade", within the meaning of the chapeau of Article XX.⁴⁰⁶ The European Communities appeals these findings of the Panel.

⁴⁰³Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, 3, at 20; Appellate Body Report, *US – Gambling*, para. 339.

⁴⁰⁴Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, 3, at 20-21; Appellate Body Report, *US – Gambling*, para. 339.

⁴⁰⁵Panel Report, para. 7.289.

⁴⁰⁶*Ibid.*, paras. 7.354 and 7.355.

1. The MERCOSUR Exemption and Arbitrary or Unjustifiable Discrimination

217. Regarding the issue of whether the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that would constitute "arbitrary or unjustifiable discrimination" between countries where the same conditions prevail, the Panel noted, first, that the health impact of remoulded tyres imported from MERCOSUR countries and their European counterparts can be expected to be comparable.⁴⁰⁷ The Panel also observed that it was only after a MERCOSUR tribunal found Brazil's ban on the importation of remoulded tyres to constitute a new restriction on trade prohibited under MERCOSUR that Brazil exempted remoulded tyres originating in MERCOSUR countries from the application of the Import Ban.⁴⁰⁸ For the Panel, the MERCOSUR exemption "does not seem to be motivated by capricious or unpredictable reasons [as it] was adopted further to a ruling within the framework of MERCOSUR, which has binding legal effects for Brazil, as a party to MERCOSUR."⁴⁰⁹ The Panel added that the discrimination arising from the MERCOSUR exemption was not "*a priori* unreasonable", because this discrimination arose in the context of an agreement of a type expressly recognized under Article XXIV of the GATT 1994 that "inherently provides for preferential treatment in favour of its members, thus leading to discrimination between those members and other countries."⁴¹⁰

218. The European Communities argued before the Panel that Brazil was at least partially responsible for the ruling that resulted in the MERCOSUR exemption because it did not defend itself in the MERCOSUR proceedings on grounds related to human health and safety.⁴¹¹ The Panel was not persuaded by this submission. Indeed, the Panel considered it would not be appropriate for it "to assess in detail the choice of arguments by Brazil in the MERCOSUR proceedings or to second-guess the outcome of the case in light of Brazil's litigation strategy in those proceedings."⁴¹²

219. For the Panel, the MERCOSUR ruling provided a reasonable basis to enact the MERCOSUR exemption, with the implication that the resulting discrimination is not arbitrary.⁴¹³ The Panel indicated, however, that it was not suggesting that "the invocation of any international agreement would be sufficient under any circumstances, in order to justify the existence of discrimination in the

⁴⁰⁷Panel Report, para. 7.270.

⁴⁰⁸*Ibid.*, para. 7.271.

⁴⁰⁹*Ibid.*, para. 7.272.

⁴¹⁰*Ibid.*, para. 7.273.

⁴¹¹Article 50(d) of the Treaty of Montevideo provides for an exception similar to Article XX(b) of the GATT 1994. (See *infra*, footnote 443)

⁴¹²Panel Report, para. 7.276 and footnote 1451 thereto.

⁴¹³*Ibid.*, para. 7.281.

application of a measure under the chapeau of Article XX."⁴¹⁴ The Panel acknowledged that "casings from non-MERCOSUR countries, as well as casings originally used in MERCOSUR, may be retreaded in a MERCOSUR country and exported to Brazil as originating in MERCOSUR."⁴¹⁵ The Panel underscored that, "[i]f such imports were to take place in such amounts that the achievement of the objective of the measure at issue would be significantly undermined, the application of the import ban in conjunction with the MERCOSUR exemption would constitute a means of unjustifiable discrimination."⁴¹⁶ However, as of the time of the Panel's examination, "volumes of imports of retreaded tyres under the exemption appear not to have been significant."⁴¹⁷ The Panel concluded that the MERCOSUR exemption has not resulted in the Import Ban being applied in a manner that would constitute arbitrary or unjustifiable discrimination.⁴¹⁸

220. The European Communities claims that the Panel erred in its interpretation and application of the term "arbitrary or unjustifiable discrimination" in the chapeau of Article XX of the GATT 1994, and in finding that the MERCOSUR exemption does not constitute such discrimination. According to the European Communities, whether a measure involves arbitrary or unjustifiable discrimination can only be determined by taking into account the objective of the measure at issue, in this case, the protection of life and health from risks arising from mosquito-borne diseases and tyre fires. A measure will not be arbitrary if it "appears as reasonable, predictable and foreseeable"⁴¹⁹ in the light of this objective. It follows, according to the European Communities, that the Panel erred in finding that the MERCOSUR exemption did not constitute arbitrary discrimination because it was introduced in response to a ruling of a MERCOSUR arbitral tribunal. The MERCOSUR exemption does not further but may undermine the stated objective of the measure. For this reason, it must be regarded as "unreasonable, contradictory, and thus arbitrary".⁴²⁰ For the European Communities, allowing a Member's obligations under other international agreements to render discrimination consistent with the chapeau of Article XX would seriously undermine the effectiveness of the chapeau. The

⁴¹⁴Panel Report, para. 7.283. The Panel also considered that it was not contrary to the terms of Article XXIV:8(a) of the GATT 1994—which specifically excludes measures taken under Article XX from the requirement to liberalize "substantially all the trade" within a customs union—to take into account, as it did, "the fact that the MERCOSUR exemption was adopted as a result of Brazil's obligations under MERCOSUR." (*Ibid.*, para. 7.284)

⁴¹⁵*Ibid.*, para. 7.286.

⁴¹⁶*Ibid.*, para. 7.287.

⁴¹⁷*Ibid.*, para. 7.288. The Panel noted that imports of retreaded tyres under the MERCOSUR exemption had increased tenfold since 2002, from 200 to 2,000 tons per year by 2004. For the Panel, "[t]hat figure remains much lower than the 14,000 tons per year imported from the European Communities alone prior to the imposition of the import ban." (*Ibid.* (referring to European Communities' first written submission to the Panel, para. 80))

⁴¹⁸*Ibid.*, para. 7.289.

⁴¹⁹European Communities' appellant's submission, para. 321.

⁴²⁰*Ibid.*, para. 323.

