

ANNEX 1¹
RESPONSES OF PARTIES TO QUESTIONS FROM THE PANEL

I. FOLLOWING THE FIRST SUBSTANTIVE MEETING OF THE PANEL

A. THE PRODUCTS AT ISSUE

Question 1. To both parties.

The Panel notes that different terms are used by the parties to designate retreaded tyres and the material from which they are made :

- (a) "retreaded,"
- (b) "recycled,"
- (c) "reconditioned,"
- (d) "top-capped,"
- (e) "recapped,"
- (f) "remoulded tyres,"
- (g) "used tyre carcasses"
- (h) "casings"
- (i) "used tyres"

(see e.g. Brazil's first written submission paragraphs 15, Exhibits EC-29, EC-34, BRA-72 and BRA-84).

Could you please define these terms, and clarify which of these terms designate retreaded tyres, which of them designate types of retreaded tyres, and which of them designate the material from which retreaded tyres are made?

Response of the European Communities

1. "Retreaded tyres" are the product at issue in the present dispute. As the European Communities has explained in its first written submission, retreaded tyres are new products which are produced by reconditioning used tyres through the addition of new material replacing the worn tread.²

2. Since retreaded tyres are produced using a used tyre casing, it can be argued that they constitute part of a group of "recycled", "reconditioned" or "remanufactured" goods.³ However, it should be noted that these terms are not sufficiently precise for the purposes of the present dispute. For instance, the term "recycled tyre" could also refer to a tyre produced partially from recycled rubber or other materials. Accordingly, the European Communities would suggest referring exclusively to "retreaded tyres" as the product at issue in the present case.

3. Retreaded tyres can be produced through a number of different processes. According to UNECE Regulations 108 and 109, there are three methods for retreading new tyres, namely top-capping (replacement of the tread), re-capping (replacement of the tread and with the new material extending over part of the sidewall) and bead to bead (replacement of the tread and renovation of the sidewall including all or part of the lower area of the tyre).⁴ The Brazilian technical regulation contained in Portaria 133 of 27 September 2001 mentions the same three methods, namely top-

¹ Footnotes in this section are those of the parties.

² European Communities' first written submission, para. 2.

³ For a definition of this latter term, which is used interchangeably with reconditioning, cf. Communication from the United States, TN/MA/W/18/Add.11 (Exhibit EC-65).

⁴ UNECE Regulation 108, para. 2.37 (Exhibit EC-6); UNECE Regulation 109, para. 2.37 (Exhibit EC-7).

capping (recapagem), recapping (recauchutagem) and remoulding (remoldagem).⁵ As the European Communities has explained in its first written submission, there are also different methods for applying the new tread, namely the cold and the hot method.⁶ Regardless of the method used, the resulting new tyre is to be regarded as a "retreaded tyre" and must meet the required specifications.

4. The European Communities notes that the Brazilian legislation does not always appear to use these terms in a consistent manner. In particular, Article 40 of Portaria Secex 14/04 (Exhibit EC-29) bans the importation of "pneus recauchutados e usados", whereas it exempts from this ban "pneus remoldados" imported from MERCOSUR countries. The European Communities understands that the term "recauchutados" in Article 40 is not intended to refer only to retreaded tyres produced by the specific method of recapping, but all retreaded tyres, and that this is also how the ban has been applied. This finds further confirmation in Decree 3.919 of 14 September 2001 (Exhibit EC-34), which imposes a fine on the importation and internal marketing etc. of any "pneu usado ou reformado", i.e. for all retreaded tyres. Pneu reformado is also the generic term used in Portaria INMETRO No. 133.⁷

5. As far as the term "remoldado" in Article 40 of Portaria 14 is concerned, the European Communities notes Brazil's statements that the MERCOSUR exemption applies narrowly only to the one type of retreaded tyre that is called "remoldado" in Portaria 133.⁸ In the light of the inconsistent terminology used in the Brazilian legislation, the European Communities finds this explanation doubtful. In this context, it is worth pointing out that Decree 4.592 (Exhibit EC-42) exempts from said fines "pneumáticos reformados", i.e. all retreaded tyres, originating in MERCOSUR countries. In any event, such a distinction between remoulded and other retreaded tyres would be arbitrary, since there are no differences between these tyres in terms of their effects for human life or health.

6. Used tyres are to be distinguished from retreaded tyres. As the European Communities has explained, a retreaded tyre is a new product intended to be placed on the vehicles in exactly the same way as a new tyre. This is also illustrated by the differences in tariff classification: retreaded tyres are classified under HS subheadings 4012.11, 4012.12, 4012.13 and 4012.19, whereas used tyres are classified under subheading 4012.20.

7. The term "used tyres" includes tyres which have undergone some use, but which may still be safely used on a vehicle (mid-life tyres). Moreover, the term used tyres also includes tyres which may no longer be used on a vehicle, since they no longer meet the minimum tread requirements, but which are suitable for being retreaded. Such tyres may be referred to as "retreadable casings" or "retreadable carcasses". Finally, the term also includes used tyres which are no longer usable nor retreadable, but which are destined for recycling, recovery or disposal.

Response of Brazil

8. Retreaded tyres, for purposes of international trade, are tyres classified under the following HS subheadings: 4012.11, 4012.12, 4012.13, and 4012.19. Brazil's internal regulations refer to retreaded tyres as "pneus reformados" (translated in Exhibit EC-11 as "reconditioned tyres") and include them in the general category of used tyres. See Technical Regulation annexed to Portaria INMETRO 133/2001, para. 3.28 (Exhibit EC-11).

⁵ Exhibit EC-11, paras. 3.29-3.31. The terms used in the translation of this section provided by the European Communities should be adjusted as indicated above.

⁶ European Communities' first written submission, para. 28.

⁷ Exhibit EC-11, point 3.28.

⁸ Brazil's first oral statement, para. 64.

9. Recycled tyres, a term used in Exhibit BRA-72, is an incorrect translation of "pneus reformados", which should have been translated as "retreaded tyres" or "reconditioned tyres". The term "recycled", when referring to tyres, describes devulcanized rubber (material obtained from a used tyre through devulcanization). A retreaded tyre is not a recycled good, but a reconditioned good, because it adds approximately 30 per cent of new material to 70 per cent of used material.

10. Reconditioned tyres is a term that Brazil's internal regulations use to describe retreaded tyres, as defined in Brazil's Response to Question 1(a).

11. Top-capped tyres are one of the three types of retreaded tyres. The top-capping process involves replacing the tread of a tyre. Brazil's technical regulations refer to the process of top-capping as "recapagem" (translated in Exhibit EC-11 as "recapping"). See Technical Regulation annexed to Portaria INMETRO 133/2001, para. 3.29 (Exhibit EC-11).

12. Recapped tyres are one of the three types of retreaded tyres. The recapping process involves replacing the tread and the shoulder of the used tyre. Brazil's technical regulations refer to the process of recapping as "recauchutagem" (translated in Exhibit EC-11 as "retreading"). See Technical Regulation annexed to Portaria INMETRO 133/2001, para. 3.30 (Exhibit EC-11).

13. Remoulded tyres are one of the three types of retreaded tyres. The remoulding process involves replacing the tread, the shoulders, and the sidewall areas of the used tyre. Brazil's technical regulations refer to this process as "remoldagem" (translated in Exhibit EC-11 as "remoulding"). See Technical Regulation annexed to Portaria INMETRO 133/2001, para. 3.31 (Exhibit EC-11).

14. Used tyre carcass is the structural part of a used tyre, made up of one or more layers with overlaying plies, to which the new tread is applied in the course of retreading. See Technical Regulation annexed to Portaria INMETRO 133/2001, para. 3.7 (Exhibit EC-11).

15. Casings is a term that describes used tyres in the context of future retreading.

16. Used tyres are, for purposes of international trade, tyres classified under the HS subheading 4012.20. In Brazil's internal regulations – note that there is no requirement that internal regulations follow the HS system – used tyres are defined as tyres that have undergone some form of use and/or wear and tear. This is a general category that embraces retreaded tyres, part-worn tyres and waste tyres that may be suitable for retreading or must be disposed of. See the Technical Regulation annexed to Portaria INMETRO 133/2001, paragraph 4.2 (Exhibit EC-11).

Question 2. To Brazil.

In paragraph 184 of its first written submission, Brazil states that "[B]ecause the tribunal limited its decision to remoulded tyres, Brazil likewise limited the scope of exemption and continued to prohibit MERCOSUR imports of tyres retreaded by other means (which is why the exemption from the ban is only limited)". A similar statement is made at paragraph 77 of the same submission.

What other types of retreaded tyres, if any, from MERCOSUR Member countries remain subject to Brazil's import prohibition? What proportion of other MERCOSUR countries' production remains covered by the import ban?

Response of Brazil

17. There are three different types of retreaded tyres: remoulded, recapped, and top-capped. The MERCOSUR dispute referred only to remoulded tyres and, therefore, Brazil lifted the ban for this category only. The importation of recapped and top-capped tyres produced in other MERCOSUR countries remains prohibited. Brazil has no information on the proportion of tyres retreaded by means

of recapping or top-capping in Argentina, Paraguay, and Uruguay. However, because remoulding is the most complex of the retreading processes, it is safe to assume that a country that produces remoulded tyres likewise has the capability to produce recapped and top-capped retreads.

Question 3. To both parties.

Do the Parties agree that the products at issue in this case are retreaded tyres classified under NCM codes 4012.11, 4012.12, 4012.13 and 4012.19? (see references in European Communities' first written submission paragraphs 16, 40 and 44, and Brazil's first written submission paragraph 16).

Response of the European Communities

18. Yes.

Response of Brazil

19. Brazil agrees.

Question 4. To both parties.

What are the differences, if any, among "commercial", "passenger" and "truck and aircraft" retreaded tyres? Does the scope of the products at issue in this case encompass all these different types of retreaded tyres? (see references in European Communities' first written submission paragraph 26 and Brazil's first written submission paragraph 16).

Response of the European Communities

20. The difference between retreaded tyres for passenger cars, commercial vehicles, and aircraft lies in the different technical standards that apply to their production.⁹ One significant resulting difference is that passenger car tyres may only be retreaded once, whereas no similar limitation exists for tyres for commercial vehicles and aircraft.¹⁰ A further difference is that the age of a casing for a passenger car tyre may not exceed 7 years when it is being retreaded, whereas no similar restriction exists for commercial vehicle and aircraft tyres.¹¹

21. Article 40 of Portaria Secex prohibits the issuing of import licences for retreaded tyres falling under the heading 4012. This heading covers retreaded tyres of a kind used on motor cars (subheading 4012.11), of a kind used on buses or lorries (subheading 4012.12), of a kind used on aircraft (subheading 4012.13), and other (subheading 4012.19). The ban thus applies to all retreaded tyres for passenger cars, commercial vehicles, and aircraft. As the European Communities has confirmed, it challenges the import ban as such, and with respect to all of the retreaded tyres covered by it.¹²

Response of Brazil

22. While there are many technical and market differences, the functional difference relevant to this dispute is that unlike passenger car tyres, commercial vehicle, truck, and aircraft tyres can be retreaded more than once. The scope of the products at issue in this case encompasses all these types of retreaded tyres. All types of retreaded tyres are similar in one important aspect: when imported, they have a shorter remaining lifespan than new tyres.

⁹ Cf. European Communities' first written submission, paras. 18, 23.

¹⁰ European Communities' first written submission, para. 26.

¹¹ European Communities' first written submission, para. 26, fn. 18.

¹² European Communities' first oral statement, para. 32.

Question 5. To Brazil.

Is it Brazil's position that "commercial" and "passenger" retreaded tyres pose the same type and level of health and environmental risk? (see Brazil's first written submission, paragraph 4)

Response of Brazil

23. Commercial vehicle retreads pose the same type of health and environmental risk as passenger retreads. Retreaded tyres in both categories have fewer remaining lifecycles and become waste sooner. The level of risk from the commercial vehicle retreads is frequently higher than that from the passenger retreads because (1) commercial vehicle retreads are substantially heavier and, thus, produce more waste, and (2) a commercial retread that is imported closer to the end of its useful life could have less than 20 per cent of its useful life left compared to the 50 per cent in the case of the passenger car retread.

24. In its first written submission, Brazil referred mainly to passenger car retreads simply because these retreads represent virtually all of the European Communities' exports to Brazil. Brazil's analysis applies equally to the commercial vehicle retreads, however.

Question 6. To both parties.

Is there any difference between imported and domestic retreaded tyres, and between MERCOSUR and non-MERCOSUR retreaded tyres, that would be significant for the purposes of these proceedings, including with respect to their "likeness" within the meaning of Articles I.1, III.4, and XIII?

Response of the European Communities

25. No.

Response of Brazil

26. There is no difference with respect to the "likeness" of the products, within the meaning of Articles I:1, III:4, and XIII. There is an important functional difference, however, between the domestic and imported retreaded tyres. Domestic retreads help solve the waste tyre problem by extending the lifespan of tyres used domestically, which would otherwise have to be disposed of immediately. Imported retreads, on the other hand, exacerbate the waste tyre problem because they either cannot be retreaded at all (passenger car tyres) or have fewer remaining lifecycles (commercial vehicle tyres).

Question 7. To both parties.

Do the Parties agree that retreaded tyres are to be distinguished from used tyres? (see references in European Communities' first written submission paragraphs 17 and 39, and Brazil's first written submission paragraph 16)

If so, please explain in detail how they differ.

Response of the European Communities

27. Yes. The European Communities can refer the Panel to its response to Question 1 above.

Response of Brazil

28. Brazil agrees that retreaded tyres are to be distinguished from used tyres for purposes of international trade. See Brazil's Responses to Questions 1 and 30.

Question 8. To Brazil.

Does Brazil export any retreaded or used tyres? If so, please provide relevant data.

Response of Brazil

29. The amounts of Brazil's used and retreaded tyre exports are *de minimis*:

Brazil's exports of used and retreaded tyres, in tonnes

| | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 |
|------------------------|------|------|------|------|------|------|
| Used Tyres | 0 | 73.6 | 0.39 | 20.3 | 1.3 | 11.4 |
| Retreaded Tyres | 30.9 | 4.1 | 20.9 | 9.3 | 0.9 | 14.2 |

Source: Sistema Alice/MDIC

Question 9. To the European Communities.

In paragraph 45 of your first written submission, you highlight the benefits arising from retreaded tyres. In your view, do these benefits arise also for countries importing retreaded tyres? If so, how?

Response of the European Communities

30. In the view of the European Communities, these advantages benefit all countries, including the importing country.

31. Retreading of tyres leads first of all to savings in terms of energy and materials (such as rubber and oil). These resources are scarce, and are traded on a global scale. Accordingly, savings of these scarce resources is in the interest of all countries.

32. Similarly, reductions of emissions in comparison to the production of new tyres will lead to a reduction in air pollution, notably in relation to CO₂ emissions, one of the six greenhouse gases covered by the Kyoto Protocol to the United Nations Framework Convention on Climate Change.¹³ Since air pollution and global warming are universal concerns, these effects are in the interest of all countries, including the importing member.

33. As further background, the European Communities provides a recent submission from the United States, which explains more broadly the environmental benefits of remanufacturing in terms of energy consumption, use of materials, and reduction of pollution (Exhibit EC-65).

Response of Brazil

34. The benefits from retreading that the European Communities describes in paragraph 45 of its first submission do not occur in the territory of countries importing retreaded tyres. As Brazil explained in paragraph 8 of its Oral Statement, a country that retreads the tyres it consumes reduces its waste tyre burden. Brazil could benefit from the European Communities' retreading activities only if the European Communities tyre manufacturers retreaded casings that had been collected in Brazil. Because this is not the case, Brazil realizes no benefit from the retreading activities that take place in the European Communities. On the contrary, retreaded tyre imports from the European Communities exacerbate Brazil's waste tyre problem because these tyres have a shorter lifespan.

¹³ Exhibit EC - 66.

Question 10. To the European Communities.

In paragraph 18 of your first written submission, you refer to two regulations developed by the UNECE. In light of the fact that Brazil is not a Member of UNECE, could you please clarify what role such regulations should play in these proceedings ?

Response of the European Communities

35. The UNECE regulations lay down the technical standards according to which retreaded tyres for passenger vehicles (UNECE Regulation 108) and commercial vehicles (UNECE Regulation 109) are produced.

36. The UNECE Regulations are adopted by the administrative committee established by the UNECE Vehicles Agreement (Exhibit EC-5). The UNECE Vehicles Agreement currently has 44 Members representing countries from many regions of the world, and constitutes the most important standard-setting body for automobiles.

37. Even though Brazil is not a party to the UNECE Agreement, it has used the UNECE Regulations as the basis for the preparation of its own technical standard for retreaded tyres for passenger vehicles, and seems to be prepared to do the same with respect to retreaded tyres for commercial vehicles.¹⁴ Since there appears to be no disagreement on this point between the parties, the Panel may assume that UNECE Regulations 108 and 109 constitute an appropriate technical standard for the production of retreaded tyres.

38. UNECE Regulations 108 and 109 are also relevant context for the evaluation of the justification of Brazil's import ban. In accordance with the fourth recital of its preamble, the objective of the Vehicles Agreement is to "facilitate the use in their countries of the vehicles, equipment and parts, where approved according to these prescriptions by the competent authorities of another contracting party". A major objective underlying the agreement is thus to facilitate trade in vehicles, equipment and parts which are in accordance with the Vehicles Agreement and the Regulations adopted under it.

39. The fact that the Contracting Parties adopted technical regulations for retreaded tyres indicates that they assumed that trade would occur in these products. It is clear that if Brazil was correct, and WTO Members were free to ban the importation of retreaded tyres, this would significantly reduce the useful value of UNECE Regulations 108 and 109. The fact that there exist accepted international standards for the production of retreaded tyres is thus a further indication that there is no justification for banning the importation of this product.

Response of Brazil

40. UNECE regulations establish technical standards for retreaded tyres. Brazil agrees with the European Communities that retreaded tyres manufactured in conformity with the UNECE standards are safe. Their safety, however, is immaterial to this dispute: Brazil prohibits imports of retreaded tyres not because they are somehow less safe, but because they have a shorter remaining lifespan. *See* UNECE No. 108, para. 6.2 (Exhibit BRA-2) ("passenger car tyres which have been previously retreaded shall not be accepted for further retreading").

¹⁴ European Communities' first written submission, paras. 21-22.

Question 11. To the European Communities.

In paragraph 28 of your first oral statement, you refer to the existence of "cheap low quality new tyres, some of which can no longer even be retreaded". Could you please clarify whether different categories of new tyres exist, that are more or less retreadable? Does this factor have any particular relevance to the issues under consideration in these proceedings?

Response of the European Communities

41. Not all new tyres are, but virtue of the way in which they are constructed, necessarily suitable for being retreaded after their first use. The existence of low-quality tyres which are not suitable for retreading is regularly identified by the retreading industry as a constraint which limits the availability of casings suitable for retreading.

42. For instance, the European Retread Manufacturers Association provides the following explanations:¹⁵

"Of the tyres rejected because of poor service repairs and casing integrity failures, around 64% were because of material failure making the casing unsuitable for further retreading. This included those tyres that have been retreaded as many times as is possible and served out their useful life. However, in excess of 35% of the repair and integrity rejects were classified as "unwanted", due to their size or load specifications or unsuitability of certain tyre brands for retreading. A substantial proportion of new tyres on the road are therefore not seen as being suitable to retread because the basic build is not sufficiently durable."

43. The same problem is also highlighted by the UK Environment Agency: ¹⁶

"The cost of many new tyres imported to the UK is similar to the price of a retreaded tyre, but the imported tyre may not be high quality and often cannot be retreaded. The motorist is likely to buy a new tyre rather than a retreaded tyre if there is little difference in cost."

44. In a report prepared of the Department of the Environment of Australia, the following statements can be found:¹⁷

"While developments in tyre manufacturing technology have resulted in improvements in the life of tyres, the life of the casing appears to have followed the opposite trend, with evidence suggesting casing life is decreasing. Industry representatives have suggested that 'cheap' imported tyres are not generally suitable for retreading. It should also be noted that, increasingly, some locally produced tyres have also been identified as unsuitable for retreading."

45. In a study produced by a team from the University of Lund, Sweden, the following factors are mentioned as limiting the rate of retreading in Sweden:¹⁸

"design/manufacture of most passenger car tyres without consideration of the need for retreading;

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

¹⁶ Exhibit EC-15, para. 4.2 (emphasis added).

¹⁷ Exhibit EC-68, Section 8.4.2.

¹⁸ Exhibit EC-69, p. 12.

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

46. In a study of the University of Missouri, the following statements can be found:¹⁹

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

47. Similar statements are also found specifically with respect to truck tyres. For instance, in a recent publication, Marco Mandrioli, marketing director of a retreading business, makes the following statements:²⁰

"Tyres and Accessories: How Detrimental are imports of low-budget truck tyres from the far east to the European retreading business?"

Marco Mandrioli: In addition to the poor quality of those imported products, the true issue is that they are not retreadable. This fact increases the lack of casings for retreading."

48. The question whether new tyres are in all cases retreadable is relevant for assessing the contribution which Brazil's import ban makes to the reduction of waste tyres in Brazil. Brazil's defence is based on the assumption that all new tyres can be retreaded, whereas retreaded tyres cannot be retreaded again. The statements above show that this assumption does not hold true for all new tyres. The situation is even more striking for truck tyres, since a retreaded tyre, which is made from a good-quality casing, is frequently still retreadable several times, whereas a low-quality new tyre is not.

49. In order to show that its ban on the importation of retreaded tyres contributes to a reduction of waste tyres in Brazil, Brazil would therefore have to show the following:

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

50. Accordingly, the quality and retreadability of new tyres sold in Brazil is an essential element in the demonstration of the contribution of Brazil's import ban to its stated goals.

51. Moreover, the fact that Brazil restricts the importation of retreaded tyres, whereas it does not take similar measures against low-quality new tyres is further evidence that the ban constitutes an arbitrary and unjustifiable discrimination against imported retreaded tyres.

¹⁹ Exhibit EC-70.

²⁰ Exhibit EC-71, p. 13.

Question 12. To Brazil.

In paragraph 28 of its first oral statement, the European Communities refers to the existence of "cheap low quality new tyres, some of which can no longer even be retreaded". Could you please comment on the types of new tyres used in Brazil and whether such distinctions are relevant on the Brazilian market ?

Response of Brazil

52. New tyres sold in Brazil (whether manufactured domestically or imported) are high-quality tyres that comply with strict technical and performance standards that are based on international standards. Tyres manufactured in accordance with these standards have the potential to be retreaded. New tyres sold in Brazil are not "cheap low quality new tyres" with no potential for future retreading.

B. RETREADING ACTIVITIES IN BRAZIL

Question 13. To Brazil.

Are used tyres from the European Communities or other sources currently being imported into Brazil? (see suggestion in European Communities' first written submission paragraphs 52, 82, 132, 147 and 155, and Brazil's first written submission paragraphs 76 and 153) If so, what is the legal basis for such imports?

Response of Brazil

53. Brazil prohibits imports of used tyres. See Portaria SECEX 14/04 (Exhibit BRA-84). However, used tyres from the European Communities and other sources have entered Brazil exclusively through preliminary injunctions issued by Brazilian courts. These preliminary injunctions were issued in *ex parte* proceedings, initiated by Brazilian retreaders that prefer cheaper foreign casings. When the government had an opportunity to present its case during the merits stage, the courts reversed the initial grant of an injunction in 67 per cent of the cases. On appeal, courts ruled against the injunction in 92.5 per cent of the cases.

Question 14. To Brazil.

What are the legal rights that the companies claim are affected by the import ban in making their requests for preliminary injunction?

Response of Brazil

54. Petitioners have typically advanced the following legal arguments in requests for preliminary injunctions:

- (a) A *portaria* is not an appropriate instrument to restrict constitutionally-protected rights; a legislative act is required to ban used tyre imports;
- (b) The government agency that imposed the initial ban (DECEX) lacked the constitutional authority to do so;
- (c) Prohibiting imports of used, but not new tyres violates the constitutional principle of isonomy, in that it favours importers of new tyres over importers of used tyres;
- (d) The import ban interferes with the constitutional principle of free enterprise because it restricts access to supplies of raw material necessary for domestic retreaders to carry on their business.

55. Brazil's Federal Supreme Court has already rejected the first three arguments, and the Government of Brazil anticipates that the Court will soon reject the remaining argument, at which point the injunctions will effectively end. So far, there is a large number of trial court decisions that affirm the compatibility of the import ban with the principles of legality, isonomy, and free enterprise. See Exhibit BRA-86.

Question 15. To Brazil.

According to Brazil, in 92.5 % of the cases in which preliminary injunctions have been ordered, the appeals court has upheld the import ban (see Brazil's first written submission paragraph 153). What happened in the rest of cases other than those 92.5% of the cases?

Response of Brazil

56. In the remaining cases, the appellate courts have either upheld the grant of a preliminary injunction, or reversed the previous denial of the injunction. Note that an appellate court ruling on preliminary injunctive relief has no effect on the outcome of the case on the merits – it only deals with the narrow issue of whether the petitioning party made a showing sufficient to obtain a preliminary injunction.

Question 16. To Brazil.

Are all used tyres currently imported into Brazil being retreaded? If not, what is the utilisation of the remaining imported used tyres?

Response of Brazil

57. While the government of Brazil does not maintain these data, information presented in a public hearing in the Brazilian Senate by the president of BS Colway, Brazil's largest importer of used tyres, indicates that a large number of imported casings arrive unsuitable for retreading. In 2005, Brazilian retreaders imported almost 11 million casing, of which only 6 million were retreaded or stocked for later use by the importers. The remaining casings were either illegally sold or disposed of. See Exhibit BRA-94. Because the preliminary injunctions authorize the importation of used tyres only as raw material, the Government of Brazil has imposed heavy fines for illegal sales of used tyres.

Question 17. To Brazil.

Could you please comment on the statement made by the European Communities in paragraph 36 of its first oral statement?

Response of Brazil

58. Suitability figures aggregated by Mazola are the best available estimate of how many tyres collected in Brazil are suitable for retreading. Only the private sector keeps this kind of information, and no country, including Brazil, can provide a precise suitability figure. The Government of Brazil sought out other sources in addition to Mazola, but no other company kept record of the actual numbers of suitable tyres.

59. Brazil believes that the Mazola figures are both reliable and representative. Mazola selects suitable casings for Brazil's leading retailer of tyres, DPaschoal, which operates in more than 200 Brazilian cities in seven states, accounting for 78 per cent of the Brazilian fleet of motor vehicles. Because of the company's extensive footprint, a sample based on DPaschoal's numbers is representative of used tyre collections in Brazil. The suitability data are also reliable because they were not prepared for purposes of this dispute, but are Mazola's internal data.

60. Contrary to the European Communities' suggestion, Mazola figures do not contradict any statements made by the Brazilian authorities. See Brazil's Response to Question 25.

Question 18. To Brazil.