European Communities adds that, in any event, the MERCOSUR tribunal did not oblige Brazil to discriminate between its MERCOSUR partners and other WTO Members, and that Brazil could have implemented the ruling by lifting the Import Ban for all third countries.⁴²¹

221. With respect to the Panel's finding that unjustifiable discrimination could arise if imports under the MERCOSUR exemption were to take place in such amounts that the achievement of the objective of the Import Ban would be significantly undermined⁴²², the European Communities argues that the Panel applied a test that has no basis in the text of Article XX and no support in the case law of the Appellate Body or of previous panels. The European Communities also notes that "the level of imports in a given year may be subject to strong fluctuations, and for this reason ... is entirely inadequate for the purposes of assessing the compatibility of a measure with Article XX".⁴²³

222. Brazil, for its part, supports the Panel's finding that the MERCOSUR exemption does not result in the Import Ban being applied in a manner that constitutes "arbitrary discrimination", contrary to the chapeau of Article XX. In addition, Brazil disputes the European Communities' argument that what constitutes "arbitrary discrimination" must be determined only in relation to the objective of the Import Ban. According to Brazil, the specific contents of the measure, including its policy objectives, must be examined under the exceptions listed in the paragraphs of Article XX. The chapeau of Article XX requires panels to examine whether the measure at issue is applied reasonably, in a manner that does not result in an abusive exercise of a Member's right to pursue its policy objectives. Brazil adds, for the sake of argument, that the Panel in any event considered the objective of the Import Ban when it determined that, at the time of its examination, volumes of imports of retreaded tyres under the MERCOSUR exemption did not significantly undermine the objective of the Import Ban. Furthermore, according to Brazil, the Panel was correct in finding that the ruling of the MERCOSUR tribunal provided a rational basis for the adoption of the MERCOSUR exemption.

223. For Brazil, the operation of the MERCOSUR exemption has not resulted in the Import Ban being applied in a manner that would constitute "unjustifiable discrimination". The Panel determined how Brazil's policy objective of reducing to the maximum extent possible unnecessary generation of tyre waste was being affected by imports of retreaded tyres under the MERCOSUR exemption. The level of imports and their effect on the objective of the Import Ban were relevant, in particular, because the chapeau of Article XX focuses on the application of the measure at issue.

⁴²¹European Communities' appellant's submission, para. 332.

⁴²²Panel Report, para. 7.287.

⁴²³European Communities' appellant's submission, para. 340.

224. We begin our analysis by recalling that the function of the chapeau is the prevention of abuse of the exceptions specified in the paragraphs of Article XX.⁴²⁴ In *US – Shrimp*, the Appellate Body stated that "[t]he chapeau of Article XX is, in fact, but one expression of the principle of good faith."⁴²⁵ The Appellate Body added that "[o]ne application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right 'impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably.'⁴²⁶ Accordingly, the task of interpreting and applying the chapeau is "the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement."⁴²⁷ The location of this line of equilibrium may move "as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ."⁴²⁸

225. Analyzing whether discrimination is arbitrary or unjustifiable usually involves an analysis that relates primarily to the cause or the rationale of the discrimination. Thus, we observe that, in *US – Gasoline*, the Appellate Body assessed the two explanations provided by the United States for the discrimination resulting from the application of the baseline establishment rules at issue.⁴²⁹ As it found them unsatisfactory, the Appellate Body concluded that the application of the baseline establishment rules resulted in arbitrary or unjustifiable discrimination.⁴³⁰ In *US – Shrimp*, the Appellate Body relied on a number of factors in finding that the measure at issue resulted in arbitrary or unjustifiable discrimination. The assessment of these factors by the Appellate Body was part

⁴²⁴Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, 3, at 21.

⁴²⁵Appellate Body Report, *US – Shrimp*, para. 158.

⁴²⁶*Ibid.* (quoting B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Stevens and Sons, Ltd., 1953), chap. 4, at 125).

⁴²⁷*Ibid.*, para. 159.

⁴²⁸*Ibid.*

⁴²⁹The *US – Gasoline* case involved a programme aiming to ensure that pollution from gasoline combustion did not exceed 1990 levels. Baselines for the year 1990 were set as a means for determining compliance with the programme requirements. These baselines could be either individual or statutory, depending on the nature of the entity concerned. Whereas individual baselines were available to domestic refiners, they were not to foreign refiners.

The first explanation provided by the United States for such discrimination was the impracticability of verification and enforcement of individual baselines for foreign refiners. (Appellate Body Report, *US – Gasoline*, pp. 25-26, DSR 1996:I, 3, at 23-24) Secondly, the United States explained that imposing the statutory baseline requirement on domestic refiners as well was not an option, because it was not feasible to require domestic refiners to incur the physical and financial costs and burdens entailed by immediate compliance with a statutory baseline. (*Ibid.*, p. 28, DSR 1996:I, 3, at 26-27)

⁴³⁰*Ibid.*, p. 29, DSR 1996:I, 3, at 27.

of an analysis that was directed at the cause, or the rationale, of the discrimination.⁴³¹ *US – Shrimp (Article 21.5 – Malaysia)* concerned measures taken by the United States to implement recommendations and rulings of the DSB in *US – Shrimp*. The Appellate Body's analysis of these measures under the chapeau of Article XX focused on whether discrimination that might result from the application of those measures had a legitimate cause or rationale in the light of the objectives listed in the paragraphs of Article XX.⁴³²

226. The Appellate Body Reports in *US – Gasoline*, *US – Shrimp*, and *US – Shrimp (Article 21.5 – Malaysia)* show that the analysis of whether the application of a measure results in arbitrary or unjustifiable discrimination should focus on the cause of the discrimination, or the rationale put forward to explain its existence. In this case, Brazil explained that it introduced the MERCOSUR exemption to comply with a ruling issued by a MERCOSUR arbitral tribunal. This ruling arose in the context of a challenge initiated by Uruguay against Brazil's import ban on remoulded tyres, on the grounds that it constituted a new restriction on trade prohibited under MERCOSUR. The MERCOSUR arbitral tribunal found Brazil's restrictions on the importation of remoulded tyres to be a violation of its obligations under MERCOSUR. These facts are undisputed.