*How many injunctions are currently in force, that allow imports of used tyres from the European Communities, and what volumes of imports does this represent? Is there a possibility that retreaders in Brazil may import (more) used tyres in the future by submitting new injunction requests? On what basis do you argue in paragraph 51 of your first oral statement that future requests for injunctive relief will soon be denied *ad portas*?*

Response of Brazil

61. The cases related to the importation of used and retreaded tyres brought against the Federal Union are decided by the members of the Federal Judiciary. There are 988 federal judges in Brazil who adjudicate the cases in the first instance. At the appellate level, the country is divided into five regions and each has an Appeals Court. There are 133 federal justices acting in the five Appeals Courts. To obtain the information required by the Panel, the Brazilian Government is consulting these Appeals Courts. Brazil will provide this information as soon as possible.

62. The evolution of the Brazilian case law on the subject supports Brazil's statement that future requests for injunctions will soon be denied *ad portas*. As Brazil explained in the response to Question 14, the Federal Supreme Court and all Federal Appeals Courts have already rejected most of the arguments used by importers to obtain the preliminary injunctions. Imports of used tyres continue, for the most part, not because courts are issuing more injunctions, but because some of the previously-issued injunctions remain in effect. While nothing prevents domestic retreaders from submitting requests for new preliminary injunctions, fewer and fewer courts are now willing to grant them.

63. One of these imports authorizations is currently on the threshold of being analyzed by the Federal Supreme Court. In 2003, the larger importer of used tyres into Brazil obtained such an authorization to import used tyres as raw material. On March 10th 2006, the 2nd Regional Federal Tribunal ruled in favor of the Government and reversed the decision which granted the authorization. On May 17th, the importer presented an "Extraordinary Appeal" so as to submit the dispute to the Federal Supreme Court. The "Extraordinary Appeal" is now under consideration by the president of the 2nd Regional Federal Tribunal, which must analyze whether the appeal fulfills all the procedural requirements. Therefore, it is highly probable that in the next few months the Supreme Court will adjudicate the issue. Given the overwhelming prevalence of decisions recognizing the legitimacy of the ban, the Government anticipates that the Federal Supreme Court will put an end to the loophole that have allowed millions of used tyres to be imported into Brazil.

Question 19. To Brazil.

Could you please clarify what is, in your view, the relevance to the Panel's assessment of the fact that imports of used tyres are taking place, under court injunctions? Given that these imports are taking place under court injunctions (as opposed, for instance, to illegal trafficking), can they be considered to be taking place lawfully?

Response of Brazil

64. The fact that imports of used tyres are taking place under preliminary injunctions issued by some courts in Brazil is relevant to demonstrate that, in the absence of governmental intervention, domestic retreaders will continue to import high volumes of cheap casings instead of collecting and retreading tyres that have been used in Brazil. The fact that local retreaders are desperately seeking to circumvent the import ban through court injunctions demonstrates, therefore, that the ban is necessary to induce local retreaders to collect waste tyres accumulated in Brazil for retreading, rather than importing used tyres – many of which are discarded upon importing for not being suitable for retreading – which only exacerbates the waste tyre accumulation problem.

65. The imports of used tyres under preliminary injunctions can be considered to be taking place lawfully in a procedural sense in that the issuing courts had the legal power to do so. Nevertheless, the fact that imports of used tyres are taking place under procedurally correct court injunctions does not mean that those injunctions were properly granted as a matter of substantive law. As Brazil has stated numerous times in this proceeding, in two thirds of the cases, the courts that issued the injunctions concluded that they were in error to do so and reversed their own original decisions. Moreover, in 92.5 per cent of the remaining cases, the court of appeals has overruled the court of lower instance and lifted the injunction. Courts have taken notice of this precedent and will soon stop granting these *ex parte* injunctions altogether.

Question 20. To both parties.

Could you please provide further evidence in support of the claims that Brazilian used tyres are or are not suitable for retreading? (see positions in European Communities' first written submission paragraphs 81 and 85, and Brazil's first written submission paragraphs 79 and 108)

Response of the European Communities

66. First of all, the European Communities would like to remark that as regards the conditions of Article XX(b), the burden of proof is on Brazil. This means *inter alia* that Brazil must demonstrate the contribution its import ban makes to the reduction of waste tyres in Brazil. Therefore, it is for Brazil to prove whether and to which extent tyres used in Brazil are retreadable, and are actually retreaded.

67. This remark notwithstanding, the European Communities can refer the Panel to the evidence it has already submitted in para. 81 and 82 of its first written submission. Notably, it is recalled that INMETRO, as the Brazilian Standard Setting Authority, has confirmed that the use of Brazilian domestic casings for retreading is not viable (Exhibit EC-45). In addition, the European Communities has referred to Brazilian court judgments in which the importation of used casings was authorised as "indispensable primary matter" for domestic retreaders (Exhibit EC-46).

68. In addition, the European Communities submits, as Exhibit EC-72, a video produced by the Brazilian retreaders association ABIP and ABR. In this video, which documents the ongoing debate in Brazil on the prohibition of the importation of used tyres, several Brazilian retreaders testify that they require the importation of used tyres in order to be able to carry out their retreading business in Brazil. For instance, Ademir Serafin, President of the Association of Retreaders of the State of Sao Paulo, declares the following:²¹

"We need good quality casings in order to supply the domestic market, casings that are not available currently, jeopardising our activity [...]"

69. The European Communities would also remark that there is no plausible explanation why Brazilian retreaders should dispense considerable resources in order to be obtain the right to import retreadable casings, if such casings were readily available in Brazil. Brazil's efforts to argue that importing casings is cheaper than procuring them domestically are unconvincing. Overall, the considerable and sustained effort by Brazilian retreaders to obtain the importation of used casings provides convincing evidence that retreadable casings are not available in sufficient quantity in Brazil.

Response of Brazil

70. Statistics on the retreadability of casings are scarce all over the world. There are no official sources for this information neither in Brazil nor anywhere else. When available, such information is always provided by the private sector, typically by collectors and retreaders. The Government of

²¹ Exhibit EC-72, minute 8:35.

Brazil has researched intensively to obtain precise data on the retreadability of domestic casings and found no source other than Dpaschoal and Mazola. As Brazil explained in its response to Question 17, Brazil believes that the Mazola suitability figures are representative and reliable.

71. Indirect evidence also suggests that the share of retreaded tyres made from domestic casings is quite high. According to the industry data, between 2001 and 2005, more than 84 million tyres were retreaded in Brazil. In the same period, just 27 million used tyres were imported. Many imported casings are not suitable for retreading, but even if all imported casings had been retreaded between 2001 and 2005, 57 million retreads would have still been manufactured from domestic casings. *See Exhibit BRA-95.*

72. Finally, Brazil has a robust retreading industry that dates back to the 1950s. The industry relied solely on domestic casings before the imported casings began to come in 1990s. At the time, domestic retreaders reported no problems with finding suitable casings in Brazil.

Question 21. To Brazil.

Brazil submits in paragraphs 76 and 153 of its first written submission that while domestic court proceedings are pending on the importation of used tyres, the Brazilian government has worked vigorously to stop the importation of both retreaded and used tyres (see Brazil's first written submission paragraph 76). Could Brazil explain what specific efforts have been made by the Brazilian government in this regard?

Response of Brazil

73. Brazil is a democratic country where the rule of law prevails. Because the importation of used tyres occurs only through the judicial decisions, the only measure the Government can employ to oppose these imports is to present its perspective in the course of the proceedings and appeal when necessary. That is what the government has done with significant success so far. Every time a domestic retreader requested an injunction, the Government of Brazil has actively opposed it, once notified of the pending case. The Government participated in the proceedings through its various agencies, including DECEX and IBAMA. *See Exhibit BRA-86.*

74. In addition, the very regulation that the European Communities now challenges, Portaria SECEX 8/2000 (subsequently incorporated into Portaria SECEX 14/2004), was adopted in an effort to stop the injunctions. *See Brazil's Response to Question 29.*

Question 22. To the European Communities.

Please clarify whether the increase in the imports of used tyres between 2003 and 2005 described in paragraph 79 of the European Communities' first written submission is entirely attributable to import authorized under the injunctions granted by Brazilian courts?

Response of the European Communities

75. The European Communities understands that this is the case. However, since the administration of Brazilian law is the responsibility of the Brazilian authorities, it is primarily for Brazil to explain the reasons for which the importations were allowed.

Question 23. To the European Communities.

In paragraph 80 of your first written submission, you indicate that EU exports of retreaded tyres to Brazil have declined dramatically to reach "close to zero". In light of the import prohibition affecting imports of retreaded tyres from the European Communities, could you please clarify what the small amount of imports that does take place corresponds to ?

Response of the European Communities

76. According to Brazil's data base Alice, on which the graph provided in paragraph 79 of the European Communities' first written submission was based, Brazil still imported, in 2005, 302,435 kg of retreaded tyres from the European Communities. The extractions from the Brazilian data base are provided as Exhibit EC-73.

77. The European Communities does not know what is the exact reason for these numbers. To the knowledge of the European Communities, the import ban on retreaded tyres is generally applied against all imports from non-MERCOSUR countries, as evidenced by the dramatic decline in imports from the European Communities since 2000. The European Communities suggests asking the question to Brazil as the WTO Member applying the import ban.

Question 24. To Brazil.

On the Brazilian market for tyres, what is the distribution between sales of new and retreaded tyres? How is that distribution affected, if at all, by the existence of the import ban?

Response of Brazil

78. Between 2000 and 2005, the distribution in the market share of new and retreaded tyres in Brazil changed as following:

- New tyres (domestic): *decreased* from 54.2% to 50.8%.
- New tyres (imported): *increased* from 6.6% to 9.1%.
- Retreaded tyres (domestic): *increased* from 34.3% to 39.7%.
- Retreaded tyres (imported): *decreased* from 4.9% to 0.4%.

79. The data demonstrate that new tyre manufacturers in Brazil have not benefited from the import ban – their market share fell, while the market share of imported new tyres has increased.

80. The data on new tyres were provided by the new tyre manufacturers association, ANIP, and refers to sales in the domestic market. The data on domestic retreaded tyres were provided by the retreaders association, ABR, and refers to production, which, due to negligible exports, is practically equal to domestic market sales. The import data were provided by the Ministry of Development, Industry and Foreign Trade.

Question 25. To Brazil.

Please comment on the following passage of a Technical Note of 3 October 2000 of INMETRO cited by the European Communities at paragraph 81 of its first written submission and mentioned again in paragraph 35 of the European Communities' first oral statement:

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

Response of Brazil

81. There are two reasons why the European Communities' reliance on Technical Note INMETRO 83/2000 is misplaced: first, the note merely memorializes the position of the industry's stakeholders as stated to INMETRO. It does not reflect INMETRO's position; and second, the note talks of *economic* viability, not about availability of suitable casings:

(e) Legal effect

The note's only function was to memorialize INMETRO's communications with representatives of Brazil's retreading industry. The views that the note reflects are not the official views of Brazil's authorities, as the European Communities suggests, but the views of the domestic retreaders. The note is not based on any independent investigation by INMETRO and is by no means a final rule or a statement of INMETRO's official position. INMETRO's actual position was formalized in Rule No. 13 of 23 January 2004, which made no mention of suitability.

The European Communities' reliance on the note is particularly disingenuous because INMETRO has repudiated the document. *See* Nota Técnica INMETRO DQUAL 15/2005 (Exhibit BRA-96). INMETRO took the unusual step of specifically repudiating the note because domestic retreaders used it in courts and in the media to support the low suitability argument, as the European Communities does now. In its letter to one of the retreaders, INMETRO threatened legal action should such misuse continue. In that letter, INMETRO expressed concern that the retreader's use of the note created an appearance that a quasi-governmental agency shared the retreader's position on suitability. INMETRO has made clear that the note "had no validity whatsoever" and that any technical note is but an "opinion, not binding the Administration or private parties to its motive or conclusions, unless approved by... Regulations." *See* Notificação INMETRO/DQUAL 10/2005 (Exhibit BRA-97).

(f) Economic viability

In addition, the note did not mention suitability at all – it only stated that obtaining domestic carcasses was not *economically* viable. Economic viability is not the same as the actual suitability of domestic casings – it merely refers to the higher costs of obtaining domestic casings.

Question 26. To Brazil.

Could you please comment on the statement made by the European Communities in paragraph 39 of its first oral statement about the origin of the used tyres retreaded in Brazil?

Response of Brazil

82. The rationale behind the import ban on retreaded and used tyres was to compel the Brazilian retreaders to use only casings collected in the country, and thus to carry out the waste management policy designed by the environmental authorities. However, due to the preliminary injunctions,

Brazil's retreaders processed not only domestic, but also foreign casings. The European Communities' own numbers, however, do not support its assertion that Brazilian retreaders operate largely with imported casings. Even if Brazil retreaded all of the 10.5 million casings imported in 2005, this would have accounted for just 56 per cent of tyres retreaded in Brazil that year. *See Exhibit BRA-95.* The actual percentage is even lower because, as explained in response to Question 16, many imported casings are not suitable for retreading and are discarded after pre-selection.

C. THE IMPORT PROHIBITION

Question 27. To the European Communities.

Could you please clarify whether you are seeking a ruling only in respect of Portaria No. 14, or also in respect of other measures? (see reference in European Communities' first written submission footnote 34 to 59).

Response of the European Communities

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

84. However, the European Communities notes that Brazil has, in the past, claimed that prohibitions on the importation of used goods equally apply to retreaded tyres.²² During the first substantive meeting with the Panel, Brazil equally referred occasionally to retreaded tyres as a type of used tyre.²³

85. As the European Communities has already set out, retreaded tyres are not to be considered as used tyres. However, if the Brazilian authorities were to apply the current measures banning the importation of used goods²⁴ also to retreaded tyres even if Portaria Secex No. 14 were amended by removing retreaded tyres from the import ban, then this would equally constitute a violation of Brazil's WTO obligations.

86. The European Communities would suggest asking Brazil for a clarification on this issue. Should Brazil reply that it would apply the measures banning importation of used goods to retreaded tyres, then the European Communities would equally request a ruling with respect to those measures, but only to the extent that they were to apply to imports of retreaded tyres.

Question 28. To Brazil.

The relevant Brazilian measures concerning the import prohibition on retreaded tyres have been revised twice respectively in 2003 and 2004 following the introduction of the first regulation to this effect (i.e. Portaria SECEX No. 8) in 2000 (see reference in European Communities' first written submission paragraphs 53-55). Could Brazil explain the purpose of these revisions?

Response of Brazil

87. *Portarias* SECEX 17/2003 and 14/2004 were adopted with the purpose of consolidating foreign trade regulations in a single legal document to improve transparency and facilitate foreign trade operations. These *portarias* simply mirror the text of Portaria SECEX 8/2000 and Portaria SECEX 2/2002, which introduced the MERCOSUR exemption.

²² European Communities' first written submission, para. 71, on Brazil's defense before the MERCOSUR Arbitral Tribunal.

²³ Brazil's first oral statement, para. 26: "used tyres, including retreaded ones".

²⁴ European Communities' first written submission, para. 59, fn. 34.

Question 29. To Brazil.

Brazil states in paragraph 65 of its first written submission that the imports of retreaded tyres in its territory continuously increased until 1998, when it clarified that its existing import ban on used consumer goods included retreaded tyres. Please explain how specifically Brazil 'clarified' its policy? Does it mean that imports of retreaded tyres were banned by Brazil even before 2000 when Portaria SECEX No. 8 was established?

Response of Brazil

88. Yes, Brazil has banned imports of used and retreaded tyres since Portaria DECEX No. 8 of 10 May 1991. However, because that regulation dealt with used consumer goods in general, and did not explicitly name tyres or any other goods, some courts and customs authorities erroneously concluded that it did not apply to retreaded tyres or used tyres imported as raw materials for retreading. To safeguard the integrity of the prohibition, Brazil adopted Portaria SECEX 8/2000, which explicitly prohibited imports of retreaded and used tyres, whether imported as part-worn tyres or raw material for retreading.

Question 30. To Brazil.

Please clarify the meaning of the terms "used and retreaded tyres" in Article 40 of Portaria No. 14.

Response of Brazil

89. Because Portaria SECEX 14/2004 is a foreign trade regulation, it employs the HS terminology. Thus, the terms "used" and "retreaded tyres" refer, respectively, to HS tariff lines 4012.20 and 4012.11, 4012.12, 4012.13, and 4012.19.

Question 31. To the European Communities.

In paragraph 56 of your first written submission, you cite Article 40 of Portaria No. 14 as referring to "retreaded used tyres". It appears that the original text version of this provision refers to "retreaded and used tyres". Could you please clarify what products are, in your understanding, covered under this provision (i.e. on the one hand, used tyres, and on the other hand, retreaded tyres, or tyres that are both used and retreaded)?

Response of the European Communities

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

Question 32. To Brazil.

Article 40 of Portaria No. 14, as cited by the European Communities at paragraph 56 of its first written submission, refers to "imports of retreaded used tyres to be used as consumer goods or raw materials...". Could you please clarify whether any other uses of the tyres at issue would be possible? If so, what uses? Specifically, can retreaded tyres be imported for purposes other than being used as consumer goods?

Response of Brazil

91. No other uses exist. Retreaded tyres are imported to be used only as consumer goods. The language "to be used as consumer goods or raw materials" modifies the term "used tyres". The language clarifies that used tyre imports are prohibited whether they are imported as part-worn tyres for additional use "as is" (consumer goods) or as raw material for retreading. The purpose of this language is to remove any ambiguity about the legality of importing used tyres for retreading.

Question 33. To Brazil.

Brazil did not provide, in its first written submission any specific responses to the European Communities' claims that the import prohibition, the fines on importation and marketing, the state measure and the MERCOSUR exemptions are inconsistent with various provisions of the GATT (i.e. Article XI:1, Article III:4, Article I:1 and Article XIII:1). Does this mean that Brazil concedes the European Communities' claims in this respect and that the Panel can accept the European Communities' arguments in respect of these claims?

Response of Brazil

92. Brazil does not contest that the measures in question are prima facie inconsistent with Articles I:1, III:4, XI:1, and XIII:1. Nevertheless, Brazil has demonstrated that the measures are justified by Articles XX(b) and (d), and XXIV, and therefore are not inconsistent with the those provisions. To the extent that the European Communities claims that the fines violate Article III:4, Brazil does not acknowledge any inconsistency because the fines are ancillary to the import ban and, therefore, are a prima facie violation of article XI:1, not article III:4.

D. ARTICLE XX(B) DEFENCE AND THE EXISTENCE OF ALTERNATIVE MEASURES

Question 34. To the European Communities.

Do you accept that there are human health risks associated with waste tyres (see paragraph 16 of your first oral statement)? If so, could you please clarify whether, in your view, this is sufficient for the measures at issue to fall within the scope of Article XX(b) ?

Response of the European Communities

93. Waste tyres are considered as inert waste in the Brazilian legislation²⁵ and they are classified as non-hazardous waste in the European Communities' legislation.²⁶ Health risks may arise from waste tyres only in case of incorrect management. Some of the arguments advanced by Brazil in this case prove this assertion: only abandoned tyres or tyres negligently placed in monofills may become breeding places for mosquitoes and only accidents or arsons in badly designed or uncontrolled monofills cause smoke plumes.

94. Besides, in our case, the ban is not related to waste tyres but to retreaded tyres, which, as the European Communities has explained, are new products made with recycled material. Thus, the ban has no direct relationship with the interests protected, which are life and health in this case.

95. Finally, as the European Communities explained in its first written submission and its first oral statement and Korea in its third party submission, the import ban is not designed to protect the interest at stake because of three flaws in the design of the system: first, not all new tyres sold in Brazil are retreadable or retreaded; second, tyres other than passenger car tyres, whose import ban is also banned, are retreadable several times, and, third, the import ban is not applied to retreaded tyres from MERCOSUR countries. Moreover, confirmation that import bans on retreaded tyres are not related to environmental protection can also be found in the rulings, awards and submissions made by Brazilian and MERCOSUR authorities mentioned in paragraphs 130 to 133 and 164 to 166 of the European Communities' first written submission.

96. For all these reasons, the European Communities cannot accept that Brazil's assertion that the aim of the ban is to protect life and health is sufficient for the measures at issue to fall within the scope of Article XX(b). The justification is apparent and not real.

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

²⁶ Code 16 01 03 of the Index in relation to paragraph 4 of the Annex to Commission Decision 2000/532/EC of 3 May 2000 establishing a list of wastes, Exhibit EC - 74.

Question 34bis. To Brazil.

Could you please clarify what are the exact environmental risks posed by the disposal of tyres (Brazil's first written submission paragraphs 18 and 29-37)?

Response of Brazil

97. Stockpiling, one of the disposal methods that the European Communities endorses, leads to propagation of mosquitoes that carry diseases, such as dengue, yellow fever, malaria, and West Nile virus. These diseases impact both humans and animals. Stockpiled tyres can also catch fire, and the pyrolytic oil released during tyre fires contaminates surface water, soil, and groundwater. This contamination damages animal and plant life. Dioxins and other pollutants released during tyre fires impact the health of animals in the same manner that they impact human health. The same pollutants are released during incineration in cement kilns, another method the European Communities endorses. While stockpiling and incineration are the disposal methods that cause the most harm to the environment, they are not the only ones. Studies have shown, for example, that artificial reefs made of waste tyres (a civil engineering use) produce toxic leachate that harms rainbow trout and other forms of aquatic life. *See Exhibit BRA-1. See also Non-Party Submission by Humane Society International (Exhibit BRA-98) for additional information.*

Question 35. To Brazil.

Could you clarify how exactly the environmental risks that you identify relate to the protection of "human, animal or plant life or health" within the meaning of Article XX(b)? (see statements in e.g. Brazil's first written submission paragraphs 4, 6, 20, 21 and 22).

Response of Brazil

98. Please see answer to Question 34bis.

Question 36. To Brazil.

Could you please clarify what exactly is the level of protection you are seeking to achieve through the import prohibition on retreaded tyres?

Response of Brazil

99. Brazil seeks to achieve a high level of protection through the import ban. The level of protection sought is achieved by avoiding the generation of additional tyre waste to the extent possible. The reduction of any amount of tyre waste contributes to the end pursued. As a legal matter, WTO Members have the right to set the level of protection they deem appropriate and are not required to quantify that level in exact terms, since, as a practical matter, such quantification would be very difficult, if not impossible. *See Appellate Body Report, EC – Asbestos, at para. 167.*

Question 37. To both parties.

Could you please elaborate on whether policies to address tyre waste by "non-generation of additional waste" are a generally recognized means of addressing the risks arising from waste tyres? Could you please also indicate the extent to which policies based on the "lifecycle" of the product are a generally recognized means of dealing with waste management issues? In addressing this question, please cite any relevant international standards or reference studies, as well as specific illustrations of the application of such policies.

Response of the European Communities

100. In relation to waste management, the reduction principle has only been recognised in Article 4(2)(a) Basel Convention, but limited to the waste streams covered by the Convention

(hazardous waste and households waste) and subject to taking into account social, technological and economic aspects. The Rio Declaration adopted in June 1992 does not mention the principle²⁷, though a reference can be found in Chapter 21, heading A, of Agenda 21, but only limited to the adoption of programmes to reduce the production of agrochemical wastes, containers and packaging materials, which do not meet hazardous characteristics.²⁸ Waste tyres are not mentioned.

101. This notwithstanding, the European Communities agrees that reduction of waste is, besides reuse, recycling, and recovery, one of the means of addressing waste management issues. However, this is a guiding principle and does not mean that reduction of waste should, under all environmental and economic conditions, be preferred to other waste management options. Such an approach would imply the prohibition of products that produce or turn into waste, which is not feasible for most products, including tyres. For the same reason, an import restriction cannot simply be justified by the desire to reduce waste from imported products.

102. As regards the second part of the question, the European Communities is not aware of any relevant international standards on the lifecycle of products. In 1994, the European Communities adopted Directive 94/62 on packaging and packaging waste, whose Article 4 requires the Member States to take preventive measures to reduce waste. This Directive also contains recycling and recovery targets that take into account the overall environmental benefits of these options over the life cycle of the concerned materials. Articles 7 and 8 lay down provisions on return, collection, recovery, marking and identification systems. Other specific obligations in relation to other waste streams are found in Articles 4 (product design) and 5 (separate collection) of Directive 2002/96 on waste electrical and electronic equipment and in Article 4 (prevention) and 5 (collection) of Directive 2000/53 on end-of life vehicles. None of these Directives establishes import ban as a measure to reduce waste production. The European Communities has not adopted specific measures on waste tyres, with the exception of the ban to landfill used tyres laid down in Article 5(3)(d) of Directive 1999/31 on the landfill of waste, which is aimed at increasing the reuse, recycling and recovery of used tyres.

103. Moreover, the European Communities would add that the present case concerns the justification of an import ban under Article XX(b). This requires Brazil to demonstrate the its measure is necessary for the protection of human, animal or plant life or health, and that it is in accordance with the requirements of the chapeau of Article XX. The European Communities does not see that considerations regarding the life-cycle of products, and of tyres in particular, are relevant in this context.

Response of Brazil

104. Yes, policies to address tyre waste by "non-generation of additional waste" are a generally recognized means of addressing the risks arising from waste tyres.

105. See EU Council Directive 75/442/EEC, of 15 July 1975, on Waste, Art. 3.1(a) (Exhibit BRA-105) – "Member States shall take appropriate steps to encourage the prevention, recycling and processing of waste, the extraction of raw materials and possibly of energy therefrom and any other process for the re-use of waste".

106. See EU Community Strategy for Waste Management, Communication from the Commission, COM(96)399 final, 30 July 1996, para. 20 (Exhibit BRA-106) – "The Commission therefore confirms the hierarchy of principles established by the strategy document of 1989 that prevention of the generation of waste shall remain the first priority, followed by the recovery of waste and finally by the safe disposal of waste".

²⁷ Exhibit EC-53.

²⁸ Exhibit EC-75.

107. See EU Council Directive 1999/31/EC, of 26 April 1999, on the landfill of waste, Recital (8) (Exhibit BRA-42) – "Whereas both the quantity and hazardous nature of waste intended for landfill should be reduced where appropriate".

108. See EU Directive 2000/53/EC of the European Parliament and of the Council, of 18 September 2000, on end-of-life Vehicles, Recital (4) (Exhibit BRA-43) – "In order to implement the precautionary and preventive principles and in line with the Community strategy for waste management, the generation of waste must be avoided as much as possible".

109. See EU Directive 2000/53/EC of the European Parliament and of the Council, of 18 September 2000, on end-of-life Vehicles, Recital (11) (Exhibit BRA-43) – "It is important that preventive measures be applied from the conception phase of the vehicle onwards and take the form, in particular, of reduction and control of hazardous substances in vehicles, in order to prevent their release into the environment, to facilitate recycling and to avoid the disposal of hazardous waste. In particular the use of lead, mercury, cadmium and hexavalent chromium should be prohibited. These heavy metals should only be used in certain applications according to a list which will be regularly reviewed. This will help to ensure that certain materials and components do not become shredder residues, and are not incinerated or disposed of in landfills".

110. See EU Directive 2000/53/EC of the European Parliament and of the Council, of 18 September 2000, on end-of-life Vehicles, Art. (1) (Exhibit BRA-43) – "This Directive lays down measures which aim, as a first priority, at the prevention of waste from vehicles and, in addition, at the reuse, recycling and other forms of recovery of end-of life vehicles and their components so as to reduce the disposal of waste, as well as at the improvement in the environmental performance of all of the economic operators involved in the life cycle of vehicles and especially the operators directly involved in the treatment of end-of life vehicles".

111. See EU Directive 2000/76/EC of the European Parliament and of the Council, of 4 December 2000, on the incineration of waste, Recital (8) (Exhibit BRA-34) – "The Communication from the Commission on the review of the Community Strategy for waste management assigns prevention of waste the first priority, followed by reuse and recovery and finally by safe disposal of waste; in its Resolution of 24 February 1997 on a Community Strategy for waste management (6), the Council reiterated its conviction that waste prevention should be the first priority of any rational waste policy in relation to minimising waste production and the hazardous properties of waste."

112. See EU Decision n° 1600/2002/EC of the European Parliament and of the Council, of 22 July 2002, laying down the Sixth Community Environment Action Programme, Recital (5) (Exhibit BRA-107) – "Greater focus on prevention and the implementation of the precautionary principle is required in developing an approach to protect human health and the environment".

113. See EU Decision n° 1600/2002/CE of the European Parliament and of the Council, of 22 July 2002, laying down the Sixth Community Environment Action Programme, Art. (8) (Exhibit BRA-107) – "The aims set out in Article 2 should be pursued by the following objectives: (...) Achieving a significant overall reduction in the volumes of waste generated through waste prevention initiatives, better resource efficiency and a shift towards more sustainable production and consumption patterns; a significant reduction in the quantity of waste going to disposal and the volumes of hazardous waste produced while avoiding an increase of emissions to air, water and soil".

114. See Environment Agency (UK), Tyres in the Environment, at § 4.1 (Exhibit BRA-1) – "The most efficient way of dealing with waste is to find ways to prevent or reduce its production in the first place. It is currently only possible to produce tyres with a limited lifespan, and there will always be used tyres to deal with. But there are ways to reduce the number of tyres we use and therefore the quantity of waste generated".

115. See also Non-Party Submission by Center for International Economic Law (Exhibit BRA-99).

Question 38. To the European Communities.

In paragraph 84 of your first oral statement, you indicate that Brazil has numerous alternatives at its disposal, "including measures aiming to reduce the accumulation of waste tyres". In light of this statement, could you please clarify :

- (a) *whether you consider that measures aiming to reduce the accumulation of waste tyres can, as a matter of principle, constitute a legitimate response to the health problems arising from waste tyres ; and*
- (b) *what alternatives you are referring to, other than an import ban, as far as retreaded tyres are concerned ?*

Response of the European Communities

116. The European Communities considers that, as a matter of principle, measures aiming to reduce the accumulation of waste tyres can constitute a legitimate response to health problems arising from waste tyres, provided that the reduction measures are not discriminatory and that the necessary measures have been taken to manage all waste tyres streams correctly. Otherwise, the measures may hide the protection of non-legitimate interests.

117. Paragraph 84 of the European Communities' first oral statement refers to measures aiming at reducing the accumulation of waste tyres that are mentioned in paragraphs 57 to 67 of the European Communities' FOS. In relation to tyres that have already been retreaded, any policy aiming at a longer safe use of retreaded tyres will contribute to the reduction in the accumulation of waste tyres. Better vehicles maintenance, including technical inspection, as well as educational campaigns on better driving habits are two examples of this kind of policies. In addition, Brazil might also adopt measures which reduce the use of cars in Brazil, for instance through the promotion of public transport in urban areas.

Question 39. To the European Communities.

Please comment on the following passage of the EC directive on Incineration of Waste cited at paragraph 75 of Brazil's first written submission:

"waste prevention should be the first priority of any rational waste policy in relation to minimizing waste production and the hazardous properties of waste."

Response of the European Communities

118. This passage cited by Brazil in its first written submission is taken from recital 8 of Directive 2000/76 on the incineration of waste and forms part of a policy declaration made by the Council of Ministers of the European Communities in its Resolution of 24 February 1997 on a Community Strategy for waste management.

119. The recital makes a reference to the first in the hierarchy of policy principles in waste management in the European Communities: reduce, reuse, recycle and recover. These principles are guidance for the European Communities and the EC Member States when adopting legislation on those waste streams requiring specific legislation. However, as the European Communities has already explained in its answer to Question 37, this does not mean that policies to reduce waste should be preferred to other waste management options at all cost, nor that the reduction of waste justifies restrictions imposed on imported products.

Question 40. To Brazil.

What is the precise impact of the restriction on the importation of retreaded tyres, on the generation of additional waste in Brazil? In answering this question, please indicate as precisely as possible how much less waste Brazil accumulates, on an annual basis, as a result of the import restriction? How is this calculated?

Response of Brazil

120. The precise impact of Brazil's restriction on the importation of retreaded tyres on the generation of additional waste in Brazil is clearly indicated by the following figures:

Brazil: Importation of Retreaded Tyres
(in tonnes)

| Year | Imported Retreaded Tyres |
|-------------|---------------------------------|
| 1999 | 18,455 |
| 2000 | 17,597 |
| 2001 | 8,181 |
| 2002 | 3,610 |
| 2003 | 1,507 |
| 2004 | 2,274 |
| 2005 | 1,727 |

121. The importation of retreaded tyres into Brazil in 2005 corresponded to less than 10 per cent of the volume in 1999, the year before the adoption of Portaria SECEX 8/2000. As Brazil has largely demonstrated in this dispute, retreaded tyres are short lifespan products and their importation generates unwanted additional volumes of waste tyres in the territory of the importing country. Therefore, any reduction in the importation of such product necessarily also leads to a corresponding reduction in the volume of waste tyres generated in the importing country.

122. Brazil never doubted that restricting the importation of retreaded tyres would reduce the generation of waste tyres in its territory. In fact, that is exactly why it banned imports of retreaded tyres, as well as of used tyres. The precise calculation of how much less waste tyres Brazil accumulated in the last years as a result of the import restriction applied on retreaded tyres is not an easy task. To obtain such figures – which would always be estimates – reflecting the non-generation of wastes in the Brazilian territory, it would be necessary to work with different trade flow scenarios, from the most conservative to the most explosive one. Moreover, since Brazil's measure is a non-generation measure, any calculation of the benefits to the Brazilian environment of the restriction should take into account what would happen if the measure was not in place.

123. The European Communities does not deny that it expects to export a lot of retreaded tyres to Brazil in case the ban is removed and that is exactly why it is challenging Brazil's measures in this dispute. Brazil will be flooded with retreaded tyres from the European Communities and other countries if it is forced to lift the ban. Since retreaded tyres are short-lifespan products which generate wastes earlier than new tyres, an opening of the Brazilian market to imports of such products is certain to increase the generation of dangerous unwanted rubber wastes in Brazil.

124. Although Article XX does not require any kind of quantification, Brazil will do its best to present to the Panel, as soon as possible, estimates as precise as possible on how much less tyre waste it accumulates as a result of the import ban on retreaded tyres.

Question 41. To Brazil.

The European Communities argues, in paragraph 127 of its first written submission, that the import ban on retreaded tyres does not reduce the rate of accumulation of waste tyres, inter alia because :

"... it can be assumed that practically every potential sale of an imported retreaded tyre is currently, due to the import ban, substituted by a sale in Brazil of a new (domestic or imported) tyre or of a domestic retreaded tyre, most likely manufactured from an imported used tyre... "

Please comment on this assertion.

Response of Brazil

125. The assertion is wrong. It is based on the assumption that virtually all tyres retreaded in Brazil are manufactured from imported used tyres. This is not the case. See Exhibit BRA-95. As explained in the response to question 20, between 2001 and 2005, more than 84 million tyres were retreaded in Brazil. In the same period, only 27 million used tyres were imported. Not all of the imported casings are suitable for retreading, and even if they were, some 57 million tyres would have still been retreaded from domestic casings.

Question 42. To the European Communities.

Please comment on Brazil's arguments in paragraph 55 of its first oral statement, including the conclusions of the report of the British Used Tyre Working group cited by Brazil in that paragraph.

Response of the European Communities

126. Contrary to what Brazil claims in paragraph 55 of its first oral statement, paragraph 11.5 of that report does not refer to the problems raised by imports of retreaded tyres. The report refers, on the contrary, to the existence, within the European Communities single market, where goods (waste included) flow freely across borders of the EC Member States, of different national regimes on the management of waste tyres. This is not the issue at stake in the case before the Panel.

Question 43. To Brazil.

Under CONAMA Resolution 258, are the disposal plans submitted by tyre importers and manufacturers approved by the Brazilian authorities? If so, what types of disposal methods do such authorities usually approve? What types of disposal methods are used by the Brazilian companies (46 according to Brazil) that are authorized to process waste tyres in Brazil? (see statement in Brazil's first written submission paragraphs 71 and 74).

Response of Brazil

127. Under CONAMA Resolution 258, before they can import tyres, the importers must demonstrate that they have already disposed of the amount of waste tyres corresponding to the number of tyres they intend to import. Manufacturers must present annual reports of their production and demonstrate that they have disposed of the corresponding amount of wastes in the same period.

128. The disposal methods are not proposed by the importers and manufacturers. Rather, they are licensed by state environmental authorities according to their assessment of the best disposal alternatives available. The disposal methods usually approved by these authorities are: co-processing in cement kilns, co-processing with bituminous schist (a form of pyrolysis), rubber asphalt, rubber products and appliances (sandals, shoes, carpets).

Question 44. To Brazil.

Could Brazil provide more information on the waste tyre disposal schemes implemented in the States of Paraná, Pernambuco and Paraíba, including on the amount of tyres disposed of under these schemes and the disposal methods used? (see references in European Communities' first written submission paragraph 113).

Response of Brazil

129. These programs are *collection* schemes that private companies have introduced to meet the obligations of CONAMA Resolution 258. Under these programs, private companies typically compensate people to collect waste tyres and take them to *ecopontos* (collection points for waste tyres). According to the participating companies, most of the collected tyres are then incinerated in cement kilns.

130. These programs are not innovative waste tyre disposal solutions – they are merely collection initiatives implemented by the private sector to comply with federal collection and disposal obligations. While these programs may reduce waste tyre accumulation risks, they do not in any way reduce or eliminate the disposal risks.

Question 45. To Brazil.

Are there any disposal obligations for vehicle owners in Brazil in relation to their new and retreaded tyres after the end of their life cycles?

Response of Brazil

131. No. Brazil has opted to attribute collection and disposal obligations in relation to tyres to manufacturers and importers and has reinforced these obligations by heavy fines. Brazil believes that it is more effective, from an enforcement perspective, to impose such post-consumption obligations on importers and manufacturers than on the consumers.

Question 46. To the European Communities.

Please comment on Brazil's comments on the availability of alternative measures at paragraph 54 of its first oral statement, especially the existence of a "gap between supply and demand" in respect of certain disposal methods.

Response of the European Communities

132. Brazil's comment refers to the availability of alternative measures in relation to material recycling, namely two disposal methods: civil engineering and the construction of playgrounds. Though there are other material recycling methods, the European Communities would like to point out that Brazil insists on the tactic of eliminating alternative methods one by one by claiming, among other arguments, that the disposal capacity of each of these methods is very limited. The European Communities considers that, even if in respect of a certain disposal method there could be a gap between supply and demand, this cannot imply that the method is discarded as irrelevant for the purposes of protecting the interest that the measure at issue is pretended to pursue. As the European Communities explained in paragraph 72 of its first oral statement, all options should be implemented within a policy scheme, not in isolation, in order to ensure a sound management of waste tyres. Brazil's arguments show that this kind of policy scheme does not exist for its territory.

Question 47. To the European Communities.

Could you please clarify what is, in your view, the relevance of circumstances specific to the country implementing the measures, in an assessment of the availability of alternative measures under Article XX(b), including:

- (a) *Technical and financial constraints; and*
- (b) *Specific geographical conditions.*

Please also indicate which such circumstances are relevant in this case and how they might affect the availability to Brazil of the alternative measures you have identified.

Response of the European Communities

133. Circumstances specific to a country implementing measures that are claimed to be justified under Article XX(b) are relevant for assessing the availability of alternative measures. It is not easy to list those circumstances, but those mentioned in the question should be taken into account.

134. However, the European Communities considers that Brazil cannot claim to have difficulties in implementing alternative measures to the import ban on retreaded tyres. According to the World Bank's classification, Brazil is a low middle income country, but its gross national product in 2003 amounted to 1,556,182 million R\$ (around 565,885 million €).²⁹ Brazil is a country with a functioning political system and administration and a civil society capable of reacting to the problems arising from waste management, as it is shown in the presentation prepared by Mr Marco Antonio Borzino, Solid Waste Programme Coordinator in the Ministry of Environment in Brazil,³⁰ where it is explained that many cities in Brazil are developing projects with non-governmental organisations and with garbage pickers associations to ensure environmentally sound management of solid wastes. The programme "Paraná Rodando Limpo" and similar programmes implemented in some other States in Brazil also prove the initiative and capacity of the Brazilian society and companies to contribute to the correct management of waste tyres.³¹

135. Moreover, Brazil is the 12th cement producer in the world, with 58 cement installation and a production of 34 million tons in 2003, as explained by the "Sindicato Nacional da Indústria do Cimento" in its 2004 Report.³² It also has 111 paper mills located in its territory, 45% of the paper mills in Central and South America, according to the 2004 Guide to Paper Mills across the Globe.³³ Finally, the "Paraná Rodando Limpo" programme counts with the participation of "Petróleo Brasileiro S.A." (Petrobras), a partially state-owned company in the energy sector, one of the most important in the world with a capitalisation of 28,680,653 thousand € in 2006,³⁴ and net earnings of 49,675 billion € in 2005.³⁵ Besides its financial capacity, Petrobras has developed its own technology and has the capacity to transform 400 tons of tyres a day into oil and gas in its installation in São Mateus do Sul (Paraná).

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

²⁹ Exhibit EC – 76.

³⁰ Exhibit EC – 77.

³¹ The European Communities has already referred to these programmes in para. 113 of its first written submission and in para. 73 of its first oral statement.

³² Exhibit EC – 78.

³³ Exhibit EC – 79.

³⁴ Exhibit EC - 80.

³⁵ Exhibit EC - 81.

137. In relation to the geographical conditions, Brazil has claimed that the huge size of its territory creates difficulties in managing waste tyres. The European Communities considers that whereas managing waste tyres might be a problem for small and micro States, this is not the case for countries of the size of Brazil, which, moreover, has 83 % of urban population.³⁶ If the argument is that there are large, isolated and virgin regions in Brazil, as the Amazon, the first flaw in that argument would be that Brazil is not expected to deal with a huge number of waste tyres in that region, due to the extreme low population density (less than 1 inhabitant per km² in general terms) and the very limited road infrastructure, as evidenced in the maps from the Brazilian Institute for Geography and Statistics.³⁷ Moreover, these regions will not have a retreading industry, which will often mean that new tyres become waste tyres after their first life, in the same way as retreaded tyres. Finally, the problems of the distribution and transportation of tyres into and from such regions pose themselves one way or another, no matter what kind of tyres are involved.

Question 48. To the European Communities.

What is the position of the European Communities in relation to Brazil's statement that incineration of waste tyres produces health and environmental risks even if it is carried out under controlled conditions? (see position in Brazil's first written submission paragraphs 43 and 122).

Response of the European Communities

138. Incineration of tyres under controlled conditions does not represent a significant risk for health and environment. In the European Communities, and surely also in Brazil, operational conditions, technical requirements and emission limit values for plants incinerating waste guarantee a high level of environmental and human health protection. Otherwise, incineration of tyres in kilns would have been prohibited, which is not the case either in the European Communities or in Brazil. The 2006 Report by the European Tyre & Rubber Manufacturers' Association³⁸ and the 2004 Report of the "Sindicato Nacional da Indústria do Cimento" in Brazil³⁹ show clearly that co-incineration of waste tyres in cement kilns are common practice in both WTO Members.

139. Moreover, as the document on "Formation and Release of POPs in the Cement Industry" acknowledges,⁴⁰ the most recent scientific evidence has shown that incineration of waste tyres in cement kilns does not influence or affect the emissions of dioxins and furans, as compared with the combustion of conventional fuels. Finally, SO₂ emissions may be reduced when waste tyres are co-incinerated with conventional fuels due to their lower sulphur content (1% in tyres versus around 5% in coal and petcoke). A study performed by IVL Swedish Environmental Research Institute Ltd reached the conclusion that "the utilization of used tyres [is] environmentally beneficial compared to the use of 'virgin' raw materials" and that replacing coal as a fuel in the cement kiln with used tyres was the second best scenario out of the six that were assessed in the study.⁴¹ This study also concludes that, for lead, nickel, chromium and cadmium, exactly the same result is obtained as for the fossil energy use.

³⁶ Exhibit EC - 82.

³⁷ Exhibit EC - 83.

³⁸ Exhibit EC - 84.

³⁹ Exhibit EC - 85; at p. 44, the report states that "O co-processamento nas fábricas de cimento brasileiras é crescente, tendo aumentado 22 per cent entre 2002 e 2003" (Co-incineration in Brazilian cement kilns is increasing, having grown 22 per cent between 2002 and 2003).

⁴⁰ Exhibit EC - 86.

⁴¹ Exhibit EC - 87.

Question 49. To Brazil.

Please comment on the argument made by the European Communities, in paragraph 92 of its first oral statement, that "what is an arbitrary or unjustifiable discrimination must be established in relation to the objectives of the measure at issue".

Response of Brazil

140. There is no defined set of factors on the basis of which it may be determined whether a measure is being applied in an arbitrary or unjustifiable manner. The objective of the chapeau is to prevent abuse of the exceptions contained in paragraphs (a) through (j) of Article XX. It is concerned with the manner in which the measure is applied. Any and all factors that would help determine whether the Member acted in good faith and had good cause for applying the measure in the manner that it did are relevant. Which are those factors can only be determined on a case by case basis and in light of the specific facts and circumstances of each case.

141. The objective of the measure at issue may be one of the many factors taken into account when determining whether a measure provisionally justified under Article XX is being applied in a manner that is not consistent with the chapeau of Article XX. Also relevant in this case are the reasons and circumstances that led Brazil to exempt MERCOSUR countries from the import ban. The fact that the exemption of MERCOSUR countries was introduced to comply with MERCOSUR provisions, as interpreted by an arbitral award, demonstrates that Brazil is not acting capriciously or in bad faith in how it applies the import ban and has not abused its right to take measures that are necessary to protect human, animal or plant life or health.

Question 50. To Brazil.

Please comment on the European Communities' arguments in paragraph 93 of its first oral statement regarding:

(a) Article XXIV:8(a) of GATT 1994; and

(b) Article 34 of the Vienna Convention on the Law of Treaties.

Response of Brazil

(a) Article XXIV:8(a) of GATT 1994

142. The MERCOSUR exemption is not incompatible with Article XXIV:8(a), as the European Communities claims. The relevant part of Article XXIV:8(a) – the parenthetical – gives Members that are part of a customs union the right to maintain duties and other restrictive regulations between the constituent territories, based inter alia on the general exceptions in Article XX, and still meet the requirement under Article XXIV:8 that restrictions be eliminated with substantially all the trade between the constituent territories. Article XXIV:8(a) cannot possibly be interpreted as imposing an obligation on Members to maintain trade restrictions between the constituent territories by invoking Article XX. A Member may be required under a regional trade agreement to eliminate trade restrictions between the constituent territories, without exception, and still exercise its right under Article XX to take measures that are necessary to protect human health and the environment, including an import ban.

143. Contrary to the European Communities' suggestion, WTO Members cannot justify otherwise inconsistent measures by simply concluding agreements with other Members that provide for discriminatory treatment. First, the European Communities is assuming that Members would act in bad faith by trying to circumvent its obligations under the GATT by relying on an exception. However, Members are presumed to act in good faith. *See EC – Hormones (US) (Article 22.6 – EC),*

para. 9. Moreover, that hypothetical agreement between the Members that the European Communities refers to would still have to meet the requirements of Article XXIV for it to justify discriminatory treatment that is contrary to Article I:1. Article XXIV contains safeguards ensuring that only bona fide customs union parties could invoke the Article to justify prima facie-discriminatory treatment. In other words, in the European Communities' hypothetical, countries attempting to discriminate against other WTO members would have to prove that they have liberalized substantially all trade among themselves and substantially harmonized duties and trade regulations for non-parties – all without raising outside trade barriers. By imposing such a high burden, Article XXIV ensures against any potential abuse.

144. In this case, it is clear that the presumption of bad faith on which the European Communities bases its argument is not present. The European Communities cannot possibly be suggesting that MERCOSUR, the second biggest customs union in the world, was designed and executed with the sole purpose of discriminating in favor of MERCOSUR retreaders. The European Communities' argument is both far-fetched and offensive. The European Communities' reliance on an extreme hypothetical reveals that it cannot formulate a well-founded rebuttal argument based on the *facts* of this case. It simply has no grounds to counter the concrete facts that fully support Brazil's invocation of Article XXIV as a justification for its limited MERCOSUR exemption.

(b) Article 34 of the Vienna Convention on the Law of Treaties (VCLT)

145. Brazil's defense is in no way contrary to Article 34 of the VCLT, which provides that "[a] treaty does not *create* either obligations or rights for a third State without its consent" (emphasis added). The Treaty of Asunción does not create any rights or obligations whatsoever for the European Communities. The European Communities' reading of Article 34 is incorrect when it substitutes the word *create* with the word *affect*, as if it indicated rights and obligations of a third State under other treaties. Clearly this is not the meaning of Article 34 of the VCLT. In any case, the Treaty of Asunción is not affecting the rights and obligations of the European Communities under the GATT, because Brazil, under Articles XX and XXIV, has the right to exempt MERCOSUR countries from the import ban. In other words, Brazil is simply exercising its rights under the GATT to take measures that are necessary to protect human health and the environment, provided that it applies that measure in a manner that is not arbitrarily or unjustifiably discriminatory – which Brazil does.

Question 51. To the European Communities.

Please clarify how exports of used tyres "to other MERCOSUR countries" (see your first oral statement, paragraph 97) contribute to a disguised restriction on international trade that would benefit the Brazilian industry. Is it your position that imports of European Communities' used tyres to Brazil and other MERCOSUR countries is an advantage to Brazil's retreaded tyre industry and a disadvantage to the European Communities' retreaded tyre industry?

Response of the European Communities

146. The chapeau of Article XX refers only to a disguised restriction on international trade without requiring the existence of an advantage to traders in the importing country and a simultaneous disadvantage in the exporting country. However, in our case, these two conditions are met. The import ban on retreaded tyres protects Brazilian retreaders and Brazilian manufacturers of new tyres from the competition of imported retreads and it has excluded European Communities and other WTO Members exporters from the Brazilian market.

147. The continuing import of used tyres into Brazil from the European Communities (and other WTO Members) contributes to the protection of the Brazilian domestic retreaders by ensuring them the supply of the material necessary to continue its production of retreaded tyres, i.e. by enabling them to produce and sell the retreads that can no longer be imported

148. Moreover, a disguised restriction to the benefit of imports from a particular country lies in the fact that retreads may no longer be imported into Brazil from the European Communities, but they can be imported from other MERCOSUR countries. The export of used tyres from the European Communities to other MERCOSUR countries, notably Uruguay, is also relevant in this context, since these tyres are used to produce retreaded tyres, which are then exported to Brazil. This further increases the trade diversion created by the Brazilian ban, which benefits retreaders located both in Brazil and in other MERCOSUR countries.

Question 52. To Brazil.

How does Article 50(d) of the Montevideo Treaty differ from Article XX(b) of GATT 1994?

Response of Brazil

149. Article 50 of the Treaty of Montevideo (1980) provides:

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

- (a) Protection of public morality;
- (b) Implementation of security laws and regulations;
- (c) Regulation of imports and exports of arms, munitions, and other war materials and, under exceptional circumstances, all other military equipment;
- (d) Protection of human, animal and plant life and health;
- (e) Imports and exports of gold and silver in bullion form;
- (f) Protection of national treasures of artistic, historical or archeological value; and
- (g) Exportation, use and consumption of nuclear materials, radioactive products or any other material used for the development and exploitation of nuclear energy."

Question 53. To the European Communities.

Please comment on Brazil's argument, at paragraph 64 of its first oral statement, that the application of the exemption for MERCOSUR imports is not arbitrary because it is included in the measure itself.

Response of the European Communities

150. The European Communities considers that what matters in interpreting the chapeau of Article XX is the practical effects of the measure. One possibility is when the laws and regulations are applied in a discriminatory manner by the administration or the judiciary. Brazilian courts granting injunctions for the import of used tyres is an example mentioned in this case. But if the discrimination is already lay down in the law itself and applied accordingly, this situation is also covered by the chapeau. A different interpretation would allow to circumvent the requirements of the chapeau and to diminish the role played by the principle of good faith that, according to the Appellate Body,⁴² is at the origin of the chapeau.

⁴² Appellate Body Report, *US – Shrimps*, para. 158, already mentioned in European Communities' first written submission, para. 144.

Question 54. To both parties.

Is the consistency of the MERCOSUR exemptions under Article XXIV of GATT 1994 a relevant consideration in assessing whether "arbitrary or unjustifiable discrimination" within the meaning of the chapeau of Article XX exists in the application of the import ban as a result of these exemptions?

Response of the European Communities

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

Response of Brazil

152. No. Brazil and the European Communities agreed that it is not a relevant consideration in their responses to the Panel's questions during the first substantive meeting of the Panel.

E. MEASURES AT STATE LEVEL

Question 55. To Brazil.

In light of the fact that an import prohibition is in place at the federal level, could you please clarify what was the purpose of the State of Rio Grande do Sul's imposition of measures relating to the importation and marketing of imported retreaded tyres?

Response of Brazil

153. The State of Rio Grande do Sul adopted the measures in question in an attempt to prevent imports of remoulded tyres from the bordering Uruguay, after the federal government authorized such imports. As the federal government understands, Rio Grande do Sul authorities were concerned that the imports would increase the amount of tyre waste in the state, and the associated risks for the environment and public health.

Question 56. To Brazil.

Could Brazil clarify its statement during the first substantive meeting with the Panel that the state laws at issue have no legal effect?

Response of Brazil

154. In Brazil, only the Federal Government can regulate importation of products and issue import licenses. Without an import license, which is issued by DECEX, no good can enter the country. State measures that purport to regulate imports have no effect because states do not issue import licenses, and the federal government will follow federal – not state – regulations, in determining whether a license should issue. Because Rio Grande do Sul cannot effect an import ban on its own, the state measures at issue have no legal effect.

Question 57. To Brazil.