227. We have to assess whether this explanation provided by Brazil is acceptable as a justification for discrimination between MERCOSUR countries and non-MERCOSUR countries in relation to retreaded tyres. In doing so, we are mindful of the function of the chapeau of Article XX, which is to prevent abuse of the exceptions specified in the paragraphs of that provision.⁴³³ In our view, there is

⁴³¹These factors were: (i) the discrimination that resulted from a "rigid and unbending requirement" (Appellate Body Report, *US – Shrimp*, para. 177; see also para. 163) that countries exporting shrimp into the United States adopt a regulatory programme that is essentially the same as the United States' programme; (ii) the discrimination that resulted from the failure to take into account different conditions that may occur in the territories of other WTO Members, in particular, specific policies and measures other than those applied by the United States that might have been adopted by an exporting country for the protection and conservation of sea turtles (*ibid.*, paras. 163 and 164); (iii) the discrimination that resulted from the application of the measure was "difficult to reconcile with the declared policy objective of protecting and conserving sea turtles" (*ibid.*, para. 165), because, in some circumstances, shrimp caught abroad using methods identical to those employed in the United States would be excluded from the United States market; and (iv) the discrimination that resulted from the fact that, while the United States negotiated seriously with some WTO Members exporting shrimp into the United States for the purpose of concluding international agreements for the protection and conservation of sea turtles, it did not do so with other WTO Members (*ibid.*, paras. 166 and 172).

⁴³²Thus, the Appellate Body endorsed the panel's conclusion that conditioning market access on the adoption of a regulatory programme for the protection and conservation of sea turtles comparable in effectiveness—as opposed to the adoption of "essentially the same" regulatory programme—"allows for sufficient flexibility in the application of the measure so as to avoid 'arbitrary or unjustifiable discrimination'". (Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 144) The Appellate Body also considered that the measures adopted by the United States permitted a degree of flexibility that would enable the United States to consider the particular conditions prevailing in Malaysia, notably because it provides that, in making certification determinations, the United States authorities "shall also take fully into account other measures the harvesting nation undertakes to protect sea turtles". (*Ibid.*, para. 147)

⁴³³Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, 3, at 21.

such an abuse, and, therefore, there is arbitrary or unjustifiable discrimination when a measure provisionally justified under a paragraph of Article XX is applied in a discriminatory manner "between countries where the same conditions prevail", and when the reasons given for this discrimination bear no rational connection to the objective falling within the purview of a paragraph of Article XX, or would go against that objective. The assessment of whether discrimination is arbitrary or unjustifiable should be made in the light of the objective of the measure. We note, for example, that one of the bases on which the Appellate Body relied in *US – Shrimp* for concluding that the operation of the measure at issue resulted in unjustifiable discrimination was that one particular aspect of the application of the measure (the measure implied that, in certain circumstances, shrimp caught abroad using methods identical to those employed in the United States would be excluded from the United States market⁴³⁴) was "difficult to reconcile with the declared objective of protecting and conserving sea turtles".⁴³⁵ Accordingly, we have difficulty understanding how discrimination might be viewed as complying with the chapeau of Article XX when the alleged rationale for discriminating does not relate to the pursuit of or would go against the objective that was provisionally found to justify a measure under a paragraph of Article XX.

228. In this case, the discrimination between MERCOSUR countries and other WTO Members in the application of the Import Ban was introduced as a consequence of a ruling by a MERCOSUR tribunal. The tribunal found against Brazil because the restriction on imports of remoulded tyres was inconsistent with the prohibition of new trade restrictions under MERCOSUR law. In our view, the ruling issued by the MERCOSUR arbitral tribunal is not an acceptable rationale for the discrimination, because it bears no relationship to the legitimate objective pursued by the Import Ban that falls within the purview of Article XX(b), and even goes against this objective, to however small a degree. Accordingly, we are of the view that the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination.

229. The Panel considered that the MERCOSUR exemption resulted in discrimination between MERCOSUR countries and other WTO Members, but that this discrimination would be "unjustifiable" only if imports of retreaded tyres entering into Brazil "were to take place in such amounts that the achievement of the objective of the measure at issue would be significantly undermined".⁴³⁶ The Panel's interpretation implies that the determination of whether discrimination is unjustifiable depends on the quantitative impact of this discrimination on the achievement of the objective of the measure at issue. As we indicated above, analyzing whether discrimination is

⁴³⁴Appellate Body Report, *US – Shrimp*, para. 165.

⁴³⁵*Ibid.*

⁴³⁶Panel Report, para. 7.287.

"unjustifiable" will usually involve an analysis that relates primarily to the cause or the rationale of the discrimination. By contrast, the Panel's interpretation of the term "unjustifiable" does not depend on the cause or rationale of the discrimination but, rather, is focused exclusively on the assessment of the *effects* of the discrimination. The Panel's approach has no support in the text of Article XX and appears to us inconsistent with the manner the Appellate Body has interpreted and applied the concept of "arbitrary or unjustifiable discrimination" in previous cases.⁴³⁷

230. Having said that, we recognize that in certain cases the effects of the discrimination may be a relevant factor, among others, for determining whether the cause or rationale of the discrimination is acceptable or defensible and, ultimately, whether the discrimination is justifiable. The effects of discrimination might be relevant, depending on the circumstances of the case, because, as we indicated above⁴³⁸, the chapeau of Article XX deals with the manner of application of the measure at issue. Taking into account as a relevant factor, among others, the effects of the discrimination for determining whether the rationale of the discrimination is acceptable is, however, fundamentally different from the Panel's approach, which focused exclusively on the relationship between the effects of the discrimination and its justifiable or unjustifiable character.