Does Law No. 12.381 establish an exception to the import prohibition set out in paragraph 1 of Article 1 of Law No. 12.114 of the Brazilian State Rio Grande do Sul of 5 July 2004 (see Exhibits EC-35, EC-37, BRA-80 and BRA-81)?

Response of Brazil

155. The amendments introduced by Law 12.381, permitting imports under certain conditions, seem to conflict with Article 1 of Law 12.114, which prohibits imports of used tyres. It is not clear whether the amendments intended to lift the import prohibition. In any event, this is irrelevant because these state measures have no legal effect: Article 22 (VIII) of Brazil's Constitution (Exhibit BRA-100) gives the federal government exclusive power to regulate foreign and interstate trade (see answers to questions 61 and 62).

Question 58. To Brazil.

Please clarify the meaning of the terms "imports" and "importation" in Laws No. 12.114 and 12.381. Could this refer to the importation from another state in Brazil to the Brazilian State of Rio Grande do Sul? Is it possible for the State of Rio Grande Do Sul to prohibit the circulation of retreaded tyres in the state?

Response of Brazil

156. The terms "imports" and "importation" refer to the importation from other countries into Brazil. These terms do not apply to trade among Brazilian states. Under Brazilian law, a state cannot prohibit the circulation of goods within its territory. Interstate commerce falls within the *exclusive* jurisdiction of the federal government, under Article 22 (VIII) of the Brazil's Constitution.

Question 59. To Brazil.

Do the marketing restrictions imposed by Law No. 12.114 and/or the disposal obligations established by Law No. 12.381 apply to retreads from other MERCOSUR countries?

Response of Brazil

157. The marketing restrictions imposed by Law 12.114 and the disposal obligations established by Law 12.381 were intended to apply to retreads from every country, including the MERCOSUR countries. In fact, these state laws seem to have been passed in reaction to the exemption of MERCOSUR countries from the national import ban. In any event, these state measures have no legal effect. *See* Brazil's Responses to Questions 61 and 62.

Question 60. To Brazil.

Have any retreaded tyres from the European Communities been imported into the Brazilian State Rio Grande do Sul since the introduction of Law 12.381?

Response of Brazil

158. Approximately 27 tons of retreaded tyres entered Brazil through Rio Grande do Sul since December 2005, the month following the introduction of Law 12.381. Brazil has no information on their eventual destination, nor does it have information on how many of these imports came from the European Communities (Brazil does not disaggregate origin information by port). However, nearly all retreaded tyres imported into Brazil during those months came from Paraguay and Uruguay. If any retreaded tyres from the European Communities did enter Brazil through Rio Grande do Sul, this would have been a direct result of the preliminary injunctions, not of operation of the state measures.

Question 61. To Brazil.

Please explain what kind of demonstration by importers on their collection and disposal of used tyres is necessary to satisfy the requirements under Law 12.381.

Response of Brazil

159. Brazil has no information on collection and disposal requirements contemplated by the state legislators. Ultimately, there are no requirements in any state law that importers can satisfy in order to obtain a permission to import, because only the federal government can regulate foreign trade and grant import licenses (*see* Brazil's Response to Question 62). If importers attempted to obtain licenses to import based on State Law 12.381, the federal body responsible for granting such licenses (DECEX) would deny the request, whether the federal import ban existed or not, and the likely outcome of this situation would be a declaration of the unconstitutionality of State Law 12.381 by the Federal Supreme Court. This has not happened yet because Law 12.381 lacks any practical effect, given the existence of the federal import ban.

Question 62. To Brazil.

Please comment on the European Communities' assertion, at paragraph 110 of its first oral statement, that Brazil has offered no proof for its statement that to the extent that the state measure conflicts with the federal measure, the federal measure will prevail. In addressing this question, please clarify the legal basis for the hierarchy of norms that you refer to between state and federal measures in Brazil. Setting aside the question of the hierarchy of norms between state and federal measures in Brazil, is a specific court ruling required to have the state measures at issue declared null and void? Could you identify a competent state court, if any, that is responsible for enforcing federal laws?

Response of Brazil

160. Technically, this is not a matter of hierarchy of norms, but rather a matter of jurisdiction. Under Article 22 (VIII) of Brazil's Constitution, the federal government enjoys exclusive jurisdiction to legislate on foreign and interstate trade. A Brazilian state, therefore, is constitutionally prohibited from legislating on matters of foreign trade, unless a supplementary federal law ("lei complementar") authorises it to legislate upon a specific question related to such matter (Article 22, sole paragraph). There is no supplementary law in the present case.

161. Article 23 (VI) of the Constitution gives states and the federal government concurrent jurisdiction over environmental protection. Thus, Rio Grande do Sul can legislate, for instance, on matters related to disposal of waste, but not on the importation. Consequently, every aspect of the Rio Grande do Sul measures that relates to foreign or interstate trade is unconstitutional, and the federal measures prevail.

162. In order to have the state measures at issue declared null and void, a specific court ruling – *i.e.*, a ruling by the Federal Supreme Court in an unconstitutionality action ("ação direta de inconstitucionalidade", cf. Art. 102 (I) (a) of the Constitution) – is required. A declaration by the Supreme Court on the unconstitutionality of a law or a provision in this type of a proceeding has *erga omnes* retroactive effects. While lower courts can also rule on constitutionality, their rulings will apply only *inter partes*.

163. Every court in Brazil, be it a federal court or a state court, is responsible for enforcing federal laws. The jurisdiction of different state courts varies according to the subject matter and to the geographic location, but federal laws are valid in the entire country and must be enforced by every court. If a decision by a state court in any way contradicts a federal law, such decision will be subject to a special appeal ("recurso especial") to the High Court of Justice (cf. Art. 105 (III) (a) and (b) of the Federal Constitution).

Question 63. To the European Communities.

The European Communities cites Law No. 12.381 of the Brazilian State Rio Grande do Sul of 28 November 2005 as follows:

"where importers can demonstrate that they will collect on Brazilian territory and destroy, in an environmentally sound manner, 1 (one) used tyre on Brazilian territory for each used tyre carcass to be imported"? (Exhibit EC-37 and the European Communities' first written submission paragraph 63)

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

Response of the European Communities

164. Yes, in the translation of Article 1 §2 II of Law 12.381, the reference to should be to "10 (ten) used tyres". The quotation in paragraph 63 of the European Communities' first written submission should be corrected accordingly.

Question 64. To the European Communities.

In paragraph 187 of your first written submission, you refer to the requirement of having to dispose of ten "retreaded tyres". Could you please clarify whether you meant "used tyres"?

Response of the European Communities

165. Yes, in paragraph 187, the reference should be to "used tyres" instead of "retreaded tyres".

F. FINES

Question 65. To the European Communities.

Please clarify how the fines on marketing relate to importation. Could you please clarify whether you consider that these fines fall at the same time within the scope of Articles XI.1 and III:4?

Response of the European Communities

166. As the European Communities has set out in its first written submission,⁴³ the fines on the marketing, transportation, storage, keeping or warehousing of imported retreaded tyres aim to complement and enforce the import ban. To this extent, they are ancillary to the ban and fines on importation. Moreover, despite their apparently internal nature, there is no doubt that their intended and real effect is to restrict the importation of retreaded tyres. Accordingly, Presidential Decree No. 3919 as a whole is to be regarded as contrary to Article XI:1.

167. In the alternative, should the Panel consider that unlike the fines on importation, the fines on marketing, transportation, storage, keeping or warehousing of retreaded tyres do not as such constitute a restriction on importation, then the European Communities submits that Presidential Decree No 3919 to this extent is incompatible with Article III:4.⁴⁴

⁴³ European Communities' first written submission, para. 174.

⁴⁴ European Communities' first written submission, para. 175 et seq.

Question 66. To Brazil.

The European Communities claims in paragraph 172 of its first written submission that the level of the fines (i.e. 400 reals per unit) exceeds the "normal per unit value" of retreaded tyres. Is this correct? What is the "normal per unit value" in Brazil, for :

- (a) *domestically produced retreaded tyres;*
- (b) *imported retreaded tyres; and,*
- (c) *new tyres, either imported or domestically produced?*

Response of Brazil

168. The fines were *intended* to exceed the per unit value of most tyres because, as the European Communities correctly pointed out, they are a "punitive measure intended to sanction a violation of the import ban imposed by Brazil". See European Communities' first written submission, at para. 172. Nevertheless, if this information may be of assistance to the Panel, Brazil can roughly estimate average prices (note that the actual price depends on many factors, such as the tyre type, brand, size, type of car, type of terrain, and the point of sale):

- (a) Domestically produced retreaded tyres for passenger cars – R\$ 100-280, trucks – R\$ 450-930.
- (b) Information to be provided if available
- (c) New tyres for passenger cars, whether imported or domestically produced – R\$ 150-550, trucks – R\$ 560-1300.

Question 67. To both parties.

If the fines on importation and marketing can be considered as ancillary to the import prohibition, what would a finding of GATT 1994 violation in respect of the import prohibition imply as to the GATT-consistency of the fines? (European Communities' first written submission paragraph 174 and Brazil's first written submission paragraph 157)

Response of the European Communities

169. A finding of violation in respect of the import ban would necessarily entail that the fines on importation and marketing are equally incompatible with the GATT. For further detail, the European Communities refers the Panel to paragraphs 102 to 106 of its first oral statement.

Response of Brazil

170. The fines would likewise be inconsistent.

G. MERCOSUR EXEMPTIONS

Question 68. To Brazil.

Which MERCOSUR countries, and in what proportion, export retreaded tyres and used tyres into Brazil? What annual volumes of imports does this represent?

Response of Brazil

171. Only Uruguay and Paraguay export remoulded tyres to Brazil. In 2005, Paraguay exported 850 tonnes and Uruguay exported 574 tonnes, for a total of 1,424 tonnes. In comparison, some 18,455 tonnes of retreaded tyres were imported into Brazil in 1999, the year before Portaria SECEX 8/2000 went into effect.

172. The trade of used tyres between MERCOSUR countries is negligible. In 2003, there were no exports of such tyres by MERCOSUR countries to Brazil. In 2004, Argentina exported 23 tonnes and Uruguay exported 7 tonnes of used tyres to Brazil, which accounted for less than 0.05 per cent of the total volume of used tyre imports.

Question 69. To both parties.

Does the exemption from the import ban on retreaded tyres for MERCOSUR countries apply equally to retreaded tyres produced with imported carcasses and retreaded tyres produced with domestic MERCOSUR carcasses?

Response of the European Communities

173. Yes.

Response of Brazil

174. Yes. After a retreaded tyre is produced, it is not possible to identify the origin of the carcass used.

Question 70. To Brazil.

What is the potential for tyres initially used or retreaded in the European Communities, or in other non-MERCOSUR countries, to be imported into Brazil as a result of the MERCOSUR exemption?

Response of Brazil

175. It is possible for tyres used in the European Communities to be remoulded in a MERCOSUR country and then exported to Brazil because Brazil has no control over remoulded tyre production in other MERCOSUR members. However, it should be noted that only Paraguay and Uruguay export remoulded tyres to Brazil. The production capacity of these countries is fairly limited. Therefore, the actual volume of tyres initially used in the European Communities that could be imported into Brazil through MERCOSUR is very small when compared to the volume that could have been imported directly from the European Communities and other countries if the import ban did not exist.

176. It is *not* possible for tyres retreaded by means other than remoulding (no matter the origin of casings) to enter Brazil because the import ban continues to apply to such imports. Finally, it is *not* possible for tyres retreaded in the European Communities to enter Brazil through other MERCOSUR countries. If an importer from another MERCOSUR country attempted to import a tyre retreaded in the European Communities and then export it to Brazil as a MERCOSUR tyre, this circumvention would violate the MERCOSUR rules of origin.

Question 71. To the European Communities.

During the first substantive meeting with the Panel, the European Communities stated that Uruguay's main retreaded tyres producers use only 10% of domestic casings. Do you have any evidence in support of this statement?

Response of the European Communities

177. The information that only 10% or even fewer of the carcasses used by SERISUR S.A. presently originate in Uruguay or other MERCOSUR countries was communicated orally on 28 March 2006 (and confirmed again on 19 July 2006) by Mr. Gustavo ALBANO, the responsible Director of Serisur, the main Uruguyan company producing retreaded tyres (and only exporter to Brazil at the moment), to Mr. Lothar Ehring, Administrator in the Directorate-General for Trade of the European Commission.

178. This information is confirmed in a very recent newspaper article (Exhibit EC-88), which states (in English translation) that "Serisur produces about 60.000 tyres per month, working with carcasses which originate in Europe, Japan and the US, and Brazilian rubber".

179. This equally finds information in the MERCOSUR arbitral award of 25 October 2005 in the dispute between Argentina and Uruguay, which mentions that Uruguay produces retreaded tyres from carcasses "generally imported from developed countries".⁴⁵ Further confirmation also lies in the sharp rise in the importation of used tyres by Uruguay since 2002,⁴⁶ the year in which the Brazilian ban was lifted on MERCOSUR countries, which is due to the increased demand for retreadable casings by Uruguayan retreaders.

Question 72. To Brazil.

Among retreaded tyres imported into Brazil from MERCOSUR countries:

- (a) *how many are made from tyres not initially used in Brazil? What proportion of such imports does this represent?*
- (b) *how many are made from tyres initially used in non-MERCOSUR countries? What proportion of such imports does this represent?*

Response of Brazil

180. Brazil does not have information on the origin of casings used in the production of retreaded tyres by other MERCOSUR countries. After a retreaded tyre is produced, it is not possible to identify the origin of the casing used.

Question 73. To Brazil.

What options were available to Brazil in order to implement the MERCOSUR Ad Hoc tribunal's ruling of 9 January 2002?

Response of Brazil

181. The MERCOSUR Ad Hoc Tribunal concluded that the Brazilian legislation – Portaria SECEX 8/2000 – was "incompatible with MERCOSUR regulations", and specifically, with Decision CMC 22/2000, which prohibited new restrictions on trade. The tribunal required Brazil to "adapt its internal legislation in view of such incompatibility". Apart from non-compliance, the only alternative available to Brazil was to exempt MERCOSUR member states from the import ban.

182. Some third parties have suggested that one of the options available to Brazil to comply with the MERCOSUR ruling was to exempt *all* WTO members from the import ban, *i.e.*, eliminate the import ban. This is clearly not a reasonable option because it would have forced Brazil to abandon its policy objective and its level of protection, which is to reduce unnecessary generation of tyre waste *to the maximum extent possible*. To preserve its policy objective, Brazil implemented the decision of the MERCOSUR tribunal as narrowly as possible. The dispute involved remoulded tyres, and Brazil exempted MERCOSUR imports of remoulded tyres *only*. Permitting imports of top-capped and re-capped tyres from MERCOSUR would not have reduced waste to the maximum extent possible because it would have permitted imports of shorter-lifespan products that Brazil did not have to allow. An exemption of all WTO members would have far exceeded what was necessary under the MERCOSUR tribunal's ruling and would not have allowed Brazil to reduce unnecessary generation of tyre waste to the maximum extent possible.

⁴⁵ Exhibit EC-43, para. 101.

⁴⁶ Cf. European Communities' first written submission, para. 84.

Question 74. To Brazil.

Did Brazil attempt to use the procedure contained in Article 22.1 of the Protocol of Brasilia to request a clarification as to how Brazil should comply with the MERCOSUR ad hoc tribunal's ruling of 9 January 2002?

Response of Brazil

183. No. Article 22.1 of the Protocol of Brasília provides for a procedure to obtain (i) clarification on the content of an award or (ii) an interpretation on how a decision should be complied with. The award was clear and there was no need for an Article 22.1 clarification. As Brazil explained in its response to question 73, there were no alternatives to implementing the ruling, other than exempting MERCOSUR members from the import ban.

Question 75. To Brazil.

In paragraph 169 of your first written submission, you indicate that MERCOSUR is consistent with Article XXIV, because:

MERCOSUR parties have eliminated duties and other restrictive regulations with respect to substantially all the trade within MERCOSUR. And they apply substantially the same duties to the trade with non-Members.

Could you please elaborate on this argument? Specifically, could you explain how "substantially all the trade" within MERCOSUR is covered and how you apply "substantially the same" duties to trade with non-Members?

Response of Brazil

184. The European Communities has recognized, during the first substantive meeting with the Panel, that MERCOSUR is a customs union. Therefore, it is unnecessary for the Panel to examine whether MERCOSUR meets the Article XXIV requirements for customs unions.

185. In any event, MERCOSUR is currently under examination in the Committee on Regional Trade Agreements. The WTO Secretariat has already concluded that MERCOSUR meets the requirements of Article XXIV:5(a). See WT/COMTD/1/Add.15.

Question 76. To the European Communities.

Please comment on Brazil's argument, in paragraph 70 of its first oral statement, that the European Communities has recognized MERCOSUR as a customs union, as evidenced by its engagement in "bi-regional FTA negotiations" with MERCOSUR. Is the European Communities' position that it recognizes MERCOSUR as a customs union regardless of whether it meets the conditions under the provisions of Article XXIV:8 and 5?

Response of the European Communities

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

187. However, the question in the present case is not merely whether MERCOSUR is a customs union in a general sense, but whether it is fully in accordance with the conditions of

Article XXIV:5 (a) and 8 (a). As the European Communities has remarked, it is for Brazil, as the party invoking Article XXIV, to demonstrate that these conditions are met.⁴⁷

188. The negotiations between the European Communities and MERCOSUR are of no relevance in this context. Since 2000, the European Communities and MERCOSUR have been in the process of negotiating a bi-regional association agreement. This regional approach reflects *inter alia* the fact that MERCOSUR has a common external tariff and a common external trade policy. However, this is unrelated to the question whether the MERCOSUR agreements itself is in compliance with Article XXIV.

Question 77. To the European Communities.

How do you reconcile the statement you made in paragraphs 121 and 122 of your first oral statement with the ruling in the US – Line Pipe case that you cited in footnote 106 of your first written submission?

Response of the European Communities

189. In *US – Line Pipe*, the Panel expressed doubt as to whether the necessity test formulated by the Appellate Body in *Turkey – Textiles* should also apply in circumstances other than *Turkey – Textiles*, notably where "where the alleged violation of GATT 1994 arises from the elimination of 'duties and other restrictive regulations of commerce' between parties to a free-trade area."⁴⁸

190. The European Communities does not share these doubts. In the view of the European Communities, there is no indication that the necessity test applied in *Turkey – Textiles* would apply only in cases where the restriction is immediately and solely imposed on imports, but not to cases where the restriction is first imposed on all goods, and then subsequently selectively removed for goods from within the customs union.⁴⁹ This is also the view the European Communities defended before the Appellate Body in *US – Line Pipe*.⁵⁰

191. It is also noteworthy that the question in *US – Line Pipe* was a highly specific one, namely whether the United States could include, in the context of a safeguards investigation, Canada and Mexico in the analysis of serious injury while excluding the same countries from the application of the safeguards measure. The Appellate Body concluded that this absence of "parallelism" between the investigation and the effects of the measure was incompatible with Articles 2 and 4 of the Safeguards Agreement.⁵¹ For this reason, the Appellate Body did not rule on the question of whether Article 2.2 of the Safeguards Agreement, or Article XXIV, would allow to exclude Members of a free trade area from the scope of a safeguards measure.⁵² Moreover, the Appellate Body also declared the findings of the Panel with respect to Article XXIV to be "moot and having no legal effect".⁵³

192. Finally, it is worth mentioning that safeguards are addressed in Article XIX, an exception which, unlike Article XX, is not mentioned in the list of exceptions in Article XXIV:8(a)(i). Therefore, even if it were permissible, under Article XXIV, to exempting imports from within a customs union from a safeguards measure,⁵⁴ this would not mean that the same is true for measures under Article XX.

⁴⁷ European Communities' first oral statement, para. 118.

⁴⁸ Panel Report on *US – Line Pipe*, para. 7.148.

⁴⁹ Cf. European Communities' first oral statement, para. 121-122.

⁵⁰ Cf. Appellate Body Report on *US – Line Pipe*, para. 66.

⁵¹ Appellate Body Report on *US – Line Pipe*, para. 197.

⁵² Appellate Body Report on *US – Line Pipe*, para. 198.

⁵³ Appellate Body Report on *US – Line Pipe*, para. 199.

⁵⁴ On this question, cf. also footnote 1 to Article 2 of the Agreements on Safeguards.

Question 78. To the European Communities.

In paragraph 129 of your oral statement you suggest that measures adopted years after the conclusion of the customs union cannot be necessary for its formation. Does this imply that no measure adopted by parties to a customs union after its formation could ever be justified under Article XXIV?

Response of the European Communities

193. The European Communities does not wish to suggest that only measures which are adopted at one single point in time, defined as the "formation of the customs union", can be justified under Article XXIV.

194. In the view of the European Communities, the formation of a customs union may also be, and typically is, a gradual process. This is recognised in Article XXIV:5 (c), which allows the adoption of interim agreements necessary for the formation of a customs union within a reasonable length of time.⁵⁵ Therefore, in the view of the European Communities, a measure may also be regarded as adopted on the formation of the customs union if it is adopted at a later point than the initial formation of a customs union, provided it is necessary for the formation of the customs union, and is adopted within a reasonable period of time.⁵⁶

195. However, as the European Communities has remarked in its first oral statement,⁵⁷ this is not the case for the measures adopted by Brazil. When MERCOSUR was concluded in 1991, trade between MERCOSUR countries in retreaded tyres was unrestricted. It is only later that Brazil decided to restrict trade, only in order to then still later remove the restriction for its MERCOSUR Members. Such an erratic policy course can hardly be regarded as part of the "gradual formation of a customs union". Accordingly, given the specific circumstances of the case, the MERCOSUR exemption cannot be regarded as introduced "upon the formation of a customs union".

Response of Brazil

196. The Panel's question illustrates the difficulty with overextending the analysis of *Turkey - Textiles* to cover measures of internal liberalization that do not raise outside trade barriers, as the panel in *US - Line Pipe* recognized. GATT members intended Article XXIV to be an effective tool of regional liberalization, not its death knell.

Question 79. To Brazil.

In paragraph 22 of its first oral statement, the European Communities argues that the sequencing of the measures which result in a discrimination between goods originating within the customs union, and goods from outside the customs union, does not change the standards applicable under Article XXIV:5. Could you please comment?

Response of Brazil

197. Brazil notes that paragraph 22 does not refer to sequencing of the measures, rather paragraph 122 does. Brazil will respond to the European Communities' arguments in paragraph 122.

198. In the present case, the sequencing of measures demonstrates that Brazil did not engage in unjustifiable and arbitrary discrimination. Brazil maintained an import prohibition that applied to imports of *all* countries. When Uruguay challenged the prohibition in MERCOSUR, Brazil

⁵⁵ Paragraph 3 of the Understanding on the Interpretation of Article XXIV of the GATT 1994 provides that the "reasonable length of time should exceed 10 years only in exceptional cases".

⁵⁶ Cf. also Panel Report on *Argentina - Footwear (EC)*, para. 8.98.

⁵⁷ European Communities' first oral statement, para. 129.

vigorously defended the ban before the MERCOSUR Ad Hoc Tribunal. It was only after the MERCOSUR tribunal ruled against Brazil, that Brazil exempted MERCOSUR members from the ban, and only to the minimum extent required. If anything, the sequencing of Brazil's measures demonstrates that Brazil's goal has always been intent in protecting public health and the environment by applying the import ban as rigorously and comprehensively as possible.

Question 80. To both parties.

Could you please clarify what, in your view the phrase "except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX" (emphasis added) in Article XXIV:8(a) means? Specifically, could you please clarify how, in your view, "necessity" is to be assessed under this provision, in relation to measures permitted under Article XX?

Response of the European Communities

199. The quoted phrase makes it clear that in order to fulfil the requirement to liberalise "substantially all trade" within a customs union, it is not necessary to also abolish the measures which are permitted, *inter alia*, by Article XX.⁵⁸

200. Of course, this does not mean that Article XXIV:8(a) requires the maintenance of restrictive regulations of commerce between Members of a customs union. This is expressed by the words "where necessary" within the brackets in Article XXIV:8(a). However, where restrictive regulations are not necessary for the purposes of Article XX, and therefore abolished between Members of the customs union, they must be abolished for all Members, and not just those members of the customs union.

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

Response of Brazil

202. As Brazil explained in its response to Question 50, the phrase "where necessary" gives WTO-Members that are part of a customs union the right to maintain duties and other restrictive regulations between the constituent territories, based *inter alia* on the general exceptions in Article XX, and still meet the requirement under Article XXIV:8 that restrictions be eliminated with substantially all the trade between the constituent territories. However, Article XXIV:8 does not *require* or impose the obligation on customs union members to maintain trade restrictions by invoking Article XX. That interpretation of the parenthetical in Article XXIV:8(a) would contradict the very purpose behind the formation of customs unions – which is to eliminate trade barriers among members – and be contrary to Article XXIV, which encourages the highest level of internal liberalization ("eliminated with respect to substantially all the trade").

Question 81. To Brazil.

Please comment on the European Communities' assertion, in paragraph 134 of its first oral statement, that "contrary to the claims of Brazil, (legislative) Decree (88/1992) does not contain the obligation set out in Article 21.2 of the Protocol of Brasilia, but merely approves the protocol on behalf of Brazil".

Response of Brazil

203. Incorporation of international treaties into Brazilian law is a complex process that requires the participation of the Executive and Legislative powers. The first step is the conclusion (signature) of the treaty by the President of the Republic, who has the exclusive power to do so under

⁵⁸ Cf. also Panel Report on *Argentina – Footwear (EC)*, para. 8.96.

Article 84(VIII) of the Federal Constitution. The treaty must then be approved through a Legislative Decree by the National Congress, which has the exclusive competence to decide conclusively on international treaties, in accordance with Article 49(I) of the Constitution. Once approved, the President will act again and promulgate a decree, which will be published in the Official Journal together with the text of the treaty translated to the Portuguese language. At that point, the treaty becomes a part of Brazil's domestic law. Incorporated international treaties are equal in hierarchy to other laws in the Brazil's legal system. A private party can even bring a legal action based on provisions of an incorporated international treaty (*see, e.g.*, Articles 102 (III) (b), 105 (III) (a) and 109 (III) of the Federal Constitution).

204. The Protocol of Brasília was approved by the National Congress through Legislative Decree 88/1992 (Exhibit BRA-76), and subsequently it was promulgated and published by Decree 922 of 10 September 1993 (Exhibit BRA-101). While Legislative Decree 88/1992 may not "contain" the obligation set out in Article 21.2 of the Protocol of Brasília, Decree 922/1993 certainly does, and the Protocol of Brasília is undoubtedly a part of the Brazil's domestic law. Therefore, the European Communities' assertions in paragraph 134 of its oral statement with respect to the status of the Protocol of Brasília in Brazilian law are absolutely incorrect.

Question 82. To Brazil.

Please comment on the European Communities' argument, at paragraph 137 of its first oral statement, that the exemptions are not "securing compliance" with the ruling of the Arbitral Tribunal by anyone else and that, rather, Brazil was simply itself complying with its obligations.