231. We also note that the Panel found that the discrimination resulting from the MERCOSUR exemption is not arbitrary. The Panel explained that this discrimination cannot be said to be "capricious" or "random"⁴³⁹ because it was adopted further to a ruling within the framework of MERCOSUR.⁴⁴⁰

232. Like the Panel, we believe that Brazil's decision to act in order to comply with the MERCOSUR ruling cannot be viewed as "capricious" or "random". Acts implementing a decision of a judicial or quasi-judicial body—such as the MERCOSUR arbitral tribunal—can hardly be characterized as a decision that is "capricious" or "random". However, discrimination can result from a rational decision or behaviour, and still be "arbitrary or unjustifiable", because it is explained by a

⁴³⁷See *supra*, paras. 225 and 226. We also observe that the Panel's approach was based on a logic that is different in nature from that followed by the Appellate Body when it addressed the national treatment principle under Article III:4 of the GATT 1994 in *Japan – Alcoholic Beverages II*. In that case, the Appellate Body stated that Article III aims to ensure "equality of competitive conditions for imported products in relation to domestic products". (Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16, DSR 1996:I, 97, at 109) The Appellate Body added that "it is irrelevant that 'the trade effects' of the [measure at issue], as reflected in the volumes of imports, are insignificant or even non-existent". (*Ibid.*, at 110) For the Appellate Body, "Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products." (*Ibid.* (footnote omitted))

⁴³⁸*Supra*, para. 215.

⁴³⁹Panel Report, para. 7.281.

⁴⁴⁰*Ibid.*, para. 7.272.

rationale that bears no relationship to the objective of a measure provisionally justified under one of the paragraphs of Article XX, or goes against that objective.⁴⁴¹

233. Accordingly, we *find* that the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination. Furthermore, we *reverse* the Panel's finding, in paragraph 7.287 of the Panel Report, that, under the chapeau of Article XX of the GATT 1994, discrimination would be unjustifiable only if imports of retreaded tyres entering into Brazil "were to take place in such amounts that the achievement of the objective of the measure at issue would be significantly undermined". We therefore *reverse* the Panel's findings, in paragraphs 7.288 and 7.289 of the Panel Report, that the MERCOSUR exemption has not resulted in unjustifiable discrimination. We also *reverse* the Panel's findings, in paragraphs 7.281 and 7.289 of the Panel Report, that, to the extent that the MERCOSUR exemption is not the result of "capricious" or "random" action, the Import Ban is not applied in a manner that would constitute arbitrary discrimination.

234. This being said, we observe, like the Panel⁴⁴², that, before the arbitral tribunal established under MERCOSUR, Brazil could have sought to justify the challenged Import Ban on the grounds of human, animal, and plant health under Article 50(d) of the Treaty of Montevideo.⁴⁴³ Brazil, however, decided not to do so. It is not appropriate for us to second-guess Brazil's decision not to invoke Article 50(d), which serves a function similar to that of Article XX(b) of the GATT 1994. However, Article 50(d) of the Treaty of Montevideo, as well as the fact that Brazil might have raised this defence in the MERCOSUR arbitral proceedings⁴⁴⁴, show, in our view, that the discrimination associated with the MERCOSUR exemption does not necessarily result from a conflict between provisions under MERCOSUR and the GATT 1994.⁴⁴⁵

⁴⁴¹See *supra*, paras. 227 and 228.

⁴⁴²Panel Report, paras. 7.275 and 7.276.

⁴⁴³Treaty of Montevideo, Instrument Establishing the Latin American Integration Association (ALADI), done at Montevideo, August 1980 (Exhibit EC-39 submitted by the European Communities to the Panel). Article 50(d) reads as follows:

No provision under the present Treaty shall be interpreted as precluding the adoption and observance of measures regarding:

...

d. Protection of human, animal and plant life and health;

⁴⁴⁴See Panel Report, para. 7.275.

⁴⁴⁵In addition, we note that Article XXIV:8(a) of the GATT 1994 exempts, where necessary, measures permitted under Article XX from the obligation to eliminate "duties and other restrictive regulations of commerce" with respect to "substantially all the trade" within a customs union. Therefore, if we assume, for the sake of argument, that MERCOSUR is consistent with Article XXIV and that the Import Ban meets the requirements of Article XX, this measure, where necessary, could be exempted by virtue of Article XXIV:8(a) from the obligation to eliminate other restrictive regulations of commerce within a customs union.

2. The MERCOSUR Exemption and Disguised Restriction on International Trade

235. The European Communities also challenges the Panel's conclusion that the MERCOSUR exemption had not been shown to date to result in the Import Ban being applied in a manner that would constitute "a disguised restriction on international trade".⁴⁴⁶

236. When examining whether the Import Ban was applied in a manner that constitutes a disguised restriction on international trade, the Panel was not persuaded by the European Communities' contention that Brazil adopted the prohibition on the importation of retreaded tyres as "a disguise to conceal the pursuit of trade-restrictive objectives".⁴⁴⁷ The Panel recalled that Brazil bans both used and retreaded tyre imports; for the Panel, such an approach "is consistent with Brazil's declared objective of reducing to the greatest extent possible the unnecessary accumulation of short-lifespan tyres"⁴⁴⁸, and "in principle deprives Brazilian retreaders of the opportunity to source casings from abroad".⁴⁴⁹

237. The Panel went on to examine more specifically the European Communities' argument that "the MERCOSUR exemption results in the application of the measure in a manner that constitutes a disguised restriction on international trade, as it alters trade flows in a manner that benefits, in addition to Brazilian retreaders, retreaders from other MERCOSUR countries."⁴⁵⁰ The Panel recalled that, under this exemption, "it is quite possible for retreaders from MERCOSUR countries benefiting from the exemption to source casings from abroad (for example from the European Communities), retread them locally, and then export the retreaded tyres to Brazil under the MERCOSUR exemption."⁴⁵¹ The Panel referred to the reasoning that it had developed with respect to arbitrary or unjustifiable discrimination and considered that, if imports from MERCOSUR countries were to occur in significant amounts, the Import Ban would be applied in a manner that constitutes a disguised restriction on international trade.⁴⁵² The Panel was however of the view that, as of the time of its examination, "the volume of imports of remoulded tyres that has actually taken place under the MERCOSUR exemption has not been significant."⁴⁵³

⁴⁴⁶Panel Report, para. 7.355.

⁴⁴⁷*Ibid.*, para. 7.330 (quoting Panel Report, *EC – Asbestos*, para. 8.236).

⁴⁴⁸*Ibid.*, para. 7.343.

⁴⁴⁹*Ibid.*

⁴⁵⁰*Ibid.*, para. 7.350.

⁴⁵¹*Ibid.*, para. 7.352. (footnote omitted)

⁴⁵²*Ibid.*, para. 7.353.

⁴⁵³*Ibid.*, para. 7.354. (footnote omitted) See also *supra*, footnote 417.

238. On appeal, the European Communities does not challenge the Panel's conclusion that the Import Ban was adopted with the intention of protecting public health and the environment. Its appeal is, instead, limited to the specific findings made by the Panel in relation to the MERCOSUR exemption⁴⁵⁴ and the imports of used tyres through court injunctions.⁴⁵⁵ For the European Communities, the Panel addressed this question with a reasoning almost identical to that it had developed in respect of the existence of arbitrary or unjustifiable discrimination.⁴⁵⁶ Therefore, the European Communities reasons, if the Panel's approach concerning arbitrary or unjustifiable discrimination is not endorsed by the Appellate Body, the Panel's finding that the MERCOSUR exemption has not been shown to date to result in a disguised restriction on international trade should also be reversed.⁴⁵⁷ In response to questioning at the oral hearing, the European Communities confirmed that its claim in this regard is based on the same arguments it put forward in relation to arbitrary or unjustifiable discrimination.

239. We agree with the European Communities' observation that the reasoning developed by the Panel to reach the challenged conclusion was the same as that made in respect of arbitrary or unjustifiable discrimination. Indeed, the Panel conditioned a finding of a disguised restriction on international trade on the existence of significant imports of retreaded tyres that would undermine the achievement of the objective of the Import Ban. We explained above why we believe that the Panel erred in finding that the MERCOSUR exemption would result in arbitrary or unjustifiable discrimination only if the imports of retreaded tyres from MERCOSUR countries were to take place in such amounts that the achievement of the objective of the Import Ban would be significantly undermined.⁴⁵⁸ As the Panel's conclusion that the MERCOSUR exemption has not resulted in a disguised restriction on international trade was based on an interpretation that we have reversed, this finding cannot stand. Therefore, we also *reverse* the Panel's findings, in paragraphs 7.354 and 7.355 of the Panel Report, that "the MERCOSUR exemption ... has not been shown to date to result in the [Import Ban] being applied in a manner that would constitute ... a disguised restriction on international trade."

⁴⁵⁴Panel Report, paras. 7.350-7.355.

⁴⁵⁵*Ibid.*, paras. 7.347-7.349 and 7.355. We examine this aspect of the European Communities' appeal in Section VI.B.2 of this Report.

⁴⁵⁶European Communities' appellant's submission, para. 366.

⁴⁵⁷*Ibid.*, paras. 367 and 368.

⁴⁵⁸*Supra*, Section VI.A.1.

B. *Imports of Used Tyres through Court Injunctions and the Chapeau of Article XX of the GATT 1994*

1. Imports of Used Tyres through Court Injunctions and Arbitrary or Unjustifiable Discrimination

240. The European Communities submits that the Panel erred in its analysis of the imports of used tyres through court injunctions under the chapeau of Article XX of the GATT 1994. We begin our analysis with the requirement in the chapeau of Article XX that the measure at issue not be applied in a manner that would result in "arbitrary or unjustifiable discrimination".

241. The Panel determined that the imports of used tyres through court injunctions resulted in discrimination in favour of domestic retreaders. This is because these imports enabled retreaded tyres to be produced in Brazil from imported casings, while retreaded tyres produced abroad using the same casings could not be imported.⁴⁵⁹ Having done so, the Panel went on to examine whether this discrimination is arbitrary or unjustifiable.

242. The Panel noted that the importation of used tyres into Brazil is prohibited, and that "used tyres have been imported into Brazil in recent years only as a result of injunctions granted by Brazilian courts in specific cases."⁴⁶⁰ The Panel found that the discrimination resulting from the imports of used tyres through court injunctions was not the consequence of a "capricious" or "random" action, and that, to this extent, the Import Ban was not applied in a manner that would constitute arbitrary discrimination.⁴⁶¹

243. The Panel recalled, however, that the contribution of the Import Ban to the achievement of its objective "is premised on imports of used tyres being prohibited".⁴⁶² For the Panel, the granting of injunctions allowing used tyres to be imported "runs directly counter to this premise, as it effectively allows the very used tyres that are prevented from entering into Brazil *after* retreading to be imported *before* retreading."⁴⁶³ The Panel examined the volumes of imports of used tyres that have taken place under the court injunctions. For the Panel, the amounts of imports of used tyres that have

⁴⁵⁹Panel Report, para. 7.243.

⁴⁶⁰*Ibid.*, para. 7.292. (footnote omitted) The Panel also observed that Brazil has challenged these injunctions "with a certain degree of success". (*Ibid.*) For the Panel, the imports of used tyres were "the result of successful court challenges", and found their basis "in the customs authorities' need to give effect to judicial orders". (*Ibid.*) The Panel added that nothing in the evidence suggested that the decisions of the Brazilian courts granting those injunctions were capricious or unpredictable, nor does "the decision of the Brazilian administrative authorities to comply with the preliminary injunctions ... seem irrational or unpredictable". (*Ibid.*, para. 7.293)

⁴⁶¹*Ibid.*, para. 7.294.

⁴⁶²*Ibid.*, para. 7.295.