Response of Brazil

205. The European Communities' argument attempts to differentiate between municipal laws that bind private parties (whether physical or juridical) and laws that bind the State or its organs. There is no basis for that differentiation. Neither the text of Article XX(d) nor the WTO jurisprudence provides basis for such a distinction. In *Mexico – Soft Drinks*, the Appellate Body distinguished between laws that regulated domestic conduct and laws that sought to secure compliance with "international obligations of *another* WTO Member". *See* Appellate Body Report, *Mexico - Soft Drinks*, para. 70 (emphasis added). It ruled that laws in the latter category could not be justified under XX(d). It made no similar finding with respect to municipal laws that secured compliance with the government's *own* international obligations. On the contrary, the Appellate Body unequivocally stated that that for purposes of Article XX(d),

"the terms "laws or regulations" cover rules that form part of the domestic legal system of a WTO Member, including rules deriving from international agreements that have been incorporated into the domestic legal system of a WTO Member or have direct effect according to that WTO Member's legal system."

Appellate Body Report, *Mexico – Soft Drinks*, para. 79 (emphasis added).

206. This clear and unambiguous language leaves no room to argue that Article XX(d) applies only to laws regulating private conduct, especially given that most international agreements obligate governments, and not private parties.

Question 83. To the European Communities.

Is your argument in paragraph 137 of your first oral statement related to your position that Brazilian Decree (88/1992) does not clearly show that the provisions of the MERCOSUR Agreement are incorporated into the Brazilian domestic laws and regulations?

Response of the European Communities

207. No. In order to successfully invoke Article XX(d), Brazil has to show a) that the obligation to comply with the ruling of the MERCOSUR arbitral tribunal is contained in a "law and regulation" within the meaning of Article XX(d), and b) that its measure is necessary to "secure compliance" with this law or regulation.

208. The argument made by the European Communities in para. 137 relates to the second of these conditions. As the European Communities has explained, to "secure compliance" with a law or regulation means to "enforce" this law or regulation as regards other actors, typically natural or legal persons.⁵⁹ With the adoption of the MERCOSUR exemption, Brazil was not "securing" compliance by anyone else, but simply complying itself with its international obligation. Brazil's measure therefore does not fall within the scope of Article XX(d).

Response of Brazil

209. Brazil notes that its commitments under MERCOSUR, including the Protocol of Brasília, have been incorporated into the domestic law. *See* Brazil's Response to Question 81.

Question 84. To the European Communities.

In light of your observations, at paragraph 137 of your first oral statement in respect of Brazil's invocation of Article XX(d), could you please comment on the statement by the Appellate Body in Mexico – Soft Drinks that the terms "laws or regulations" in Article XX(d) "cover rules that form part of the domestic legal system of a WTO Member, including rules deriving from international agreements that have been incorporated into the domestic legal system of a WTO Member". ?

Response of the European Communities

210. At the outset, the European Communities would recall that its argument in paragraph 137 of its FOS does not concern the meaning of the term "laws or regulations", but the meaning of the term "to secure compliance" in Article XX(d).

211. As regards the meaning of the term "laws and regulations", the European Communities agrees with the Appellate Body that such laws or regulations include international agreements when they are incorporated into the domestic legal order of the WTO Member in such a way as to be enforceable as against individuals.⁶⁰

212. The reason for this interpretation is that international agreements may deal with matters which require enforcement in the internal legal order of WTO Members. An example would be international agreements dealing with the protection of intellectual property rights, such as trademarks, copyrights, or geographical indications. If such an agreement, rather than being transposed through internal

⁵⁹ European Communities' first oral statement, para. 135.

⁶⁰ Before the Panel in *Mexico – Soft Drinks*, the European Communities expressed its views as follows (Panel Report on para. 5.51, emphasis added):

At a general level, the European Communities would not exclude that an international agreement concluded by a WTO Member might also constitute a "law or regulation" within the meaning of Article XX(d) of the GATT 1994, provided that the agreement is directly applicable in the internal legal order of such member, and is therefore capable of being directly enforced on individuals.

legislation, is directly applicable in the domestic legal order, then it may also be the subject of enforcement measures within the meaning of Article XX(d).

213. However, this does not mean that the international obligations contained in an international agreement equally become "laws or regulations" within the meaning of Article XX(d). Accordingly, Article XX(d) cannot be invoked when a Member, rather than enforcing an international agreement in its internal order, simply complies with its international obligations.

H. REQUEST FOR SPECIFIC INFORMATION

Question 85. To Brazil.

Could Brazil provide an English translation of the parts of The National Code of Traffic, which are meant to contribute to the promotion of better tyre care?

Response of Brazil

214. See Exhibit BRA-102.

Question 86. To Brazil.

Could Brazil provide an English translation of the MERCOSUR ad hoc tribunal ruling (Exhibit BRA-74)?

Response of Brazil

215. See Exhibit BRA-103.

II. FOLLOWING THE SECOND SUBSTANTIVE MEETING OF THE PANEL

A. GENERAL

Question 87. To Brazil.

Does Brazil have a system of regular mandatory vehicle inspections in place (see Brazil first written submission, paragraph 82 and EC second written submission, paragraph 78)?

Response of Brazil

216. Yes. The National Code of Traffic (Law No. 9.503/1997) (Exhibit BRA-102) establishes a system of mandatory vehicle inspections in Brazil. The Code requires examination of the vehicle's safety, including tyres, and its compliance with emission rules. Under the law, states have the jurisdiction to develop and enforce safety standards and inspection procedures in their individual territories and, at present, that is what happens. However, the Executive has submitted a bill to establish uniform federal inspection standards (Bill 5.979/2001) (Exhibit BRA-167). The bill is presently being considered by the legislature.

217. The absence of nationwide rules at present does not mean that Brazilian states and municipalities cannot in the interim use local rules to carry out regular inspections. They can and they do, as Brazil noted in its response to the European Communities' Question 8. In addition, the inspections in Brazil are not limited to the annual inspections. Every vehicle in Brazil is inspected when it is first licensed, when its ownership changes, and also when the vehicle owner moves to a different state. According to the National Traffic Department, 30 per cent of the Brazilian automobile fleet is annually inspected because of a change in ownership or the owner's move to a different state.

Comments of the European Communities

218. In its reply to the Panel's Question, Brazil claims that it has a system of regulatory mandatory vehicle inspections in place. However, this claim is unsupported by the evidence provided by Brazil, and incompatible with Brazil's own statements on this issue.

219. In its reply, Brazil claims that the National Code of Traffic Law (Law No. 9.503/1997, Exhibit BRA-102) establishes a system of mandatory vehicle inspections in Brazil. However, this is not true. Article 104 of the said law merely announces that vehicles "will have their safety [...] evaluated via inspection, which will be mandatory". As Brazil itself clarifies, there are currently no rules at the federal level in Brazil which would establish such a system, and relevant inspection procedures therefore must be laid down by the Brazilian states and municipalities.

220. As regards the rules existing at the level of Brazilian states, Brazil has also clarified in its reply to the European Communities' question No. 8 and 9 that only one out of its 27 States, namely the State of Rio de Janeiro, has a system of mandatory regular vehicle inspections.⁶¹ Accordingly, it is simply not true that there exists a system of mandatory regular vehicle inspections throughout Brazil.

221. Brazil has also once again referred to a draft law which would establish a uniform federal inspection scheme, and has finally produced a copy of this bill (Bill 5.797/2001, Exhibit BRA-167). However, it is noted that this bill, which dates from 2001, is still not adopted, and it is not clear whether and when it will be. Moreover, what matters is the date of establishment of the Panel, and at that date, Brazil clearly had no mandatory system of regular vehicle inspections in place.

222. Brazil has also argued that every vehicle in Brazil is inspected when its ownership changes, or when the owner moves to a different state, and has claimed that 30 per cent of the Brazilian automobile fleet is annually inspected for this reason.⁶² However, Brazil has provided no evidence to prove that such inspections are indeed mandatory and effectively carried out throughout the territory in Brazil. Moreover, it seems highly unlikely that 30% of the Brazilian automobile fleet would be affected by a change in ownership or a move to a different state every year. Since Brazil has not provided any proof to substantiate its assertion, it can therefore not be assumed that such inspections would serve as a substitute for regular vehicle inspections.

223. In conclusion, it is recalled that Brazil has itself recognised that "automotive inspections are an important instrument to increase the number of retreadable casings in the country".⁶³ Accordingly, Brazil has failed to take a reasonably available alternative to the import ban on retreads, which would have resulted in a reduction of the number of waste tyres arising in Brazil.

Question 88. To Brazil.

Could Brazil provide examples of tyre fires that took place in Brazil, their dimension and an assessment of their negative effect on human, animal or plant life or health (see EC second written submission, paragraph 60)?

Response of Brazil

224. Brazil has provided information on tyre fires in the States of Paraná, Minas Gerais and in the Federal District in paragraph 36 of its first written submission. Brazil has not been able to obtain information on tyre fires in other states because fire brigades of those states do not maintain records that distinguish between tyre fires and other fires. Unavailability of these records does not mean, of course, that tyre fires do not occur in other states.

⁶¹ European Communities' second written submission, para. 78 and fn. 73.

⁶² Brazil's answer to panel question No. 87, para. 2.

⁶³ Brazil's answer to European Communities' question No. 8.

225. There is no need to assess the negative effect on human, animal or plant life or health of tyre fires specifically in Brazil because there is extensive evidence of the risks resulting from fires all over the world. Fires in Brazil are no different from fires elsewhere. The European Communities' argument with regard to tyre fires in paragraphs 60 and 61 of its second written submission is specious. It is based on what is referred to as the problem of induction, i.e., reasoning that just because experience shows that event A has always followed event B, it does not mean that it will do so again. Governments cannot base their decisions on this reasoning. Prudent governments believe that if stockpiles of used tyres can be set on fire by lightning or arson elsewhere, the same can happen in their territory. Likewise, prudent governments also believe that if those fires emitted deadly pollutants elsewhere, the same will happen in their territory.

226. When, in the 1990s, Brazil set out to combat dengue and other mosquito-borne diseases by, among other things, collecting the used tyres that were scattered over its vast territory, Brazilian officials also realized that simply collecting and stockpiling them was no panacea. Not only do stockpiles risk contaminating the soil and ground water through leaching, and becoming breeding grounds themselves for mosquitoes, they also can catch fire through lightning or criminal behaviour. Brazil was aware of the devastating tyre fires in Wales,⁶⁴ in California,⁶⁵ in Ontario,⁶⁶ and in many other locations, both in Brazil and in other countries. Brazil was also aware of studies showing the toxic risks of such fires.

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

Comments of the European Communities

228. Contrary to the claims of Brazil in its answer to this question from the Panel, Brazil has provided no relevant information on tyre fires in its territory. The only information given is limited to the number of tyre fires in two states and in the Federal District, without giving information, as the European Communities has already pointed out,⁶⁷ on their location, origin/causes, dimension and duration and an assessment of their real negative effects on health. Brazil has also admitted that it has not been able to obtain information on tyre fires in other states.

229. This already shows that tyre fires in Brazil do not appear to have the dimensions of the tyre fires in the United Kingdom, United States, and Canada to which Brazil has referred in its submissions.⁶⁸ Otherwise, it would have been very easy for Brazil to attach, in relation to waste fires in its territory, similar reports and press clippings to those that it has found for tyre fires abroad. The

⁶⁴ See Health Protection Agency (UK), Chemical Hazard and Poisons Report 8 (2003) (Exhibit BRA-10).

⁶⁵ Mike Martinez, "Cleanup of Tracy tyre fire ending soon," *Oakland Tribune*, January 3, 2006 (Exhibit BRA-35); California Environmental Protection Agency (US), Integrated Waste Management Board, Five-Year Plan for the Waste Tyre Recycling Management Program 18 (2003) (Exhibit BRA-36).

⁶⁶ Laurent Simon & Thierry C. Pauchant, Developing the Three Levels of Learning in Crisis Management: A Case Study of Hagersville Tyre Fire, Review of Business, Fall 2000, at 7 (Exhibit BRA-139).

⁶⁷ European Communities' second written submission, para. 60. The EC had already asked Brazil to provide information on these issues at the beginning of the proceeding: see European Communities' Question No 13.

⁶⁸ It is quite important to point out that the fires mentioned by Brazil in its answer involved several million of tyres: 10 million tyres in Powys (Wales) (Exhibit BRA-10), 7 million tyres in Tracy (California), 5 million in Westly (California) (Exhibit BRA-36) and in Hagersville (Ontario) 14 million tyres (Exhibit BRA-139). In another tyre fire in Wyandot (Ohio), 26 million tyres were involved (Exhibit BRA-38, at p. 2).

dimension of the site in number of tyres is an important element to assess the adverse effects of tyre fires. Thus, Exhibit BRA-10 shows in its table 1, at page 8, that in two more reduced waste fires, one in Washington (Pennsylvania) with 1.7 million tyres, and the other in Gila River Reservation (Arizona) with 3 million tyres, no adverse environmental effects were reported. In another tyre fire in Cheshire (England), with 500,000 tyres, the only adverse effect was limited to the site.

230. Brazil claims that prudent governments are entitled to rely on inductive inference in order to conclude that, if tyre fires occur and have negative effects in other parts of the world, it will also happen in their respective territory. But this argument does not take into account that the adverse consequences arising from waste tyre fires depend on the variables mentioned above. Neither the risk of tyre fire occurrence is the same between different countries, because the vast majority of tyre fires are due to arson,⁶⁹ which is an event very much depending on social factors.

231. In any case, it is astonishing to learn that Brazil does not keep records of the tyre fires occurred in its territory, as all prudent governments do. That information is essential to prevent and fight future tyre fires, and the evidence attached by Brazil to its submissions reflects clearly that preoccupation.⁷⁰

232. The European Communities would finally recall that tyre fires are a problem that is not related to the importation of retreads, but to the management of tyre waste. Given the numbers involved, the resumption of trade in retreaded tyres would in the worst case have a small impact on the overall quantity of the tyre waste that arises. Also for that reason, Brazil has not demonstrated in any manner the connection between the importation of retreaded tyres and the frequency, magnitude or harmful effects of tyre fires.

Question 89. To Brazil.

Could Brazil comment on a statement made by a representative of the Brazilian Minister of Health on 14 April 2002 before the Consumer, Environment and Minority Protection Committee explaining that "even if we were to eliminate all tyres from Brazil we would still not prevent transmission of [dengue]"? (see EC second written submission, paragraph 59)

Response of Brazil

233. The statement is correct. As Brazil explained in paragraphs 125-130 of its second written submission and in paragraph 91 of its second oral statement, waste tyre fires are one of the three major contributors to the dengue epidemic in Brazil. Reducing the accumulation of waste tyre fires by itself will not eliminate dengue because doing so would eliminate only one of the mosquito sources. This is why, in addition to collecting tyre fires, Brazil's campaign against dengue also targets other key containers. The campaign also educates the public about dengue prevention, carries out mosquito surveillance, monitors mosquito resistance to insecticides, and offers guidance on treatment of dengue patients.

⁶⁹ Table 1 of Exhibit-BRA-10, at p. 8, shows that, out of the 11 tyre fires listed there, only in one there were no data available concerning its cause; for the other 10 the cause is "arson suspected" or "arson a potential cause".

⁷⁰ Thus, the document "Tyre Pile Fires", attached as Exhibit BRA-29, at p. D-1, explains that "[t]he extinguishment of the last flame is by no means the end of activities at a tyre pile fire. Part D of this volume describes the post-fire activities. These post-fire activities include [...] and 3) preparation of reports describing the fire fighting activities, health and safety concerns, environmental concerns, and lessons learned during the entire fire process".

234. Nevertheless, it is important to underline that waste tyres are the favourite breeding site for mosquitoes, as Brazil extensively demonstrated in paragraphs 17 to 32 of its second written submission. The European Communities argued in its SOS that other containers are much more relevant to dengue control and, in support, presented a study of *aedes aegypti* in two neighbourhoods in Manaus, Brazil (Exhibit EC-124). Yet even this study – with its very limited scope – proves that tyres are highly relevant. It specifically states at page 6 that among the positive containers, "Tyre, Flask, Construction Material and Storage groups stood out," and that "[t]he tyre group [] showed very high averages at Praça 14."

Comments of the European Communities

235. Brazil's answer to this question is, first of all, in contradiction with what the Brazilian Minister for Environment explained at the first substantive meeting with the Panel. Now Brazil argues that "waste tyres are the favourite breeding site for mosquitoes".⁷¹ According to the Minister, only in 25 per cent of the 1.140 municipalities having notified dengue cases in 2003, were tyres the most important breeding place for dengue-carrying mosquitoes. However, this statement has also to be taken with great prudence because Brazil has never submitted to the Panel the survey conducted by the Minister of Health on which this assertion was made.

236. In any case, the reports on which Brazil based its assertions in paragraphs 17 to 32 of its second written submission are not valid to demonstrate that waste tyres are *generally* the predominant breeding site for mosquitoes. The report attached as Exhibit BRA-109 was conducted in 1985 and is limited to 14 city blocks in the municipality of Sao José do Rio Preto (state of Sao Paulo). The survey enclosed as Exhibit BRA-110 was carried out also in a municipality of the state of Sao Paulo and positive values for tyres only represented 11,9 per cent of the containers. The report attached as Exhibit BRA-111 is limited to two islands on the river Paraná and positivity of tyres was nearly equal to the one of tins. The report attached as Exhibit BRA-112 only used waste tyres as collecting places, which were set up as traps in the municipality of Nova Iguaçu (Rio de Janeiro). The surveys enclosed as Exhibit BRA-113 and BRA-114 only used waste tyres and bamboos as collecting places, which were set up in forests in the municipalities of Cambé and Londrina (Panará).

237. Finally, even if tyres were considered, *quod non*, as the main breeding place for mosquitoes, it is clear that the elimination of waste tyres as breeding places will not depend on the maintenance of the import ban on retreaded tyres but on a better management of waste tyres arising from all sources in Brazil, not only those arising from imported retreaded tyres. As the European Communities stated in its second written submission, the relevance of waste tyres arising from imported retreaded tyres in the fight against dengue must be minimal.⁷²

Question 90. To both Parties.

What is the average life of a passenger tyre in Brazil? (see EC second written submission, paragraph 57)

Response of Brazil

238. There is no official estimate of the average life of a passenger tyre in Brazil. INMETRO clarifies that the durability of a tyre depends on many factors, such as the region's terrain, road quality, and climate.

239. Brazil's tyre industry estimates that a 175/30 passenger car tyre lasts about 60,000 km or about six years. Mazola estimates that a 165/70 tyre lasts about 40,000 km or four years. Given that

⁷¹ Brazil's answer to panel question No. 89, para. 8.

⁷² European Communities' second written submission, para. 59, *in fine*.

retreading regulations in Brazil and in the European Communities prohibit tyres that are older than seven years from being retreaded, it is safe to assume that a tyre seldom lasts longer than seven years.

Response of the European Communities

240. The average life of a tyre, when expressed in years, is the average total number of kilometres which a car drives with a tyre before it is replaced, divided by the average number of kilometres driven by a passenger car per year.

241. The number of five years referred to in paragraph 57 of the European Communities' second written submission, was, as is made clear in the paragraph itself, a mere assumption adopted for the purposes of analysing the information on the numbers of dengue cases provided by Brazil. The European Communities notes that Brazil used the same assumption of a lifespan of five years in its Exhibit BRA-162.⁷³

242. In the European Communities, according to information received from the tyre industry, the average number of kilometres which are driven with a passenger car tyre before it is replaced is between 60.000 and 75.000 kilometres. According to the European Automobile Manufacturers Association, the average number of kilometres driven per passenger car in the European Communities is around 15,000 kilometres per year. On this basis, the average lifespan of a passenger car tyre in Europe may be assumed to be between four and five years.

243. The European Communities does not have specific information regarding the same numbers for Brazil, and considers that these are for Brazil to provide. However, the European Communities notes that according to information received from Brazilian retreaders, the average mileage of a passenger car tyre in Brazil is around 45,000 km. This lower mileage of Brazilian tyres would appear to reflect the rougher road conditions in Brazil and the accordingly higher wear of tyres to which Brazilian retreaders have equally referred.⁷⁴

244. Assuming an average number of 15,000 kilometres driven per year, the average life of a tyre in Brazil may therefore be somewhat shorter than in the European Communities.

Comments of the European Communities

245. As regards the average number of kilometres driven with a tyre in Brazil, Brazil indicates a maximum mileage between 40.000 and 60.000 kilometres depending on the tyre type. While it is not clear how representative the tyre types indicated by Brazil are, and to which extent these numbers take into account risks of tyres being damaged due to road conditions, it is noteworthy that even according to Brazil's own figures, the average mileage of passenger car tyres in Brazil appears to be lower than in the European Communities. This confirms implicitly the fact that there is a higher factor of wear and tear on tyres in Brazil due to the local road conditions.

246. As regards the number of kilometres driven by a vehicle per year in Brazil, Brazil appears to use an average of 10.000 km. According to Brazilian retreaders, however, it would appear that this number is closer to 15.000 km. Accordingly, the lifespan of tyres in years in Brazil would appear to be somewhat lower than the one indicated in Brazil's reply.

247. Finally, Brazil argues that because passenger car tyres which are older than seven years may not be retreaded, "it is safe to assume that a tyre seldom lasts longer than seven years". This is not correct. The seven-year maximum is purely a limitation on the age of the casing used in the retreading process, after which the casing can be used again for a number of years. Accordingly, it is

⁷³ Cf. Exhibit BRA-162, Note (2), which refers to new tyre and new vehicle exports, "5 yrs prior".

⁷⁴ Exhibit BRA-157, para. 6.

clear that if a tyre is not used much, it may effectively last much longer than 7 years. Similarly, if a tyre is retreaded again after having been in use for 6.5 years, it will also normally achieve a total lifespan of far longer than 7 years, when adding up the lifespans of the new and the retreaded tyre.

Question 91. To Brazil.

Are all new tyres imported in Brazil retreadable? Does Brazil have measures in place to prevent imports of cheap low quality new tyres?

Response of Brazil

248. As Brazil pointed out in its Response to Question 12 from the Panel, all new tyres sold in Brazil – whether produced domestically or imported – are high-quality tyres that comply with strict technical and performance standards. They are not "cheap low quality new tyres" with no potential for future retreading. This is best demonstrated by the high rate of retreadability in Brazil.

249. Neither Brazil nor any other country, as far as Brazil understands, employs any measures "to prevent imports of cheap low quality new tyres." Brazil is not aware of a means to distinguish between new tyres that are capable of being retreaded and those that are not before the tyres have actually been used.

Comments of the European Communities

250. In its reply to the Panel's question, Brazil claims that all new tyres sold in Brazil are "high-quality tyres" which can be retreaded. At the same time, Brazil also concedes that "it is not aware of a means to distinguish between new tyres that are capable of being retreaded and those that are not".⁷⁵

251. This statement is entirely unsubstantiated and at the same time contradictory. In reply to the Panel's Question No. 11, the European Communities has produced ample evidence that not all new tyres are retreadable. Brazil has not refuted this evidence in any way. Moreover, the European Communities does not see how Brazil can claim that all new tyres sold in Brazil can be retreaded, if at the same time it recognises that it cannot distinguish between tyres which can and such which cannot be retreaded. The European Communities would like to clarify that new tyres that are not be retreadable from the outset nevertheless manage to satisfy the "strict technical and performance standards" which exist in Brazil, in the European Communities and elsewhere, and which do not include the question of retreadability.

252. The European Communities would like to clarify that it is not asking Brazil to ban the importation of certain types or brands of new tyres. However, the European Communities challenges Brazil's unfounded assumption that all new tyres can always be retreaded, whereas passenger car retreads tyres cannot. Obviously, to the extent that Brazil allows the importation and domestic production of certain new tyre types or brands that *a priori* are not suitable for retreading, this constitutes an additional discrimination against imported retreaded tyres, which are banned. Moreover, the unsuitability of certain new tyres will also have the effect of reducing the rate of retreading, which, contrary to Brazils' assertion, is very low in Brazil for passenger car tyres.

Question 92. To Brazil.

In its answer to Panel's Question n° 18, you indicated that "some of the previously-issued injunctions remain in effect". Could you please clarify how long these could remain in place and what you expect their continued impact on imports of used tyres to be?

⁷⁵ Brazil's answer to panel question No. 91, para. 12.

Response of Brazil

253. The injunctions that are still in effect can be, and are being, challenged through a number of appeals or actions for rescission. They can also be challenged on constitutional grounds and the President's Chief of Staff is presently in the process of initiating one of these constitutional actions. See Exhibit BRA-168, Exhibit BRA-169. As a result of such constitutional actions, Brazil expects that the Federal Supreme Court will annul these injunctions in the very near future. As Brazil explained in paragraphs 135-141 of its second written submission, imports of used tyres through preliminary injunctions – both existing and new – will soon end. While Brazil cannot provide the Panel with a specific date when the last injunction import will take place, it believes that imports of used tyres by means of preliminary injunctions will become *de minimis* in the near future.

Comments of the European Communities

254. At the outset, the European Communities would like to recall that Brazil's measures must be evaluated as in existence at the time of the establishment of the Panel. This also includes the question of whether the import ban makes a contribution to the reduction of the number of waste tyres in Brazil, and of whether Brazil has taken other reasonable available alternatives to the ban.

255. As the European Communities has demonstrated in its previous submissions,⁷⁶ high numbers of used tyres are being imported into Brazil, on the basis of court injunctions, for the purpose of being retreaded in Brazil. As the European Communities has explained, the importation of large amounts of used tyres reduces the contribution that the ban could make to the reduction of waste tyres arising in Brazil, and equally signifies that Brazil has not taken other available measure to the ban. For this reason, the European Communities considers that Brazil's unsupported assurances that the importation of used tyres on the basis of court injunctions will soon cease are legally irrelevant for the evaluation to which the Panel must proceed in the present case.

256. In its reply to the Panel's question, as in its previous submissions, Brazil has not contested that the injunctions are in force, and that the importation of used tyres occurs in the amounts indicated by the European Communities. Rather, Brazil has claimed that the injunctions "can be, and are being, challenged through a number of appeals or actions", including "actions for rescission" or actions on constitutional grounds. On this basis, Brazil renews its assurance that imports of used tyres through preliminary injunctions "will soon end".⁷⁷

257. In this respect, it must be noted that Brazil's statements relate to decisions which Brazilian courts might take in the future. There is no way of knowing when and how Brazilian courts might decide any of the appeals or actions which might be introduced in the future. However, as the Appellate Body has confirmed, speculation about future court decisions cannot be a basis for the objective assessment of the facts to which a Panel must proceed in accordance with Article 11 DSU.⁷⁸

258. It must also be noted that contrary to Brazil's explicit claims,⁷⁹ there is no indication that any of the appeals or actions in question have already been introduced. As Exhibits BRA-165, BRA-168, and BRA-169, Brazil has merely introduced technical notes prepared by Legal Advisers to the Brazilian President which expressly recommend that certain actions be introduced. However, Brazil has not submitted any proof that such actions have already been commenced.