⁴⁶³*Ibid.* (original emphasis)

actually taken place under the court injunctions were significant.⁴⁶⁴ Accordingly, the Panel found that, "since used tyre imports have been taking place under the court injunctions in such amounts that the achievement of Brazil's declared objective is being significantly undermined, the measure at issue is being applied in a manner that constitutes a means of unjustifiable discrimination."⁴⁶⁵

244. For the European Communities, the Panel erred in finding that the imports of used tyres through court injunctions do not result in arbitrary discrimination, given that "[w]hat is arbitrary must be decided in the light of the stated objectives of the measure".⁴⁶⁶ Because, from the point of view of the protection of human life or health, there is no difference between, on the one hand, a retreaded tyre produced in the European Communities and, on the other hand, a retreaded tyre produced in Brazil from a casing imported from the European Communities, prohibiting imported retreaded tyres while allowing the importation of used tyres through court injunctions must be regarded as constituting arbitrary discrimination.⁴⁶⁷ Furthermore, the European Communities maintains that, as regards the issue of whether court injunctions constitute unjustifiable discrimination, the Panel adopted the same erroneous quantitative approach as it did when discussing the MERCOSUR exemption.⁴⁶⁸ The European Communities adds that the Panel's approach engenders uncertainty for the implementation of the Panel Report, because the Panel did not identify "the threshold below which the imports of used tyres would no longer be significant".⁴⁶⁹

245. Brazil submits that the Panel did not err in the analytical approach it adopted to determine whether imports of used tyres under court injunctions resulted in the Import Ban being applied in a manner that constituted "arbitrary or unjustifiable discrimination" under the chapeau of Article XX. For Brazil, it was appropriate for the Panel to consider the level of imports of used tyres in its determination. Brazil thus dismisses the European Communities' argument that the Panel's approach engenders uncertainty for the implementation of the Panel Report, and stresses that the monitoring of a WTO Member's compliance is an integral part of the dispute settlement system.

⁴⁶⁴Panel Report, paras. 7.297 and 7.303. In particular, the Panel noted that, in 2005, Brazil imported approximately 10.5 million used tyres, compared to 1.4 million in 2000, the year in which the ban on imports of used and retreaded tyres was first enacted (Portaria SECEX 8/2000). The Panel also observed that the total number of retreaded tyres imported annually to Brazil, from all sources, was 2-3 million prior to the Import Ban. Thus, according to the Panel, in 2005, the imports of used tyres were approximately three times the amount of retreaded and used tyres combined that were imported annually prior to the Import Ban. (*Ibid.*, paras. 7.301 and 7.302)

⁴⁶⁵*Ibid.*, para. 7.306.

⁴⁶⁶European Communities' appellant's submission, para. 357.

⁴⁶⁷*Ibid.*

⁴⁶⁸*Ibid.*, para. 360.

⁴⁶⁹*Ibid.*, para. 363.

246. As we explained above, the analysis of whether the application of a measure results in arbitrary or unjustifiable discrimination should focus on the cause or rationale given for the discrimination.⁴⁷⁰ For Brazil, the fact that Brazilian retreaders are able to use imported casings is the result of the decisions of the Brazilian administrative authorities to comply with court injunctions.⁴⁷¹ We observe that this explanation bears no relationship to the objective of the Import Ban—reducing exposure to the risks arising from the accumulation of waste tyres to the maximum extent possible. The imports of used tyres through court injunctions even go against the objective pursued by the Import Ban. As we indicated above, there is arbitrary or unjustifiable discrimination, within the meaning of the chapeau of Article XX, when a Member seeks to justify the discrimination resulting from the application of its measure by a rationale that bears no relationship to the accomplishment of the objective that falls within the purview of one of the paragraphs of Article XX, or goes against this objective. Accordingly, we *find* that the imports of used tyres through court injunctions have resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination.

247. The Panel approached the question of whether the imports of used tyres through court injunctions result in unjustifiable discrimination in the same manner as it did with the MERCOSUR exemption. We explained above why we are of the view that this quantitative approach—according to which discrimination would be characterized as unjustifiable only if imports under the MERCOSUR exemption take place in such amounts that the achievement of the objective of the measure at issue would be "significantly undermined"⁴⁷²—is flawed.⁴⁷³ Accordingly, we *reverse* the Panel's findings, in paragraphs 7.296 and 7.306 of the Panel Report, that the imports of used tyres through court injunctions have resulted in the Import Ban being applied in a manner that constitutes unjustifiable discrimination only to the extent that such imports have taken place in volumes that significantly undermine the achievement of the objective of the Import Ban. Furthermore, for the same reasons as those explained in paragraph 232, we *reverse* the Panel's finding, in paragraph 7.294 of the Panel Report, that the imports of used tyres under court injunctions have not resulted in arbitrary discrimination to the extent that such imports are not the result of "capricious" or "random" action.

⁴⁷⁰*Supra*, Section VI.A.1.

⁴⁷¹See Panel Report, paras. 7.292 and 7.293; see also Brazil's appellee's submission, para. 245.

⁴⁷²Panel Report, para. 7.287 (as regards the MERCOSUR exemption); see also para. 7.296 (with respect to the imports of used tyres through court injunctions).

⁴⁷³*Supra*, Section VI.A.1.

2. Imports of Used Tyres and Disguised Restriction on International Trade

248. The Panel found that, "since imports of used tyres take place in significant amounts under court injunctions to the benefit of the domestic retreading industry, the [Import Ban] is being applied in a manner that constitutes a disguised restriction on international trade."⁴⁷⁴ The Panel reasoned that the restriction on international trade inherent in the Import Ban has operated to the benefit of domestic retreaders, because "[t]he granting of court injunctions for the importation of used tyres has ... in effect meant that ... domestic retreaders have been able to continue to benefit from the importation of used tyres as material for their own activity in significant amounts, while their competitors from non-MERCOSUR countries have been kept out of the Brazilian market."⁴⁷⁵

249. The European Communities submits that the Panel erred in finding that the imports of used tyres through court injunctions would have resulted in the Import Ban being applied in a manner that constitutes a disguised restriction on international trade only to the extent that these imports are taking place in such quantities that they significantly undermine the objective of the Import Ban.⁴⁷⁶ The European Communities refers to the arguments it made regarding the existence of arbitrary or unjustifiable discrimination, and reiterates its view that the Panel's reliance on import volumes for the purpose of determining compatibility with the chapeau of Article XX of the GATT 1994 is erroneous.⁴⁷⁷

250. Brazil argues that the Panel correctly considered the volume of imports of used tyres as part of its determination that the Import Ban was being applied in a manner that constituted a disguised restriction on international trade, and refers to the arguments that it made before the Panel in support of this position.

251. The reasoning elaborated by the Panel to reach the challenged finding was the same as that it developed in respect of "arbitrary or unjustifiable discrimination". Indeed, the Panel conditioned a finding of a disguised restriction on international trade on the existence of imports of used tyres in amounts that would significantly undermine the achievement of the objective of the Import Ban. We explained above why we consider this reasoning of the Panel erroneous. As the challenged finding results from the same reasoning that we have found to be erroneous and have rejected, this finding of the Panel cannot stand. Accordingly, we *reverse* the Panel's finding, in paragraph 7.349 of the Panel Report, that the imports of used tyres through court injunctions have resulted in the Import Ban being

⁴⁷⁴Panel Report, para. 7.349.

⁴⁷⁵*Ibid.*, para. 7.348. (footnote omitted)

⁴⁷⁶*Ibid.*, para. 7.349.

⁴⁷⁷European Communities' appellant's submission, para. 367.

applied in a manner that constitutes a disguised restriction on international trade only to the extent that these imports are taking place in such quantities that they significantly undermine the objective of the Import Ban.

252. We found that the MERCOSUR exemption and the imports of used tyres under court injunctions have resulted in the Import Ban being applied in a manner that is inconsistent with the chapeau of Article XX of the GATT 1994. In the light of these findings, we *uphold*, albeit for different reasons, the Panel's findings, in paragraphs 7.357 and 8.1(a)(i) and (ii) of the Panel Report, that the Import Ban, found by the Panel to be inconsistent with Article XI:1 of the GATT 1994, is not justified under Article XX of the GATT 1994.

VII. The European Communities' Claims that the MERCOSUR Exemption Is Inconsistent with Article I:1 and Article XIII:1 of the GATT 1994

253. Before the Panel, the European Communities made separate claims regarding the MERCOSUR exemption, namely, that the MERCOSUR exemption was inconsistent with Article I:1 and Article XIII:1 of the GATT 1994. Brazil did not contest that the MERCOSUR exemption was *prima facie* inconsistent with Articles I:1 and XIII:1, but claimed that it was justified under Articles XX(d) and XXIV of the GATT 1994.

254. After noting that the MERCOSUR exemption and the Import Ban have the same legal basis, namely, Article 40 of Portaria SECEX 14/2004⁴⁷⁸, the Panel emphasized that, under Article 11 of the DSU, "it was required to address only those issues that are necessary for the resolution of the matter between the parties."⁴⁷⁹ The Panel recalled its earlier findings that the Import Ban was inconsistent with Article XI:1 and not justified under Article XX(b). It then decided to exercise judicial economy in respect of the European Communities' separate claims that the MERCOSUR exemption was inconsistent with Article I:1 and Article XIII:1, and not justified under Articles XX(d) or Article XXIV of the GATT 1994. According to the Panel, the MERCOSUR exemption derives from and exists only in relation to the Import Ban. The Panel reasoned that, as it had already found that the Import Ban was inconsistent with the requirements of the GATT 1994, it was unnecessary to examine the European Communities' separate claims regarding the MERCOSUR exemption.⁴⁸⁰

⁴⁷⁸See Panel Report, para. 7.453.

⁴⁷⁹*Ibid.*, para. 7.454 (referring to Appellate Body Report, *US – Wool Shirts and Blouses*, p. 18, DSR 1996:I, 323, at 339).

⁴⁸⁰*Ibid.*, para. 7.455.

255. On appeal, the European Communities requests that we reverse the Panel's decision to exercise judicial economy in relation to its separate claims regarding the MERCOSUR exemption. The European Communities also requests us to complete the legal analysis and find that the MERCOSUR exemption is inconsistent with Articles I:1 and XIII:1, and not justified under Article XX(d) or Article XXIV of the GATT 1994. This request, however, is conditioned upon our upholding the Panel's finding that the MERCOSUR exemption does not result in the Import Ban being applied inconsistently with the requirements of the chapeau of Article XX.

256. As we have found that the MERCOSUR exemption results in the Import Ban being applied inconsistently with the chapeau of Article XX, the condition on which the European Communities' request is predicated has not been fulfilled. It is therefore not necessary for us to rule on the European Communities' conditional appeal. Accordingly, we do not examine the European Communities' conditional appeal and make no finding in relation to its separate claims that the MERCOSUR exemption is inconsistent with Article I:1 and Article XIII:1 of the GATT 1994, and not justified under Article XX(d) or Article XXIV of the GATT 1994.

257. Having said that, we observe that it might have been appropriate for the Panel to address the European Communities' separate claims that the MERCOSUR exemption was inconsistent with Article I:1 and Article XIII:1. We have previously indicated that the principle of judicial economy "allows a panel to refrain from making multiple findings that the same measure is inconsistent with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute"⁴⁸¹, and it seems that the Panel assumed this to be the case in the present dispute. However, the Panel found that the MERCOSUR exemption resulted in the Import Ban being applied *consistently* with the requirements of the chapeau of Article XX. In view of this finding, we must acknowledge that we have difficulty seeing how the Panel could have been justified in not addressing the separate claims of inconsistency under Article I:1 and Article XIII:1 directed at the MERCOSUR exemption. We emphasize that panels must be mindful, when applying the principle of judicial economy, that the aim of the dispute settlement mechanism under Article 3.7 of the DSU is to secure a positive solution to the dispute. Therefore, a panel's discretion to decline to rule on different claims of inconsistency adduced in relation to the same measure is limited by its duty to make findings that will allow the DSB to make sufficiently precise recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members.'⁴⁸²

⁴⁸¹ Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133.

⁴⁸² Appellate Body Report, *Australia – Salmon*, para. 223.