⁷⁶ European Communities' second written submission, para. 81 et seq; European Communities' second oral statement, para. 62 et seq.

⁷⁷ Brazils' answer to panel question No. 92, para. 13.

⁷⁸ Appellate Body Report on *US – Shrimp (Article 21.5 – Malaysia)*, para. 95; for the full citation, cf. European Communities' second written submission, para. 87.

⁷⁹ Brazil's answer to panel question No. 92, para. 13, and para. 99 of Brazil's second oral statement.

259. Moreover, the notes in question were prepared during the Panel proceedings and as recently as 25 August 2006 (Exhibit BRA-165) or 15 September 2006 (Exhibits BRA-168 and BRA-169). Moreover, as is clear from the content of the notes, notably the references to the agency requesting these notes and the frequent references to the ongoing WTO proceedings, the notes were prepared specifically because of the ongoing WTO dispute and for the purposes of submission to the present Panel. This fact significantly undermines the credibility of the legal analysis contained in these notes. In fact, if indeed the legal actions recommended in those notes were promising, the question would arise why they have not been initiated earlier by the Brazilian government.

260. As regards the specific actions addressed by the notes, Exhibit BRA-165 recommends a "recissory action" and a "declaratory action of non-existence of legal relation" against the final court decision confirming an injunction held by the Brazilian rethead Pneuback to import used tyres. It is noted that a "recissory action" is an exceptional legal remedy directed at decisions which have become *res judicata*. This is explicitly acknowledged in Exhibit BRA-165, which explains that a "recissory action is the legal and procedural remedy for dismissing a legal decision that can no longer be attacked through appeals".

261. For this reason, Exhibit BRA-165 explicitly confirms the European Communities' earlier submission that the injunctions held by Pneuback are *res judicata*,⁸⁰ and disproves Brazil's statement that "the case is far from closed", that it is "subject to further appeal and is being appealed by the Brazilian government" and that the "European Communities is misinformed on these proceedings".⁸¹ The legal action envisaged by Brazil also shows the irrelevance of the comment made by Brazil that the "injunction involved an entirely different measure – a 15 years old ban on imports of used goods".⁸² What matters is not how old the injunction is, but whether it is still in force and can be used to import used tyres. Otherwise, it would not be clear why Brazil is considering a recissory action and an action of non-existence of legal relation against this injunction.

262. Finally, it should also be noted that given their character as exceptional remedies, a recissory action and a nullity action can only succeed under very narrow conditions.⁸³ This exceptional character of the remedy makes it even more doubtful whether it would succeed if it were introduced.

263. As regards the action for non-compliance with fundamental constitutional principles considered in Exhibits BRA-168 and 169, this appears to be an even more exceptional remedy with an equally uncertain outcome. In fact, the action recommended is based on the assumption that the injunctions at issue would violate certain general principles of the Brazilian constitution, such as the right to an ecologically balanced environment (Article 225 of the Brazilian Constitution), or the right to health (Article 196 of the Constitution). It is manifest that the outcome of an action based on such general principles is highly uncertain at best.

264. What is far more interesting about Exhibit BRA-168, however, is that it contains a list of 24 Brazilian retheaders who hold injunctions which entitle them to import used tyre casings. The same exhibit also contains a list of cases in which the requests for injunctions have been rejected, which however is notably shorter than the first. With this exhibit, Brazil therefore disproves its own claim that the injunctions are an isolated phenomenon, that the Brazilian government has been

⁸⁰ European Communities' second written submission, para. 89.

⁸¹ Brazil's second oral statement, para. 99. This is incidentally also proven by Exhibit BRA-161, which concludes that "the decision that granted the injunction and ensured the right of Pneuback to import used tyres in order to carry out its [commercial] activities is still in effect".

⁸² Brazil's second oral statement, para. 99.

⁸³ For the recissory action, cf. Article 485 of the Brazilian Civil Procedural Code, referred to in Exhibit BRA-165.

successful in fighting the injunctions, and that the European Communities was "cherry-picking" its examples.⁸⁴

265. Finally, the European Communities would also like to comment on the specific case of the importer BS Colway. It is noteworthy that Colway is equally referred to in Exhibit BRA-168 as one of the companies benefiting from an injunction. This disproves the contrary impression Brazil has tried to create in its second oral statement, where it claimed that the European Communities had ignored a March 2006 ruling which was positive for the government.⁸⁵ In fact, the ruling referred to by Brazil was a ruling by a mid-level court which does not affect the validity of the injunction in force.⁸⁶

266. In conclusion, the European Communities submits that Brazil did not give a credible answer to the Panel's question of how long the existing injunctions could remain in place and what their continued impact on imports of used tyres can be expected to be. The facts suggest that these injunctions could remain in effect for a very long time and especially, but not only, those of the two largest Brazilian retreaders and importers of casings, BS Colway and Pneuback, are likely to ensure a large-scale ongoing importation of used tyres into Brazil.

Question 93. To Brazil.

In its answer to Panel's Question n° 16, Brazil said : "Because the preliminary injunctions authorize the importation of used tyres only as raw material, the Government of Brazil has imposed heavy fines for illegal sales of used tyres."

Do retreading companies that import used tyres sell these (as used tyres) and if yes to whom?

Response of Brazil

267. Brazil estimates that at least nine per cent of the used tyres imported as raw material for retreading are sold to the general public as part-worn (used) tyres. See Exhibit BRA-94. Such sales are illegal in Brazil and are subject to fines of R\$ 400 per tyre under the Presidential Decree 3.179 - the same regulation that imposes fines for imports of retreaded tyres. In 2005, Brazil fined Brazilian retreaders a total of R\$ 22.7 million for resale of imported used tyres as part-worns. See Exhibit BRA-69.

Comments of the European Communities

268. In reply to this question, Brazil informs the Panel that on the basis of Exhibit BRA-94, it believes Brazilian retreaders in 2005 sold 9% of the imported 11 million imported used tyres as part-worn tyres, i.e. 1 million tyres. At the same time, Brazil refers to the information contained in Exhibit BRA-69 concerning fines imposed by Brazil, which indicates 59,885 as the number of imported tyres for which fines were imposed in 2005. The European Communities does not know what explains this discrepancy in the numbers provided by Brazil, but they either undermine the credibility of the information provided, or cast serious doubt on the efficiency with which Brazil enforces its relevant legislation.

269. The European Communities would also point out that the sale of mid-life imported used tyres to consumers for direct use as such seems to be a side-effect of the importation of casings (by way of court injunctions). It would not exist if Brazil allowed the importation of retreads instead of the casings, and in comparison the effect of such imports and sales on waste accumulation can be

⁸⁴ Brazil's second oral statement, para. 101.

⁸⁵ Brazil's second oral statement, para. 101; cf. equally Brazil's second written submission, para. 140.

⁸⁶ Exhibit BRA-151 admits that the decision of 7 March 2006 is not valid at present and confirms that that BS Colway maintains its import right based on the 22 May 2006 decision by the vice-president of the Regional Federal Court of the Second Region, which prevails.

presumed to be more negative. According to Brazil's own response, this phenomenon of mid-life sales to consumers continues to exist, despite the above-mentioned fines.

Question 94. To Brazil.

*In its answer to Panel's Question n°60, Brazil said : "If any retreaded tyres from the European Communities did enter Brazil through Rio Grande do Sul, this would have been a direct result of the preliminary injunctions, not of operation of the state measures."
Have preliminary injunctions been granted for the import of retreaded tyres?*

Response of Brazil

270. Yes, a few preliminary injunctions that permitted limited imports of retreaded tyres have indeed been granted, but the volumes imported through these injunctions have been minimal.

Question 95. To Brazil.

The European Communities submits in paragraph 91 of its second written submission that "presently ongoing legislative developments in both houses of the Brazilian legislature are moving, with quite some support, in the direction of formally permitting, not prohibiting, the importation of casings (and retreads)" and mentions inter alia bill 216/03 approved by the Social Affairs Committee of the Brazilian Senate. Could Brazil explain the legal status of these "legislative developments"?

Response of Brazil

271. The European Communities' discussion of what may happen to draft bills 203/1991 and 216/2003 is speculative and has no legal relevance. Nevertheless, Brazil will briefly discuss these bills to respond to the Panel's question.

272. At the outset, Brazil notes that one measure dates back to 2003 and another to 1991, as the bill numbers indicate, but neither has become law to this date. Bill 216/2003 was introduced by a Senator from Paraná, the home state of Brazil's largest retreader. As Brazil has explained, Brazilian readers actively pursue imports of used tyres because these imports are substantially cheaper.

273. Brazil's Executive has actively opposed the bills from the start and will veto them if they manage to clear the legislative hurdles. These bills are very unlikely to be enacted, which would require them to be approved by both the Senate and the House of Representatives and then signed by the President. To this date, neither of the bills has been passed even by one of the houses. Supporters of Bill 216/2003 managed to get the bill approved by the Social Affairs Committee. Instead of scheduling a vote by the full Senate, the President of the Senate has scheduled public hearings on the bill because of the bill's health and environmental ramifications. Even if the bill is passed by the Senate, it will then need to be passed by the House of Representatives and avoid the president's veto. Because this scenario is very unlikely, the European Communities' conclusion that Brazil will soon lift its ban on imports of used and retreaded tyres has no basis. Had the European Communities truly believed in what it claims, it is puzzling why it would even continue its WTO challenge, instead of just letting Brazil's legislative process take its course.

Comments of the European Communities

274. In its reply to the Panel's question, Brazil has argued that the European Communities' reference to the two draft bills is "speculative and has no legal relevance".⁸⁷

275. At the outset, the European Communities would agree with Brazil that the two draft laws are not yet in force, and for this reason do not affect the measures at issue in the present dispute, which

⁸⁷ Brazil's answer to panel question No 95, para. 16.

must be evaluated as in force at the time of the Panel's establishment. For this reason, the draft bills are of no relevance to the recommendations which the Panel must make in accordance with Article 19(1) DSU.

276. This being said, it is somewhat surprising to see Brazil insisting on the irrelevance of future developments when it itself has repeatedly referred to future measures it claims it will adopt, for instance as regards the enforcement of the import ban on used tyres, the establishment of a mandatory system of vehicle inspections, or the removal of the MERCOSUR exemption.

277. In fact, the European Communities referred to the bills in particular in response to the Brazilian claim that it would soon end the importation of used tyres.⁸⁸ Moreover, the European Communities believes that these legislative developments are useful context for the Panel in evaluating the ban's justification under Article XX(b). It is significant that at a time when the Brazilian government is defending the ban as indispensable for the protection of life and health in Brazil, bills aiming at the revocation of the ban are finding considerable support among Brazilian legislators, including of a specialised body such as the Special National Waste Policy Commission of Brazil, where an overwhelming majority of the deputies oppose the government's position as well as the kind of arguments which Brazil has submitted to this Panel.

278. This being said, the European Communities has no certainty that any bill revoking the import ban will indeed be adopted, which is why it was forced to initiate the present dispute settlement proceedings.

Question 96. To Brazil.

In relation to the video contained in Exhibit EC –73:

- (a) *Please clarify what the "Raupp opinion" is and what its relevance to these proceedings might be;*
- (b) *Please comment on the suggestion made in the document that the Brazilian retreading industry can only function at 60% of its capacity using domestic carcasses.*

Response of Brazil

279. The exhibit is a 12-minute video produced by Brazil's largest retreader, BS Colway, to persuade Brazilian legislators to support Bill 216/2003 that would have permitted imports of used and retreaded tyres. See Brazil's Response to Question 95 of the Panel. The Raupp Opinion is the amended version of this bill, introduced by Senator Waldir Raupp. The amended bill reflects the position of Senator Raupp alone, not of Brazil's Government or legislature. It is not a law and thus has no legal relevance.

280. The video offers valuable evidence, however, that directly contradicts the argument on which the European Communities has based its case – that tyres used in Brazil are not suitable for retreading. The video states: "Nowadays, 60 per cent of the raw material used by the Brazilian retreaders are domestic casings." This is an effective admission by the Brazilian retreaders that of some 18.7 million retreaded tyres made in Brazil in 2005, at least 60 per cent, or 11.2 million retreads were made from domestic casings. If 80 per cent, or 6.2 million of truck tyres in 2005 were made from domestic casings, as ABR states⁸⁹, this means that the remaining 5 million domestic casings were used to make passenger car retreads, and that of the 10.8 million passenger car retreads, at least 46 per cent were made from domestic casings in 2005. This directly contradicts the

⁸⁸ European Communities' second written submission, paras. 91-92.

⁸⁹ ABR Report, para. 5 (Exhibit BRA-95).

European Communities' claims that "Brazilian used tyres are not suitable for being retreaded"⁹⁰ and that "retreaded passenger car tyres produced in Brazil are made overwhelmingly from imported casings."⁹¹

281. With respect to part (b), if Brazilian retreaders indeed cannot operate at full capacity on Brazilian casings alone, this is a direct consequence of excess capacity, as Brazil explained in paragraph 119 of its SWS. This is the only plausible conclusion because Brazil has already achieved some of the highest suitability and retreadability rates reported by any country – a third of the total waste arisings are retreaded according to the retreaders' numbers (roughly 32 million used tyres are generated in Brazil every year, and based on the 60-per cent figure in the video and the ABR production numbers, 11 million of them are retreaded).

Comments of the European Communities

282. As regards the first part of the Panel's question, the European Communities would like to clarify that contrary to Brazil's reply, the Raupp opinion does not merely reflect the opinion of Senator Raupp, since it was approved by the Federal Senate's Social Affairs Commission with a majority of 18 to 1.⁹² For the more general relevance of this opinion, the European Communities refers to its comments on Brazil's reply to the Panel's Question No. 95.

283. As regards the second part of the Panel's Question, Brazil avoids a meaningful response by stating that "if Brazilian retreaders cannot operate at full capacity on Brazilian casings alone, this is a direct consequence of excess capacity".⁹³ This is a circular response which avoids addressing the central issue, namely the problems in the supply of retreadable casings which is the underlying cause of the low level of capacity utilisation. This low capacity utilisation makes Brazil's statement that "Brazil has already achieved some of the highest suitability and retreadability rates reported by any country" entirely implausible. In fact, Brazil suggests essentially that Brazilian retreaders have been acting in an economically irrational fashion by building up capacity which even under the best of scenarios they could not expect to use. The European Communities submits that a far more plausible explanation for the presently unused capacity is the one it has already offered, namely that the adaptation of Brazilian industry to the standards of INMETRO Portaria 133 has led to a higher demand for good quality casings, which are not available in Brazil.⁹⁴

284. In relation to the Video contained in Exhibit EC-73, Brazil also claims that the video states that "Nowadays, 60 per cent of the raw material used by the Brazilian retreaders are domestic casings".⁹⁵ However, the video contains no such statement. The video reports a statement by Roberto de Oliveira, Marketing Director of ABR, who states the following:⁹⁶

National casings are already being used. Due to the bad conditions of the country's roads and highways, we have only been able to use enough to meet 60% of our need, *that is, our segment operates with 40% idleness.*

285. Accordingly, the needs to which reference is made is the overall production capacity, which is used only at 60 per cent. However, as is not contested, the Brazilian retreading industry uses large numbers of imported used casings to reach even this 60% capacity utilisation. Contrary to Brazil's

⁹⁰ European Communities' first written submission, para. 81.

⁹¹ European Communities' second written submission, para. 33.

⁹² European Communities' second written submission, para. 91 and Exhibit EC-101.

⁹³ Brazil's answer to panel question No. 96, para. 21.

⁹⁴ European Communities' answer to panel question No. 107, para. 30.

⁹⁵ Brazil's answer to panel question No. 96, para. 20.

⁹⁶ Exhibit EC-73, minute 8:18 (emphasis added).

claim, the statement does not confirm that 60% of casings used by the retreading industry are of domestic origin.

286. For this reason, Brazil's calculations⁹⁷ are based on a fatal misunderstanding of what the 60 % stand for. The result of allegedly 46 % of passenger retreads being made from domestic casings is accordingly flawed. Such a result would also contradict the evidence adduced by Brazil in Exhibit BRA-95, stemming from ABR, which "believes that the large majority, but not the totality, of passenger car casings reformed in Brazil are imported, and is unable to precise the percentage of casings that is effectively obtained in the local market."

287. Moreover, it is also noted that the ABR representative speaks of capacity for the industry as a whole, i.e. including both truck and passenger car tyres. In this context, it must be recalled that the use of domestic casings for passenger car tyres is far lower than for truck tyres.

Question 97. To Brazil.

Please comment on the European Communities' statement in paragraph 85 of its second oral statement that "the technology and equipment for ensuring the respect of [dioxin] emission limits exist, and the Brazilian cement, steel and paper mills companies can surely afford the investments, if they have not done it yet".

Response of Brazil

288. As Brazil explained in paragraphs 78-93 of its second written submission, properly operated, state-of-the-art cement kilns can only mitigate – not completely eliminate – health and environmental harm. Because harm from incineration cannot be avoided, no matter how high the standards, it is necessary to reduce – as much as possible – the volume of tyres that must be incinerated. As Brazil pointed out in paragraphs 74, 85, and 95 of its second written submission, the European Environment Agency itself recognizes the dangers of incineration and advises member States to incinerate waste tyres only "if no other outlet is possible."⁹⁸

289. There is also a practical side to setting permissible emission levels. As Brazil explained in paragraph 14 of its Concluding Statement in the Second Panel Meeting, neither the European nor Brazilian governments can require cement kilns, paper mills, and other facilities to incinerate waste tyres. These facilities are private businesses that will incinerate tyres only if the incineration makes business sense. As the emission standards increase, costs of incinerating tyres increase, and the number of incinerators willing to accept tyres decreases. The OECD report (Exhibit EC-16) states at page 140 that introduction of strict environmental laws caused the use of incineration to decline in several OECD countries. In Austria, for example, the share of incineration dropped from the original share of 70 per cent to 40 per cent.⁹⁹

290. Governments, therefore, face the difficult task of setting the standards high enough to reduce the unavoidable risks of incineration to a level they believe is acceptable under the circumstances, yet low enough to ensure that incinerators continue to accept waste tyres, which would otherwise have to be landfilled or stockpiled – at an even greater health and environmental cost. The issue, therefore, is not whether Brazilian incinerators can afford the safest technology available, but whether incineration of waste tyres would continue to make business sense if expensive investments were required. This especially is a concern in a developing country with fewer resources available.

⁹⁷ In paragraph 20 of Brazil's answer to panel question No. 96.

⁹⁸ European Environment Agency, Waste from Road Vehicles 2 (2001) (Exhibit BRA-108).

⁹⁹ OECD Environment Directorate, Improving Recycling Markets 140 (2005) (Exhibit EC-16).

Comments of the European Communities

291. Brazil has eluded the answer to this Question from the Panel and has decided to continue its evasive tactics in relation to co-incineration as an alternative, which Brazil insists in citing wrongly as "incineration".¹⁰⁰ Instead of providing information to the Panel on the state of the installation co-incinerating or capable of co-incinerating waste tyres in its territory, Brazil repeats that co-incineration produces health and environmental harm and that the Brazilian government can neither require these installations to co-incinerate waste tyres nor to increase the emission standards because the number of installations willing to accept tyres would decrease.

292. The European Communities will respond in relation to the harms caused by co-incineration in its comments on Brazil's answer to Question 123 from the Panel.

293. For the rest, it is quite surprising to learn that the Brazilian government has no regulatory powers to require cement kilns, paper mills and other facilities to co-incinerate waste tyres. This is not a question of business sense but one more related to the protection of the general interest, notably life and health. If it is true that Brazil is confronted with such important life and health challenges related to waste tyres as it has described in its submissions before the Panel, making compulsory co-incineration of waste tyres would be among the best solutions to those problems.

294. This is not a question related to the level at which emission standards for co-incinerating installations should be laid down. Brazil has already adopted those standards, and the European Communities has to presume that the level chosen by Brazil is sufficient to protect its population and environment. In any event, it is the level which Brazil has chosen in reality.

295. The only questions are whether Brazil has these installation in its territory, whether they are capable of and still have unused capacity to co-incinerate waste tyres, and, if some investments are needed, whether these are financially acceptable.

296. Brazil has not provided any information in this respect and it has limited itself to attaching, as Exhibit BRA-166 to its second oral statement, a list with the names and addresses of the companies that are authorized to dispose of waste tyres. This list gives a hint of the halting policy that Brazil has in relation to co-incineration: out of the 9 industrial groups producing cement in Brazil and listed in Exhibit EC-78,¹⁰¹ only 4 have an authorisation to co-incinerate waste tyres.¹⁰² Brazil has not provided any information about the reasons for this gap, which evidences on the face that Brazil's cement industry has unused capacity to co-incinerate more waste tyres than it currently does, a point that is also made in the video contained in Exhibit EC -73.

297. Finally, Brazil cannot defend its policy by arguing that it is a developing country.¹⁰³ The European Communities has already demonstrated that Brazil is one of the world's foremost producers of cement, paper and steel.¹⁰⁴ It is worth noting that, in the European Communities, only Spain and Italy produce separately more cement than Brazil. The companies in those three sectors have sufficient resources to face the investments needed to built or upgrade installations where waste tyres can be co-incinerated. Moreover, financing in Brazil of these investments are ensured by the gate fees

¹⁰⁰ The differences between "co-incineration" and "incinerations" have been explained by the European Communities in its answer to panel question No. 125, para. 61.

¹⁰¹ These groups are: Joao Santos, Votorantim, Cimpor, Lafarge, Camargo Correa, Soecom, Holcim, CP Cimento and Itambé.

¹⁰² CP Cimento, Cimpor, Lafarge and Votorantim, the latter also controls Cimento Poty, Cimento Rio Branco and Cimento Tocantins.

¹⁰³ Brazil's answer to panel question No. 97, para. 24, *in fine*.

¹⁰⁴ European Communities' answer to panel question No. 47, para. 61, and European Communities' second written submission, para. 127.

that, in order to comply with their disposal obligations under Resolution CONAMA No. 258/99, producers and importers of tyres have to pay to those industrial installations for accepting waste tyres for co-incineration.

Question 98. To Brazil.

Please clarify whether the increase in the imports of used tyres between 2003 and 2005 described in paragraph 79 of the European Communities' first written submission is entirely attributable to import authorized under the injunctions granted by Brazilian courts?

Response of Brazil

298. Yes, the described increase is attributable solely to imports authorized under preliminary injunctions granted by Brazilian courts.

B. TRADE DATA

Question 99. To Brazil.

Could you please comment on the European Communities' statement in footnote 151 to paragraph 178 of its second written submission claiming that the graph submitted by Brazil in paragraph 148 of its first written submission actually shows an increase in the total number of new tyre sales?

Response of Brazil

299. The increase in the sales of new tyres in Brazil was caused not by the import ban, but by the fact that there are simply more cars on Brazilian roads. From 2001 to 2005, the Brazilian fleet expanded from 32 million registered motor vehicles to 42 million, according to the National Traffic Department (*see* table below). During this period, the replacement market expanded by 9.4 million, or 22 per cent, from about 42.7 million to 52.1 million. During the same period, sales of new tyres produced in Brazil increased by only 900,000, or a mere five per cent. The European Communities' suggestion that these sales increased by "a few millions" in footnote 151 is untrue and misleading. Even if one counts 1999 and 2000 – for which Brazil does not have retread production information to calculate the market size – the sales of domestic tyres increased by only 1.6 million, or nine per cent. At the same time, imports of new tyres more than doubled from 1999 to 2005.

Registered Motor Vehicles in Brazil, million units

| 2001 | 2002 | 2003 | 2004 | 2005 | Change, units | Change, % |
|------|------|------|------|------|---------------|-----------|
| 31.9 | 35.5 | 36.7 | 39.2 | 42.1 | 10.2 | 32% |

Source: National Traffic Department (http://www.denatran.gov.br/frota_03.htm)

**Sales of New and Retreaded Tyres in Replacement Market in Brazil, 2001-2005
in million units**

| | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | Change, 1999-2005, units | Change, 1999-2005, percent | Change, 2001-2005, units | Change, 2001-2005, percent |
|---|------|------|-------------|-------------|-------------|-------------|-------------|--------------------------|----------------------------|--------------------------|----------------------------|
| Sales of domestic new tyres | 18.0 | 19.4 | 18.7 | 19.7 | 20.0 | 21.3 | 19.6 | 1.6 | 9% | 0.9 | 5% |
| Imports of new tyres | 6.5 | 9.3 | 10.0 | 8.1 | 7.5 | 9.2 | 13.8 | 7.4 | 114% | 3.9 | 39% |
| Production/sales of retreaded tyres in Brazil | | | 14.1 | 15.5 | 17.6 | 18.6 | 18.7 | | | 4.7 | 33% |
| TOTAL | | | 42.7 | 43.3 | 45.0 | 49.1 | 52.1 | | | 9.4 | 22% |

*Retread production numbers are substituted for retread sales and imports/exports of retreaded tyres are excluded because the import/export volumes are insignificant

Sources: ANIP, DECEX, ABR

Comments of the European Communities

300. The European Communities notes that Brazil's reply essentially confirms the comment made by the European Communities in footnote 151 to paragraph 178 of its second written submission, namely that there was an increase in the sale of new domestic replacement tyres in Brazil from 1999 to 2005 of 1.6 million. It should be noted that if one compares 2004 with 1999, the increase is even of the magnitude of 3.3 million.¹⁰⁵ Accordingly, Brazil's claims in paragraph 148 that the figures had remained stable were inaccurate.

301. As regards the relative magnitude of the change, Brazil suggests that 1.6 million additional new tyres represents an insignificant increase. This is a remarkable contrast to Brazil's statements regarding the justification of the ban, where it has claimed that even an additional number of 500 waste tyres was sufficient to justify the import ban on retreaded tyres.¹⁰⁶

302. This contradiction also becomes apparent in the fact that Brazil's total imports of retreaded tyres in 2000 were in the order of 2 million tyres, and thus not of a very different magnitude from the change in the number of new tyres which Brazil now tries to dismiss as insignificant.

Question 100. To both parties.

What is an appropriate method to calculate the number of individual tyres contained in one ton of retreaded tyres? Can the same calculation method be applied in the case of used tyres? Is the difference between passenger car and commercial tyres relevant for this calculation?

Response of Brazil

303. According to the EC-commissioned report on implementation of the Landfill Directive, the approximate weights are as follows:

- new car tyre – 8 kg, used car tyre – 6.5 kg;
- new bus/truck tyre – 60 kg, used bus/truck tyre – 52.5 kg.

See Exhibit BRA-41, at p. 124.

304. The difference between passenger car and commercial tyres is relevant because commercial vehicle tyres are substantially heavier. However, because the weight of different types of commercial vehicle tyres can vary significantly, the industry's trend has been to calculate the number of waste tyres using passenger tyre equivalents (PTEs), also referred to as equivalent passenger units (EPUs).¹⁰⁷

Response of the European Communities

305. The appropriate method to calculate the number of individual tyres contained in one ton of retreaded tyres is to divide 1000 kilograms by the average weight of a tyre in kilograms.

306. This general method can be applied for any type of tyre, including used tyres and new tyres. Similarly, it can be applied to passenger, truck and aircraft tyres.

307. However, when applying the method, and as will be explained in response to the following two questions, it has to be taken into account that there are considerable differences in the average

¹⁰⁵ See the table in para. 26 of Brazil's responses to the panel's second set of questions. Apart from the small fall in 2001, 2005 is the first year in that row where sales fell (by 1.7 million).

¹⁰⁶ Brazil's second oral statement, para. 78.

¹⁰⁷ See, e.g., Commonwealth Department of Environment (Australia), *A National Approach to Waste Tyres 39-I (2001)* (Exhibit BRA-8).

weight of passenger, truck, and aircraft tyres. Accordingly, the conversion has to be done separately for each of these categories.

308. Moreover, there are also differences in the average weight of new and used tyres. According to information received from both European and Brazilian retreaders, the difference in weight between a new and used tyre can be around 25% to 30%, depending on the degree of use of the tyre. The difference in weight tends to be relatively more important for truck tyres than for passenger car tyres. Accordingly, when carrying out the conversion, it must be taken into account whether this conversion is done for new tyres, used tyres, or end-of-life tyres. In contrast, it does not appear that there are significant differences in weight between new tyres and retreaded tyres.

309. When establishing the average weight of tyres, it must furthermore be noted that there may be considerable differences in the average weight of tyres even within the same category, such as passenger, truck and aircraft tyres. Moreover, as the European Communities will also explain, there may also be differences between countries in the average weight of a particular category of tyre (such as a passenger car tyre), depending on the car and tyre models typically used in the market.

Question 101. To the European Communities.

Could you please comment on Brazil's statement in paragraph 47 of its second written submission that the average weight of one passenger car tyre is approximately 6.5 kilograms?

Response of the European Communities

310. The European Communities notes that in paragraph 47 of its second written submission, Brazil speaks of waste passenger car tyres in the European Communities. The European Communities considers that whereas 6.5 kilograms may be a roughly accurate average for waste passenger car tyres in Brazil, this number may be somewhat too low for the European Communities.¹⁰⁸

311. As for Brazil, which is the relevant market, the Brazilian retreader Colway has indicated that popular new car tyres have around 8 kg and high performance car tyres have around 10 kg of weight. Taking into account a loss of around 25 % to 30 % of their weight after being used, Colway suggests a weight of used passenger car tyres of around 6 kg to 6.5 kg, on average.¹⁰⁹

312. The European Retreads Manufacturers Association (RMA) advises that in the United Kingdom, 130 tyres correspond to one ton of scrap car tyres, which gives a weight of 7.7 kg per car tyre. As an explanation for this higher weight, one must bear in mind that car and tyre sizes are on average somewhat larger in Europe.

Question 102. To both parties.

What is the average weight of truck, buses and aircraft tyres?

Response of Brazil

313. As Brazil explained in its response to Question 100 of the Panel, the weight of truck/bus tyres varies depending on the type of the vehicle. The typical weight of truck/bus tyres is generally assumed to be 52.5-60 kg. The weight of an aircraft tyre can vary significantly, from as low as 14 kg to as high as about 120 kg, depending on the type of the aircraft.

¹⁰⁸ For this reason, the average disposal cost of 1.2€ indicated by Brazil is somewhat overstated.

¹⁰⁹ It is noted, however, that Art. 4(c) of Instrução Normativa IBAMA n° 08/02 (Exhibit EC-48) defines 5 kg as the weight equivalent for one automobile (car) tyre for the purposes of "fiscalisation and control" in the context of the CONAMA 258/99 tyre disposal scheme.

Response of the European Communities

314. According to the Brazilian retreader Colway, the average weight of used truck and bus tyres is around 45 to 50 kg in Brazil.¹¹⁰ In the European Communities, the Retreads Manufacturers Association (RMA) advises that 18 used truck tyres correspond to one ton of truck tyres, resulting in a weight of 55.6 kg for a used truck tyre. Once again, this difference in average weights between the European Communities and Brazil reflects the fact that that new truck tyres in the European Communities are somewhat larger on average.

315. As regards aircraft tyres, one must note that their sizes not only vary between those below the nose (smaller) and those below the wings (bigger, and called "principal") on the same aircraft, but there are also very different sizes corresponding to different aircraft models. In general, the average weight of an aircraft tyre would therefore not appear to be very meaningful, given that the variation between the sizes and weights of airplanes (from glider to Airbus A380) is of a totally different order of magnitude than for cars, trucks and buses.

316. This remark notwithstanding, Goodyear Aviation Tyres informed the European Communities that Aircraft tyres can weigh from 5 kg to 130 kg depending on the tyre size. A typical fully worn aircraft tyre may have lost up to 10 % of its weight in service, varying from size to size and design to design. The European Tyre and Rubber Manufacturers Association (ETRMA) supplied the following information on two typical aircraft types:

- Airbus 320: principal tyre: 207 lb; nose tyre: 52 lb (1 lb = 0.4536 kg);
- Boeing 737 new generation: principal: 185 lb; nose: 39 lb.

317. While a weighted average can theoretically still be calculated, the European Communities has no such information on the general market, either in the EU or in Brazil, because this would imply knowing either the total number and total weight of all aircraft tyres sold, or the respective numbers and weights of the various types of aircraft tyres sold.¹¹¹ More easily, one can calculate an average from trade statistics, for instance in a given year (2003) Brazil imported 40 retreaded aircraft tyres weighing 3.5 tonnes (average 87.5 kg), and exported 54 retreaded aircraft tyres weighing 1 tonne (average 18.5 kg). If one takes the European Communities trade statistics for imports and exports of new and retreaded aircraft tyres, it seems more cautious to speak of an average weight of 20-40 kg. However, due to the small sample sizes and possible variations between tyres, it is not clear that these numbers are representative for the entire market.

Question 103. To both parties.

Brazil indicates in paragraph 47 of its second submission that a passenger car tyre weighs approximately 6.5 kilograms. Would it be correct to assume, on that basis, that the importation of 6,500 tons of tyres could be considered to represent the importation of 1 million passenger car tyres?

Response of Brazil

318. Yes.

¹¹⁰ Once again, Art. 4(e) of Instrução Normativa IBAMA n° 08/02 (Exhibit EC-48) uses a slightly lower figure, namely 40 kg, as the weight equivalent for one truck or bus tyre for the purposes of "fiscalisation and control" in the context of the CONAMA 258/99 tyre disposal scheme.

¹¹¹ It is noteworthy that IBAMA Instruction 8/2002 (Exhibit EC-48) does not stipulate a standard weight conversion for aircraft tyres, which is due to the fact that the CONAMA 258/99 collection and disposal system does not cover aircraft tyres, but only tyres for automotive vehicles and bicycles (cf. Articles 1 and 2 of Resolution CONAMA 258/1999, Exhibit EC-47).

Response of the European Communities

319. As the European Communities has explained in its Reply to the Panel's Question No. 101, the figure of 6.5 kilograms is a roughly accurate average for waste passenger car tyres in Brazil. It is not the accurate number for new or retreaded passenger car tyres in Brazil, nor for new, retreaded, or waste passenger car tyres in the European Communities. Subject to this clarification, the Panel's calculation is correct.

Question 104. To the European Communities.

Is the figure of 2 million retreaded tyres imported to Brazil from the European Communities mentioned in footnote 151 to paragraph 178 of your second written submission equivalent to the 14,000 tons of retreaded tyres you referred to in paragraph 80 of your first written submission?

Response of the European Communities

320. At the outset, the European Communities would note that Footnote 151 is a reference to paragraph 175 (not 178) of its second written submission. In the footnote, the European Communities speaks of the Brazilian imports of retreads being "in the order of 2 million when the [import] ban was introduced" in 2000. This "order" was given because those imports were 2.00 million in 2000, 2.02 million in 1999, 3.33 million in 1998, 2.25 million in 1997, and 0.97 million in 1996.¹¹²

321. This is not equivalent to the 14,000 tonnes of imported retreads in para. 80 of the European Communities' first written submission (and reflected in the graph in para. 79). The reason is that "imports in the order of 2 million in 2000" refers to all imports of retreads, whereas the "close to 14,000 tonnes" refers to imports from the European Communities only (13,559.10 tonnes exactly) in 2000. Equivalence would be attained by taking the total weight of all retread imports (17,598 tonnes) or the number of EC imports in units (1,582,984).

Question 105. To Brazil.

Is Brazil aware of the reasons why the Brazilian Association of Retreaders (ABR) was able to estimate the proportion of domestic casings used by domestic truck and bus tyre retreaders, but it was unable to provide the same information in relation to domestic passenger car tyres? Is it feasible to determine the proportion of domestic casings used by passenger car retreaders in Brazil? If so, can Brazil provide the Panel with this information since 2000 (broken down by year)?

Response of Brazil

322. Brazil is not aware of the reasons why ABR did not estimate the proportion of passenger car retreads produced with domestic tyres. It seems that if the retreaders can provide this number for truck and bus retreads, they should be able to do the same for passenger car retreads. The reason for this refusal may be that because the actual share of passenger car retreads made from domestic casings is very high, providing this information would contradict the low suitability claims that these retreaders make before Brazilian courts and legislature.

323. While the ABR reports do not provide a specific proportion figure, the production data provided in the reports plainly demonstrates that a high proportion of passenger car retreads in Brazil are made from domestic casings. According to the ABR numbers, between 2001 and 2005, Brazilian retreaders produced some 43.7 million passenger car retreads. However, during the same period these retreaders imported 27.3 million casings. The European Communities agrees that at least 15 per cent

¹¹² According to official Brazilian import statistics (ALICE).

of the imports are discarded as "technical losses."¹¹³ These technical losses are common in every market (e.g., in the United Kingdom they reach 30 per cent).¹¹⁴

324. To avoid argument over proper assumptions, Brazil assumes that the remaining 85 per cent were retreaded (although the actual share of imports that are retreaded is even lower, as admitted by Brazilian retreaders in Exhibit BRA-94). This means that even if all imports were passenger casings and the highest possible number of them was retreaded, even then, they would have been used to produce just 23.2 million of the 43.7 million retreads between 2001 and 2005.

325. In reality, the proportion of imported passenger casings used is even lower, not only because far more than just 15 per cent of imported casings are unsuitable for retreading, but also because some of the imports are truck and bus casings. It is impossible to tell what share of imported casings were passenger car tyres because used passenger car and truck/bus tyres share the same HS subheading – 4012.20. The ABR numbers suggest that roughly 15 per cent are truck/bus tyres and the rest are passenger car tyres.¹¹⁵ This only leaves 19.8 million passenger car casings that were imported and could have, in principle, been retreaded. This means that at least 23.9 million, or 55 per cent of passenger car retreads made in Brazil necessarily had to be made from domestic casings.

326. From 2001 to 2003, before the imports of used tyres substantially increased, this proportion was even higher. The table below provides the calculations employed above for each year, from 2001 to 2005. The table shows that even under the most conservative assumptions, as much as 74 per cent of passenger retreads in Brazil were made from domestic casings. Brazil cannot provide the Panel with the information for 2000 because the Government of Brazil has no independent access to the retread production data and the ABR did not provide it.

| Proportion of passenger car retreads made with domestic casings in Brazil | | | | | | |
|--|-------------|-------------|-------------|-------------|-------------|--------------|
| | 2001 | 2002 | 2003 | 2004 | 2005 | TOTAL |
| PRODUCTION AND IMPORT DATA (ABR; DECEX) | | | | | | |
| Production of passenger car retreads in Brazil, million units | 6.50 | 7.50 | 9.00 | 9.90 | 10.80 | 43.70 |
| Imports of used tyres into Brazil (passenger car and truck/bus) | 2.40 | 2.66 | 4.24 | 7.56 | 10.48 | 27.34 |
| Imports less technical losses | 2.04 | 2.26 | 3.60 | 6.43 | 8.91 | 23.24 |
| PASSENGER CAR RETREADS MADE WITH DOMESTIC CASINGS | | | | | | |
| If all used tyre imports are passenger car tyres | 4.46 | 5.24 | 5.40 | 3.47 | 1.89 | 20.46 |
| Percentage if all casing imports are passenger car tyres | 69% | 70% | 60% | 35% | 18% | 47% |
| If 85 percent of used tyre imports are passenger car tyres | 4.77 | 5.58 | 5.94 | 4.43 | 3.23 | 23.95 |
| Percentage if 85 percent of casing imports are passenger car tyres | 73% | 74% | 66% | 45% | 30% | 55% |

¹¹³ See European Communities' second oral statement, at para. 33.

¹¹⁴ See Used Tyre Working Group (UK), Sixth Report of the Used Tyre Working Group, at para. 14.1 (2003) (Exhibit BRA-55).

¹¹⁵ Information Regarding the Tyre Retreading Sector in Brazil (prepared by Associação Brasileira do Segmento de Reforma de Pneus), at para. 5 (Exhibit BRA-95).

Comments of the European Communities

327. In its reply to the Panel's question, Brazil begins by questioning the good faith of the Brazilian retreading association ABR for not providing information on the share of domestic casings used for retreading of passenger car tyres.

328. In this respect, it is recalled that it is Brazil which has introduced the statements by ABR contained in Exhibits BRA-95 and BRA-157 into the present dispute, and which has relied on various statements contained in these exhibits. It is not admissible for Brazil to rely selectively on certain parts of its own exhibits, and to question the credibility of other parts of the same exhibit. In passing, it should also be noted that there may be certain reasons for why ABR may not be able to provide the information in question, not least the large number of retreaders in Brazil, the large number of injunctions in force, and the unverified figures for total production.

329. Subsequently, Brazil attempts to recalculate the rate of domestic tyre utilization, using a similar methodology to the one applied in Exhibit BRA-162. At a general level, the European Communities can therefore refer to the comments it has already provided in this regard in response to the Panel's Question No. 107. However, Brazil's reply exposes an additional number of inaccuracies and incorrect assumptions, which the European Communities would like to point out hereunder.

330. First of all, Brazil once again relies on the production figures provided by ABR in Exhibit BRA-157.¹¹⁶ However, the European Communities has already shown that these production figures are based on a number of unverified assumptions, and therefore do not appear reliable.¹¹⁷

331. Second, Brazil assumes that only 85% of imported casings are being retreaded, the rest being technical losses.¹¹⁸ In this respect, Brazil relies on Exhibit BRA-94. In this respect, it must first of all be noted that this exhibit indicates technical losses as amounting only to 1 million out of 11 million tyres, i.e. less than 10 per cent. Also, it is noted that Exhibit BRA-94 provides for information only for one single year, namely 2005. In contrast, Brazil has provided no corresponding information for the other years covered in its calculations.

332. Moreover, in support of its assumption of a low rate of retreading of imported casings, Brazil argues that there are rates of technical losses of up to 30% which are common for every market.¹¹⁹ However, whereas this may be true for industries which use local casings, this can certainly not be true for the rates of retreading of imported casings, which are already specifically pre-selected for their retreadability.¹²⁰

333. Finally, Brazil refers to the fact that from 2001 to 2003, before the imports of used tyres substantially increased, the proportion of use of domestic tyres was substantially higher. However, as the European Communities has already explained,¹²¹ this reflects the earlier utilisation of sub-standard casings not compatible with the standards of Portaria 133, to which the Brazilian retreading industry has been adapting since their promulgation. The proportion of domestic casings in the production of retreads from 2001 to 2003 is therefore no longer relevant for the situation today.

¹¹⁶ Brazil's answer to panel question No. 105, para. 32.

¹¹⁷ European Communities' answer to panel question No. 107, para. 24.

¹¹⁸ Brazil's answer to panel question No. 105, para. 32-33.

¹¹⁹ Brazil's answer to panel question No. 105, para. 32.

¹²⁰ Cf. the invoices contained in Exhibit EC-91, which identify the good as "tyre casings (Class A) for retreading process (raw material), selected according portaria INMETRO nr. 133/01".

¹²¹ European Communities' answer to panel question No. 107, para. 29-30.

334. Third, Brazil makes the assumption that 15% per cent of the imported tyre casings are truck tyre casings.¹²² In support for this assumption, Brazil refers to para. 5 of Exhibit BRA-95. However, the quoted passage deals with a completely different issue when it states that "out of the 8 million [cargo] tyres retreaded in 2003, approximately 85% were recapped and 15% were top-capped". Accordingly, Brazil's assumption that 15% of imported casings are truck casings is not based on any evidence.

335. For all the reasons, as well as the reasons already set out in the European Communities' Reply to the Panel's Question No. 108, Brazil has not demonstrated that domestic passenger car casings are currently being used in significant numbers for the production of retreaded tyres in Brazil.

Question 106. To Brazil.

How do you reconcile your position that domestic casings are retreadable and that there is a waste tyre accumulation problem in Brazil with the statement made by the Brazilian Association of Retreaders (ABR) in the document submitted as Exhibit BRA-95, that "In 2004... there was a supply shortage of casings in Brazil, leaving [the Brazilian] tyre retreading sector vulnerable"?

Response of Brazil

336. At the outset, Brazil notes that it submitted the ABR report because it is the only source of information on retread production in Brazil. Brazil has no reason to doubt the reliability of the production figures, but it expressly disagrees with the report's suggestions that few Brazilian casings are suitable for retreading.

337. There is no evidence that there was indeed a shortage of domestic casings in 2004, as ABR claims. As a general matter, Brazilian retreaders' claims of unavailability of retreadable domestic casings are unfounded, as figures provided in Brazil's response to Questions 96 and 105 of the Panel plainly demonstrate.

338. In its entirety, the statement quoted states: "In 2004, when their export numbers were excellent (see ANIP numbers), there was a supply shortage of casings in Brazil, leaving our tyre retreading sector vulnerable." First, by singling out year 2004, the statement seems to suggest that in previous years, there was no shortage of domestic casings. Second, the statement is internally inconsistent. It blames high levels of exports and, by implication, lower domestic sales of new tyres in 2004 for a shortage of casings in the same year. However, casings retreaded in 2004 would have come from new tyres produced in prior years – not in 2004 – because a tyre is used for several years before it is retreaded. Brazil therefore expresses reservations about the statement's credibility.

339. These reservations notwithstanding, it is possible, in principle, that there may be fewer domestic casings in Brazil than necessary to fully utilize the production capacity of domestic retreaders. As Brazil explained in paragraph 119 of its second written submission and in its response to Question 96, however, this would merely be a consequence of excess capacity in the industry, not of the lack of suitable casings.

Comments of the European Communities

340. In its reply to the Panel's Question, Brazil again cherry-picks on the information provided by ABR by expressing its trust in those figures that suit Brazil's defence and disagreeing with those that do not. After all the information which the European Communities has submitted in relation to the suitability of Brazilian passenger casings for retreading, it is astonishing that Brazil asserts that "[t]here is no evidence that there was indeed a shortage of domestic casings in 2004". Contrary to Brazil's claim, its responses to Questions 96 and 105 do not demonstrate that "Brazilian retreaders'

¹²² Brazil's answer to panel question No. 105, para. 34.

claims of unavailability of retreadable domestic casings are unfounded", also because of the flaws on which these responses are based.¹²³

341. Brazil also draws baseless *a contrario* conclusions from ABR's remarks in relation to casing shortages in 2004, to the effect that there therefore would have been no casing shortages in the previous years. In paragraph 6, the new ABR Exhibit BRA-157 makes general statements, not related to a specific year, on the scarcity of good quality Brazilian casings, which is indeed the unanimous position of the Brazilian retreading industry.¹²⁴ The European Communities has drawn the Panel's attention in its closing statement at the second oral hearing.¹²⁵

342. Regarding Brazil's statements in relation to the "excess capacity" existing in the Brazilian retreading industry, it is interesting to note that Brazil's judgment of what is "excess" is premised on the number of casings which the domestic market can supply, or rather cannot supply. Brazil omits the existing and unsatisfied demand for higher numbers of retreads that could be produced and sold in Brazil at the current prices. Given their success on the domestic market, it is not inconceivable that the quite competitive Brazilian retreaders would also be capable of exporting more retreads in the future. This presupposes of course that they are freed from their current capacity utilisation constraints. The European Communities would also refer to its above comments on Brazil's circular arguments on excess capacity.¹²⁶

Question 107. To the European Communities.

Please comment on the following elements presented by Brazil in its second oral statement:

(a) *the figures contained in Exhibit No. 162 on the number of tyres retreaded in Brazil made from domestic casings, in the years 2001 to 2005, as referred to in paragraph 57 ff. of Brazil's oral statement;*

(b) *the arguments in paragraph 61 of Brazil's oral statement relating to the proportion of retreads made in Brazil made from domestic casings and the proportion of retreadable used tyres actually being retreaded.*

Response of the European Communities

343. The calculations contained in Exhibit BRA-162, to which Brazil refers in paragraphs 57 et seq. of its second oral statement, are based on (i) overall casings imports; (ii) retreader's estimates on the internal destination of imported casings; (iii) ABR's new information on the production of retreads in Brazil in Exhibit BRA-157; and (iv) used tyre arisings in Brazil.

344. Whereas the European Communities does not contest Brazil's numbers as regards the importation of used tyres into Brazil, the European Communities submits that the further assumptions and factors used in the equations are partially incorrect, and partially based on unverifiable assumptions.

345. As regards the internal destination of imported casings, Brazil distinguishes between a "conservative scenario", in which all imported casings are retreadable, and a "realistic scenario", according to which only "approximately two-thirds" of the imported casings are retreaded.¹²⁷ As footnote 51 to Brazil's SOS clarifies, this assumption is supposed to be based on the information provided by Brazilian retreaders in Exhibit BRA-94.¹²⁸ However, as the European Communities has

¹²³ Cf. the European Communities' comments on Brazil's answer to questions 96 and 105.

¹²⁴ See, for instance, the video contained in Exhibit EC -73.

¹²⁵ European Communities' Closing Statement, para. 22.

¹²⁶ See the European Communities' comments on Brazil's response to panel's question No. 96.

¹²⁷ Brazil's second oral statement, para. 58.

¹²⁸ This information is also part of the Parecer Raupp, which the European Communities submitted as Exhibit EC-22.

already pointed out,¹²⁹ Exhibit BRA-94 in no way confirms Brazil's submission that only two thirds of imported casings are retreaded. In fact, of the 11 million casings mentioned in Exhibit BRA-94, only 1 million, i.e. less than 10%, are mentioned as "lost" (presumably due to lacking retreadability), with another million being sold as mid-life tyres. The percentage of imported casings that are retreaded can therefore not be 67 %, but would have to be around 90 %, based on Brazil's own source. This misrepresentation invalidates entirely the calculations in the fourth table of Exhibit BRA-162 and all percentages which Brazil quotes in the context of what it calls the "realistic scenario".

346. As regards the production of retreaded tyres in Brazil, Brazil relies on an "updated version" of a report of the Brazilian retreaders association, which provides production figures for retreaded car and truck tyres.¹³⁰ In relation to these figures, it is necessary to point out that these figures are estimates based on unreliable assumptions and unclear methodology. In fact, at the end of para. 2 of the ABR Exhibit BRA-157, it is indicated that the production figures are the result of calculations with:

- the weight of the rubber produced by the rubber industry divided by a weight factor for each tyre kind. First of all, it is not clear what is meant by "weight of the rubber produced by the industry", which specific industry is referred to, and where this industry is located. Second, given the considerable divergences between tyre types, it seems questionable to rely on numbers resulting from calculations with the raw material produced and undisclosed weight factors.
- national production of new tyres in Brazil, multiplied by a "recapability index" for truck and bus tyres, i.e. the number of times which ABR assumes, based on its experience, a truck tyre is retreaded, on average. The numbers which ABR gives are thus based on an assumed rate of retreading. Brazil then uses these ABR numbers to demonstrate the actual rate of retreading and the share of domestic retreads that are made from domestic casings. This is not a proper methodology, because if the input into an equation is an assumption, then the effective reverse calculation cannot return a proven empirical number for the same variable.
- an ABR census. However, there is no information about this census and its quality, notably the size of the sample and the questions and answers, and therefore no possibility to verify the accuracy of the results of this census.

347. As regards the used tyre arisings in Brazil contained in the last two tables of Exhibit BRA-162, Brazil assumes an average life of 5 years, which, as the European Communities has explained in response to the Panel's Question No. 90, may be somewhat too high. Since the overall market for new tyres is slowly expanding, the figures of casings arisings may therefore have been slightly underestimated. The production numbers themselves appear identical to the ones in the LAFIS report,¹³¹ but they seem to omit light trucks/vans ("camionetas"), which are roughly as many as the numbers for truck tyres (3-4 million per year). The calculations on arisings also make a number of

¹²⁹ European Communities' second written submission, footnotes 43 and 75.

¹³⁰ Brazil's second oral statement, para. 58, referring to Exhibit BRA-157. Contrary to Brazil's claim, the only difference between Exhibit BRA-157 and the earlier report of the Brazilian Retreaders Association ABR (Exhibit BRA-95) is not that the numbers for truck and passenger car retreaded tyres have been disaggregated. Rather, the accompanying text contains marked differences. In addition, it is noted that in Exhibit BRA-157, two paragraphs (paragraphs 7 and 8) seem to be missing.

¹³¹ Exhibit EC-92, p. 4.

assumptions that are questionable, notably that $\frac{3}{4}$ of Brazilian truck retreads can be retreaded again (Note 4 at the end of Exhibit BRA-162).¹³²

348. Overall, with the exception of the number of imported used tyres, the calculations contained in Exhibit BRA-162 are full of inaccuracies and unproven assumptions. For this reason, Exhibit BRA-162 is inadequate for the purpose of establishing the rate of retreading of passenger car and truck tyres as well as the share of domestic casings in retreads manufactured in Brazil.

349. On this basis, the European Communities maintains its view, which is based on the LAFIS report, that the rate of retreading of passenger car tyres in Brazil must be considerably below 9.9%, which is the overall rate of retreading indicated in this report.¹³³ Brazil has argued that this number was based on a "controversial" IPT study commissioned by the new tyre producers in Brazil which "was so flawed that the author was asked to redo it".¹³⁴ Brazil equally indicates that the new study has not yet been completed.¹³⁵ The European Communities has not commissioned the study in question, and is not in a position to verify the methodology and input used in the preparation of the study. However, the European Communities notes that the study at issue was prepared independently of the present proceedings, whereas Brazil has presented calculations which were prepared at a late stage in the present proceedings, and specifically for the purposes of the use in dispute settlement. It appears therefore that apart from their general methodological and factual inadequacy, Brazil's numbers cannot claim a higher degree of credibility than those prepared by independent parties in Brazil.

350. Accordingly, Brazil's statement in para. 61 of its SOS that the overall rate of retreading in Brazil is as high as 44% lacks all credibility.¹³⁶ Moreover, after announcing its inflated rate of retreading, Brazil triumphantly declares that its rate of retreading is "at least three times the rate of the EC countries".¹³⁷ However, this statement, rather than supporting Brazil's case, in fact underlines the lack of credibility of Brazil's calculations. According to the evidence presented by Brazil itself,¹³⁸ there is a strong fatigue factor affecting Brazilian casings due to factors in Brazil such as road quality, consumer habits, poor tyre maintenance, and the lack of inspections. Moreover, if Brazil really had so many good domestic casings, one wonders why Brazil continues to import huge quantities of casings for the purposes of retreading, rather than exporting casings.