VIII. Findings and Conclusions

258. For the reasons set out in this Report, the Appellate Body:

- (a) with respect to the analysis of the necessity of the Import Ban under Article XX(b) of the GATT 1994:
 - (i) upholds the Panel's finding, in paragraph 7.215 of the Panel Report, that the Import Ban can be considered "necessary" within the meaning of Article XX(b) and is thus provisionally justified under that provision; and
 - (ii) finds that the Panel did not breach its duty under Article 11 of the DSU to make an objective assessment of the facts;
- (b) with respect to the analysis under the chapeau of Article XX of the GATT 1994:
 - (i) reverses the Panel's findings, in paragraphs 7.287, 7.354, and 7.355 of the Panel Report, that the MERCOSUR exemption would result in the Import Ban being applied in a manner that constitutes unjustifiable discrimination and a disguised restriction on international trade only to the extent that it results in volumes of imports of retreaded tyres that would significantly undermine the achievement of the objective of the Import Ban;
 - (ii) reverses the Panel's findings, in paragraphs 7.281 and 7.289 of the Panel Report, that the MERCOSUR exemption has not resulted in arbitrary discrimination; also reverses the Panel's findings, in paragraphs 7.288 and 7.289 of the Panel Report, that the MERCOSUR exemption has not resulted in unjustifiable discrimination; and finds, instead, that the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination within the meaning of the chapeau of Article XX;
 - (iii) reverses the Panel's findings, in paragraphs 7.296, 7.306, 7.349, and 7.355 of the Panel Report, that the imports of used tyres under court injunctions have resulted in the Import Ban being applied in a manner that constitutes unjustifiable discrimination and a disguised restriction on international trade only to the extent that such imports have taken place in volumes that significantly undermine the achievement of the objective of the Import Ban;

- (iv) reverses the Panel's finding, in paragraph 7.294 of the Panel Report, that the imports of used tyres under court injunctions have not resulted in arbitrary discrimination; and finds, instead, that the imports of used tyres under court injunctions have resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination within the meaning of the chapeau of Article XX; and
- (c) with respect to Article XX of the GATT 1994, upholds, albeit for different reasons, the Panel's findings, in paragraphs 7.357 and 8.1(a)(i) and (ii) of the Panel Report, that the Import Ban is not justified under Article XX of the GATT 1994; and
- (d) with respect to the European Communities' claims that the MERCOSUR exemption is inconsistent with Article I:1 and Article XIII:1 of the GATT 1994, finds that the condition on which the European Communities' appeal is predicated is not satisfied, and therefore does not consider it.

259. The Appellate Body recommends that the DSB request Brazil to bring its measure, found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the GATT 1994, into conformity with its obligations under that Agreement.

Signed in the original in Geneva this 16th day of November 2007 by:

Georges Abi-Saab
Presiding Member

Luiz Olavo Baptista
Member

Yasuhei Taniguchi
Member

ANNEX I

**WORLD TRADE
ORGANIZATION**

WT/DS332/9
3 September 2007

(07-3724)

Original: English

BRAZIL – MEASURES AFFECTING IMPORTS OF RETREADED TYRES

Notification of an Appeal by the European Communities
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 20(1) of the Working Procedures for Appellate Review

The following notification, dated 3 September 2007, from the Delegation of the European Commission, is being circulated to Members.

1. Pursuant to Article 16.4 and Article 17 of the DSU and to Rule 20.1 of the Working Procedures for Appellate Review, the European Communities submits its Notice of Appeal on certain issues of law covered in the Report of the Panel on *Brazil – Measures Affecting Imports of Retreaded Tyres*¹ and certain legal interpretations developed by the Panel.

2. The European Communities seeks review by the Appellate Body of the following aspects of the Report of the Panel:

- (a) The Panel's finding that the import ban on retreaded tyres was necessary within the meaning of Article XX(b) of the GATT. The Panel's finding and corresponding reasoning are contained in paragraphs 7.103 to 7.216 of the Panel Report. The EC appeals this finding notably because:
- in assessing the contribution of the measure to the protection of human, animal and plant life and health, the Panel merely assesses whether the ban is capable of making a potential contribution to its stated objectives. This reasoning is inconsistent with Article XX(b) of the GATT. Moreover, in reaching its conclusion regarding the potential contribution of the ban, the Panel also fails to make an objective assessment of the matter before it, including of the facts of the case, as required by Article 11 of the DSU, and effectively shifts the burden of proof to the EC;

¹ WT/DS332/R, circulated on 12 June 2007.

- in assessing the reasonably available alternative measures, the Panel wrongly excludes some of the alternatives proposed by the European Communities, on the basis that those alternatives are related to the manner in which the import ban is implemented *in practice*, that they are not necessarily readily available, that they do not avoid the waste tyres arising specifically from imported retreaded tyres, that they already exist in Brazil, or that they are individually capable of disposing only of a small number of waste tyres. Moreover, the Panel has ignored important facts and arguments presented by the European Communities, has referred to the evidence submitted by the parties in a selective and distorted manner, and has effectively shifted the burden of proof to the EC. These findings are inconsistent with Article XX(b) of the GATT and with the Panel's duty to make an objective assessment of the matter before it, including of the facts of the case, as required by Article 11 of the DSU;
 - contrary to Article XX (b) of the GATT, the Panel has erred by not carrying out a process of weighing and balancing the relevant factors and elements (objective pursued, trade-restrictiveness of the measure, contribution and alternatives);
- (b) the Panel's finding that the exemption, from the import ban and other challenged measures, of imports of retreaded tyres from other Mercosur countries does not constitute arbitrary or unjustifiable discrimination (paragraphs 7.270 to 7.289 of the Panel Report). This finding is inconsistent with the chapeau of Article XX of the GATT;
- (c) the Panel's 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 (paragraphs 7.292 to 7.294, 7.296 and 7.306 of the Panel Report). This finding is inconsistent with the chapeau of Article XX of the GATT;
- (d) the Panel's finding that the Mercosur exemption does not constitute a disguised restriction on international trade, and that imports of used tyres would constitute a disguised restriction only to the extent that they significantly undermine the objectives of the ban (paragraphs 7.347 to 7.355 of the Panel Report). This finding is inconsistent with the chapeau of Article XX of the GATT;
- (e) the Panel's decision to exercise judicial economy with respect to the European Communities' claims under Articles XIII:1 and I:1 of the GATT (paragraphs 7.453 to 7.456 and 8.2 of the Panel Report). Since the Panel found that the Mercosur exemption is not incompatible with the chapeau of Article XX GATT, a separate finding on the compatibility of this exemption with Articles XIII:1 and I:1 GATT would have been necessary to secure a positive resolution of the dispute, as required by Articles 3.3, 3.4, 3.7 and 11 of the DSU. The European Communities therefore asks the Appellate Body to find that the Mercosur exemption is incompatible with Articles XIII:1 and I:1 of the GATT, and is not justified either by Article XXIV or by Article XX(d) of the GATT.
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