351. Moreover, it must also be noted that the results presented in Exhibit BRA-162 show a constant decline of the rate of retreading from 2000 to 2005. For instance, even according to Brazil's calculations in the conservative scenario, the rate of retreading for passenger car tyres declined from 21% in 2000 to 9% in 2005, and for truck tyres from 77% to 60%. Brazil has attributed this decline to the importation of casings.¹³⁹ However, the importation of casings is itself due to the lack of retreadable casings which comply with the standards imposed by Portaria INMETRO 133, which in turn reflect the requirements for tyre retreading set out in UNECE Regulation 108.¹⁴⁰

¹³² In note 3 to Exhibit BRA-162, the weight of a new passenger car tyre is indicated as 852,76 kg, which appears to be a further mistake.

¹³³ European Communities' second written submission, para. 45 and Exhibit EC-92, p. 11.

¹³⁴ Brazil's second oral statement, para. 72. It is noted that Brazil provides a study by IPT as Exhibit BRA-159. This study is dated July 2004. In contrast, the LAFIS report refers to a study commissioned by the Brazilian association ANIP in 2005 (Exhibit EC-92, p. 11). It is therefore not clear that the study provided by Brazil is the one to which the LAFIS report refers.

¹³⁵ Brazil's second oral statement, para. 24.

¹³⁶ In addition, the European Communities notes that it is not very meaningful to calculate an overall retreading rate for truck and car tyres, given the important differences between these two markets.

¹³⁷ Brazil's second oral statement, para. 61.

¹³⁸ Cf. Exhibit BRA-157, para. 6, and EC Closing Statement, para. 22.

¹³⁹ Brazil's second oral statement, para. 5.

¹⁴⁰ The European Communities explained these requirements in para. 25 of its first written submission.

352. In other words, the declining rate of retreading reflects the gradual adaptation of the Brazilian retreading industry to the higher standards of Portaria 133. For this reason, higher rates of retreading in earlier years are no longer relevant, because they reflect the use of casings which were not in compliance with the relevant standards, and will therefore not be able to continue in the future. To the extent that retreading of domestic passenger casings continues in small numbers, this reflects the use of sub-standard casings by smaller Brazilian retreaders who are not able to import suitable casings from abroad.¹⁴¹

353. As regards the retreading of truck tyres, it is recalled that INMETRO is still working on the adoption of the relevant technical standard.¹⁴² Accordingly, it is likely that the higher – albeit declining – rate of retreading of truck tyres may reflect a high use of sub-standard casings which would not comply with the requirements for tyre retreading under UNECE Regulation 109. In this context, it is noted that retreaded tyres produced with sub-standards casings will not have the same durability and safety as retreaded tyres, which, like retreaded tyres produced in the European Communities, are produced with good-quality casings.¹⁴³

Comments of Brazil

354. The European Communities' entire case depends on its being able to demonstrate that new tyres used in Brazil cannot be retreaded again, and, therefore, present the same health and environmental risks as imported retreads. The European Communities has failed to prove this point. It has offered no evidence to support this unlikely hypothesis, with the exception of some self-serving statements made by Brazilian retreaders.¹⁴⁴ Brazil, on the other hand, has extensively demonstrated that tyres used within its territory (domestic casings) are both suitable for retreading and are, in fact, retreaded. In its Exhibit BRA-162, Brazil presented specific figures showing that a very high number of Brazilian casings are retreadable and are retreaded.

355. To calculate the share of Brazilian retreads made with domestic casings, Brazil deducted imported casings that would have been retreaded from the total number of retreads produced in Brazil. Brazil then divided the number of retreads made from domestic casings by the total used tyre arisings to arrive at the rate of retreading of exclusively domestic casings. The European Communities, in its response to Question 107, did not contest the import numbers.¹⁴⁵ Neither did it actively contest the waste arisings, noting only that they "may [] have been slightly underestimated."¹⁴⁶ The two aspects that the European Communities did challenge were the retread production figures in the ABR report (both the original and the updated versions) and the proportion of imported casings that are, in fact, retreaded.

(i) ABR report and production numbers

356. With respect to the ABR report, the European Communities questions its methodology and also suggests that it is not credible because it was prepared "specifically for the purposes of the use in

¹⁴¹ In this context, it is noteworthy that Brazil keeps postponing the definitive entry into force of Portaria INMETRO 133/2001. Portaria INMETRO 163 of 3 July 2006 (Exhibit EC-125) postpones the entry into force of Portaria INMETRO 133/2001 to 1 January 2007, which is already the third such postponement (cf. European Communities' first written submission, para. 20).

¹⁴² European Communities' first written submission, para. 22.

¹⁴³ In addition, it is also recalled that retreading of truck and aircraft tyres generally occurs without change in ownership (cf. European Communities' closing statement, para. 24). For truck tyres, this is explicitly confirmed in Exhibit BRA-95, para. 6; for aircraft tyres, cf. Exhibit EC-23.

¹⁴⁴ See Brazil's second oral statement, at para. 63.

¹⁴⁵ See European Communities' answer to panel question No. 107, at para. 22.

¹⁴⁶ See European Communities' answer to panel question No. 107, at para. 25.

dispute settlement."¹⁴⁷ The European Communities' criticism of the ABR report in its latest set of responses represents a remarkable reversal of the European Communities' own position in its second written submission and second oral statement, where it enthusiastically endorsed the findings of the ABR report. In paragraph 44 of its second written submission, the European Communities employed the very figures it now challenges to argue that Brazilian passenger casings are not retreadable. It also cited ABR's belief that "the large majority, but not the totality of passenger car casings reformed in Brazil are imported."¹⁴⁸ The European Communities then concluded:

"This information thus fully confirms the European Communities' view that the retreading of domestic passenger car casings, to the extent it occurs at all, represent only a very small proportion of used car tyres arising in Brazil."¹⁴⁹

357. In paragraph 29 of its second oral statement, the European Communities again noted, "It is, however, worth recalling that the ABR's report indicates that the large majority of passenger car casings retreaded in Brazil are imported."

358. Having apparently recognized that the ABR report hurts its case more than it helps, the European Communities has now gone from endorsing the report to criticizing it for questionable methodology and bias. However, even in its criticism the European Communities is inconsistent: having just contested the reliability of the ABR report in paragraphs 24 and 27 of its response to Question 107, the European Communities proceeds to cite the report in paragraph 28 in support of its low suitability argument. Instead of explicitly referring to the report, however, the European Communities this time only makes a vague reference to "the evidence presented by Brazil." The exhibit number in the footnote reveals, however, that the evidence the European Communities refers to is none other than the updated ABR report (Exhibit BRA-157). The European Communities also cites the report to support its argument in response to Question 90, at paragraph 4.

359. At the outset, Brazil reminds the Panel that Brazilian retreaders have vigorously opposed the import ban on used and retreaded tyres and clashed with the Government in countless legal disputes. In the present WTO dispute, Brazilian retreaders support the European Communities – not Brazil – and have no reason to help the Government of Brazil make its case in the WTO. Judging by the European Communities' responses to the second set of the Panel's questions, at least one of these retreaders, has assisted the European Communities in this very dispute.

360. With this in mind, Brazil has no reason to suspect that the report's methodology is anything but sound. First, no entity is more familiar with Brazil's retreaded tyre market than the retreaders themselves, and if they have chosen a particular method to calculate production, they must have done so because it is the best available method. Second, the ABR report includes statements that not only contradict Brazil's arguments, but actually support the arguments made by the European Communities. As noted above, the European Communities has actively relied on these statements to build its own case. Had the retreaders indeed sought to present distorted numbers, those numbers would have favoured the European Communities, not Brazil, just as the narrative that accompanies the numbers favours the European Communities. Brazil again points out, however, that the ABR production numbers contradict ABR's assertions of low suitability made in the narrative.

361. For the very same reason, the fact that the ABR report was prepared after the European Communities initiated the present proceeding in no way undermines the reliability of the figures presented in the report. In addition, the production statistics that the European Communities

¹⁴⁷ European Communities' answer to panel question No. 107, at para. 27.

¹⁴⁸ See European Communities' second written submission, at para. 44, citing ABR Report, at para. 6 (Exhibit BRA-95).

¹⁴⁹ European Communities' second written submission, at para. 44.

now challenges have been collected for many years. Only the narrative part of the report was prepared after the establishment of the panel.

362. Brazil would have liked to be able to present retreadability figures from an independent source that were not accompanied by self-serving and unfounded claims. However, Brazil is not aware of another source that provides this kind of data.

363. The LAFIS survey of tyre industry (Exhibit EC-92) – which the European Communities still endorses¹⁵⁰ – supports the ABR numbers. The survey states that some 10.5 million remoulded tyres were made in 2004.¹⁵¹ According to the 2005 estimate of the destinations of imported casings ("Raupp Opinion," Exhibit EC-22, at 4), of all the casings that were retreaded, about 57 per cent were remoulded and the rest were top-capped or re-capped. If the remoulded tyre production mirrored the utilization of imported casings – that is, if 10.5 million remoulds amounted to 57 per cent of the retread production – then the total retread production would have been 18.4 million. The ABR puts the total at 18.6 million.¹⁵² Applying the proportion of remoulded tyres given in the ABR report would give a slightly higher production figure.¹⁵³

364. The European Communities' dramatic shift of positions on the ABR report illustrates the willingness that the European Communities has exhibited throughout this dispute to make any argument convenient at the moment, even if that argument has no basis in fact and even if it contradicts the European Communities' own prior statements made before this Panel and in other fora. In this dispute, the European Communities has offered studies that it claimed proved that incineration was safe, but as Brazil pointed out in paragraphs 86-92 of its second written submission, if those studies proved anything, it is that incineration is dangerous. The European Communities then pointed to the Stockholm Convention and said that dioxins – dangerous chemicals released during incineration – were not among the 12 persistent organic pollutants that the Convention targeted for elimination, when, in fact, they patently are.¹⁵⁴ The European Communities claimed in its second oral statement that its Exhibit No. 124 demonstrated that tyres had nothing to do with dengue, but that very exhibit said that "[t]he tyre group [] showed very high averages" of dengue-positive larvae at one of the surveyed locations.¹⁵⁵ The European Communities has even stated that it sees no harm in Brazil relying on landfilling, even though the European Communities itself categorically prohibits the practice.¹⁵⁶

(ii) LAFIS/IPT Report

365. In its responses, the EC continues to argue that the 9.9 per cent figure presented in the LAFIS report is the rate of retreading in Brazil.¹⁵⁷ The LAFIS report explicitly states at page 11 that the source of the 9.9 per cent figure is the IPT study, commissioned by Brazil's National Tyre Manufacturers' Association (ANIP) (Exhibit BRA-159). It is noteworthy that the European Communities chose not to rebut arguments that Brazil made in its SOS about the flaws of the study, despite the fact that the study is the actual source of the 9.9 per cent figure and is the only remaining source that – in the European Communities' interpretation – supports the claims of low suitability.¹⁵⁸

¹⁵⁰ See European Communities' response to panel question No. 107, para. 27.

¹⁵¹ See LAFIS, Brazil – Car Parts and Vehicles: Tyres 4 (2006) (Exhibit EC-92).

¹⁵² See ABR Report, at 1 (Exhibit BRA-95).

¹⁵³ See ABR Report, at 2 (Exhibit BRA-95).

¹⁵⁴ See European Communities' second written submission, para. 117; Brazil's second oral statement, para. 40.

¹⁵⁵ See Brazil's response to panel question No. 89, para. 8.

¹⁵⁶ See European Communities' second written submission, para. 107.

¹⁵⁷ See European Communities' response to panel question No. 107, para. 27.

¹⁵⁸ See Brazil's second oral statement, at paras. 24, 72.

366. As Brazil explained in paragraph 24 of its second oral statement, the study accounted for just a half of the used tyres generated in Brazil in that particular year. It surveyed only "retailers and tyre repair shops"¹⁵⁹ and did not account for retreadable tyres that were retained by owners even though they comprise a third of the total waste arisings. Neither did it account for a large part of commercial tyres because these tyres do not typically pass through the retailers or tyre repair shops.

367. The study first concludes – in a direct contradiction to the European Communities' low suitability argument – that some 47 per cent of used tyres in Brazil can be retreaded or even used as part-worns (*i.e.* still usable) (Figure 4). Of these, the study – by design – only accounts for 9.9 per cent – which are those tyres that pass through tyre retailers, repair shops, and ultimately junk yards. The remaining 37 per cent are retained by the owner and are, in most cases, sold to retreaders and retreaded. The very reason owners keep these tyres is because they have value, whether as retreadable casings or part-worns. The study does not specify the share of these tyres that are retreaded because it has no way of documenting it, given that it only surveys tyre repair shops and retailers.

368. The study also leaves out another important group of used tyres – commercial vehicle tyres. As the EC itself pointed out, "retreading of truck and aircraft tyres generally occurs without change in ownership,"¹⁶⁰ that is, companies do not sell used tyres and buy retreads – rather they retread their own tyres. For this reason, most commercial vehicle tyres would not have been captured by the IPT study. This squarely contradicts the European Communities' earlier suggestion, in its second written submission, that "since the retreading of domestic truck tyres occurs to a much higher extent than for car tyres, it must be assumed that the percentage of Brazilian passenger car tyres which are being retreaded is considerably lower than 9.9%, and most likely *de minimis*."¹⁶¹

369. This evidence plainly demonstrates that the 9.9 per cent figure does not represent the actual rate of retreading, as the European Communities claims. The actual rate of retreading in Brazil is much higher, as reflected in Exhibit BRA-162.

(iii) *Portaria 133*

370. The European Communities began this dispute by arguing – with no qualifications – that tyres used in Brazil cannot be retreaded.¹⁶² In response, Brazil pointed out that before 2004 – the first of the two years when high volumes of used tyres were imported – domestic retreaders had no difficulty finding suitable domestic casings and the vast majority of Brazilian retreads were made from domestic casings.¹⁶³

371. To explain away this incontrovertible fact, the European Communities has invented a new argument: it now claims that imports of casings increased in 2004 and 2005 because Portaria INMETRO 133 imposed rigid standards on casings, rendering Brazilian casings *no longer* suitable for retreading. First, Brazil notes that this is the first time that the European Communities has even made this argument. In its first written submission, the European Communities dedicated three paragraphs to the discussion of Portaria INMETRO 133 and its equivalent for commercial vehicles (paragraphs 20-22), but did not once suggest that the *portaria* created a shortage of suitable casings. In its second written submission, the European Communities did not mention the regulation at all. The European Communities' belated invocation of the *portaria*, at the close of the proceedings, should be

¹⁵⁹ See IPT Study, Section 3 (Exhibit BRA-159).

¹⁶⁰ European Communities' response to panel question No. 108, at fn. 24.

¹⁶¹ European Communities' second written submission, at para. 45.

¹⁶² See European Communities' first written submission, at para. 81.

¹⁶³ See Brazil's second oral statement, at paras. 56-61; see also Exhibit BRA-162.

seen for what it is – a last-minute attempt by the European Communities to bolster its faltering argument.

372. Second, Portaria INMETRO 133 is not a recent development. It has been in effect since 2001. Used tyre imports, on the other hand, did not become substantial until 2004 – some three years later. Had the *portaria* in fact had something to do with the suitability of domestic casings, imports of used tyres would have reached the 2004 levels much earlier. Finally, Brazil is not aware of any times when Brazilian retreaders and other opponents of the import ban argued in any court or forum that the *portaria* made finding suitable domestic casings difficult, even though such arguments could, in principle, strengthen the retreaders' case in favour of the imports.

373. In its response to Question 107, the European Communities again repeats its claim that the allegedly poor conditions of Brazilian roads contribute to the allegedly low retreadability rate. However, the European Communities has offered no evidence in support of its argument, with the exception of the INMETRO Technical Note 83, which, as Brazil has explained, merely restated the arguments made by the Brazilian retreaders and did not reflect INMETRO's views.¹⁶⁴ The European Communities also misses an important point: regardless of the road conditions in Brazil's countryside, most tyres – and especially passenger car tyres – are used in urban areas, where the roads are just as good as the roads in wealthier countries.

374. The European Communities argues in its response:

"To the extent that retreading of domestic passenger casings continues in small numbers, this reflects the use of *sub-standard* casings by smaller Brazilian retreaders who are not able to import suitable casings from abroad."¹⁶⁵

375. Evidence already presented by Brazil aptly rebuts this statement. In addition, Brazil points out that European Communities' own exhibits contradict this assertion. According to the LAFIS report, some 10.5 million remoulded tyres were made in 2005.¹⁶⁶ Of this amount, 6.5 million were made with Brazilian casings.¹⁶⁷ Remoulding is a fairly new retreading technology that requires substantial investment and better quality casings. Most small retreaders would not pay for the new equipment and better casings when they can continue re-capping or top-capping tyres with equal success. For this reason, remoulding is typically carried out by more well-established and financially-able companies. This means that in 2005, at least six million Brazilian retreads – a third of the total production – were made by fairly well-established businesses from high-quality casings.

376. Not only is the quoted statement manifestly untrue, but it also illustrates the condescending attitude toward Brazil the European Communities has exhibited throughout this dispute. To the European Communities, everything about Brazil seems to be *sub-standard*, be it Brazil's casings, Brazil's roads, habits of Brazil's drivers, Brazil's regulations, its waste tyre management practices,¹⁶⁸ or its dengue control efforts¹⁶⁹ – all in direct contrast with the ways of the European Communities. In reality, however, it was Brazil – not the European Communities – that first prohibited the landfilling of waste tyres and that achieved some of the highest rates of retreading.

(iv) *Conservative vs. realistic scenarios*

¹⁶⁴ See Brazil's response to panel question No. 25.

¹⁶⁵ European Communities' response to panel question 107, at para. 30 (emphasis added).

¹⁶⁶ See LAFIS, Brazil – Car Parts and Vehicles: Tyres 4 (2006) (Exhibit EC-92).

¹⁶⁷ See Raupp Opinion, at 4 (Exhibit EC-22).

¹⁶⁸ See, e.g., European Communities' second written submission, at para. 55.

¹⁶⁹ See European Communities' second written submission, at para. 57-59.

377. The European Communities challenges the two-thirds figure that Brazil used to estimate the proportion of the imported casings that were actually retreaded. At the outset, Brazil points out that the European Communities' criticism applies only to the realistic scenario because the conservative scenario assumed that all imported casings were retreaded – precisely to avoid an argument over this particular assumption. The conservative scenario likewise showed that a substantial number of retreads were made from domestic casings. In addition, Brazil has revised the conservative scenario in its second set of responses to account for the European Communities' admission in its second oral statement that at least 15 per cent of imported casings are discarded as technical losses.¹⁷⁰ This means that even under the most conservative estimates, only 85 per cent of the imported casings are retreaded. Brazil included the revised numbers in its table at paragraph 35 of the second set of responses. The revised *conservative* scenario shows that between 2001 and 2005, some 55 per cent of retreads – on average – were made from Brazilian casings. In 2002, that number reached 74 per cent. This alone conclusively demonstrates that Brazilian casings are retreadable and are retreaded.

378. Even the revised conservative scenario, however, is too conservative. First, Brazil pointed out in its response to Question 105 of the Panel that technical losses are common in every market. In the United Kingdom, these losses reach 30 per cent.¹⁷¹ There is no reason to believe that casings imported into Brazil are any different from casings imported into the United Kingdom. Second, at least for the year 2005, Brazil used hard numbers – not assumptions – to arrive at the number of imported casings that were actually retreaded. This number was the 2005 destination estimate by BS Colway, cited in the "Raupp Opinion," at page 4 (Exhibit EC-22). According to this number, of the 11 million casings that were imported into Brazil in 2005, only 7 million were used to make retreaded tyres in 2005. Therefore, the realistic scenario for 2005 is based exclusively on hard numbers, and contrary to the European Communities' suggestion,¹⁷² at least 50 per cent of passenger car retreads necessarily had to have been made from domestic casings that year. This puts the rate of retreading for the passenger car tyres alone at 25 per cent for 2005 – again, substantially higher than the rate achieved by the European Communities itself. Finally, to recall, in the video that the European Communities submitted as Exhibit No. 72, Brazilian retreaders admit that 60 per cent of tyres retreaded in Brazil are made with domestic casings.

379. To summarize, the evidence establishes that the scenario that applies the 2005 destination figures to previous years best reflects the reality. Nevertheless, even the most conservative scenario – assuming that only 15 per cent of the imported casings are not retreaded – demonstrates that most of the Brazilian retreads are made from domestic casings. For this reason, the European Communities' argument that Brazilian casings are not retreadable is plainly wrong.

(v) *Price of casings*

380. In its second set of responses to the Panel, the European Communities once again asks rhetorically:

"[I]f Brazil really had so many good domestic casings, one wonders why Brazil continues to import huge quantities of casings for the purposes of retreading, rather than exporting casings."¹⁷³

381. Brazil has already demonstrated in paragraph 117 of its SWS and in paragraph 63 of its second oral statement that Brazilian retreaders prefer imported casings not because there is a shortage

¹⁷⁰ See European Communities' second oral statement, at para. 33.

¹⁷¹ See Used Tyre Working Group (UK), Sixth Report of the Used Tyre Working Group, at para. 14.1 (2003) (Exhibit BRA-55).

¹⁷² See European Communities' answer to panel question No. 107, at para. 29.

¹⁷³ See European Communities' answer to panel question No.107, at para. 28.

of domestic casings, but because the imports are substantially cheaper. In fact, since 2004, imported casings have become even less expensive than domestic casings for a number of reasons: increasingly more stringent – and expensive – waste tyre disposal obligations in the European Communities; exchange rate variations (R\$3.9 per US\$ 1 in October 2002 to R\$ 2.3 per US\$ 1 in October 2005); and a higher demand for domestic casings, caused by an opening of a retreading plant in the state of Paraná, Brazil, claimed to be the largest in the world. This is a point the European Communities fails to address.

382. The European Communities ignores the dynamics of the market. Demand for foreign casings is not static. Cheaper imports reduce production costs and, thereby, lower the price of retreads. The lower price, in turn, increases the demand. To produce enough retreads to satisfy the higher demand, some imports may be necessary, which increases the volumes of shorter-lifespan tyres in Brazil. As Brazil has already explained in paragraph 119 of its second written submission, however, the Government's goal is to retread as many used tyres generated in Brazil as possible, not to satisfy the artificially high demand on retreaded tyres at the expense of public health and the environment. The most recent evidence of this commitment to human health and the environment is the presentation by the President of Brazil, on 21 September 2006, of a Supreme Court action that would end imports of used tyres through preliminary injunctions. *See* Exhibit BRA-173.

383. These facts conclusively demonstrate that the data and the assumptions that underlie the retreadability figures in Brazil's Exhibit No. 162 are highly reliable. For this reason, the high rates of retreadability of Brazilian casings demonstrated by the exhibit are fully accurate.

Question 108. To both parties.

Could you please clarify the extent to which new tyres and retreaded tyres compete on the Brazilian market?

Response of Brazil

384. Brazil notes that new and retreaded tyres do not compete in the new car market because retreaded tyres are not fitted on new vehicles. New and retreaded tyres do compete in the replacement market, but the detailed market data necessary to measure the extent of the competition by econometric analysis do not exist. *See* Brazil's second oral statement, at para. 81. As Brazil understands, imported retreaded tyres compete with domestic retreads, and all retreaded tyres (domestic and imported) compete with new tyres in the replacement market. Brazil also understands that if the price of a retreaded tyre is sufficiently low, Brazilian consumers tend to prefer a retread over a new tyre.

Response of the European Communities

385. At the outset, the European Communities would like to note that in Brazil, new tyres and retreaded tyres compete only in the replacement market, since new cars may not be fitted with retreaded tyres.¹⁷⁴

386. As regards the market for replacement tyres, it is clear that there is a close competitive relationship between new tyres and retreaded tyres given their identical end uses and their comparable quality in terms of durability and safety.¹⁷⁵ However, the relationship between the products will also be affected by other factors, including the difference in price, the price-sensitivity of the consumer, and the perception of the consumer of the product.

¹⁷⁴ Cf. Brazil's first written submission, para. 148.

¹⁷⁵ Cf. already European Communities' second written submission, para. 33. According to Brazil's answer to panel question No. 24, the market share of retreaded tyres in Brazil rose slightly from 39.2 per cent in 2000 to 40.1 per cent in 2005.

387. The European Communities does not have data that would permit to define the competitive relationship between new and retreaded tyres in the Brazilian market in more quantitative terms. The European Communities considers that it would be for Brazil, as the party invoking an exception to its WTO obligations, to establish the relevant facts. However, in its second oral statement, Brazil has already indicated that the relevant economic data for the Brazilian market has not been collected, and that precise calculation of the relevant price elasticities is therefore impossible.¹⁷⁶ However, this information would be required in order to establish the precise contribution Brazil's ban might make to the prevention of waste tyres in Brazil.¹⁷⁷ For this reason also, Brazil has failed to discharge its burden of proof in this regard.

Comments of the European Communities

388. In its reply to the Panel's question, Brazil once again confirms that the precise data to evaluate the competition between new and retreaded tyres in the Brazilian market is not available. As the European Communities has already pointed out, this data would be necessary to evaluate the precise existence and extent of the contribution of the import ban to the reduction of waste tyres in Brazil.¹⁷⁸ Accordingly, this constitutes another reason why Brazil has not discharged its burden of proof in this regard.

Question 109. To the European Communities.

Does the European Communities agree to the translations provided by Brazil of the Brazilian laws and regulations pertinent to this case?

Response of the European Communities

389. Where the European Communities has noted a discrepancy, it has pointed this out.¹⁷⁹ However, the European Communities is not in a position to verify all translations provided by Brazil. Accordingly, the fact that the European Communities has not commented on a specific translation does not mean that the translation is necessarily accurate.

C. IMPORT BAN

Question 110. To the European Communities.

Please comment on the arguments presented by Brazil in its answer to question 35 of the Panel, in relation to animal and plant life or health, and on the arguments contained in the submission by the Humane Society International, submitted by Brazil as Exhibit BRA-98, in respect of risks to animal health or life.

Response of the European Communities

390. The arguments by Brazil in relation to animal and plant health or life refer to two of the risks that Brazil claims it aims at reducing with the import ban (some mosquito-borne diseases and pollution from waste tyre fires) and to two of the existing alternatives to the import ban (co-incineration in cement kilns and construction of artificial reefs). The Humane Society International argues only on the three first issues.

391. Exhibit BRA-98 and Brazil's own submissions to the Panel contain only very general arguments in relation to animal and plant life or health, making it difficult to address them specifically. However, the European Communities will comment on these arguments, while recalling

¹⁷⁶ Brazil's second oral statement, para. 81.

¹⁷⁷ Cf. Exhibit EC-122, para. 22.

¹⁷⁸ European Communities' answer to panel question No. 108, para. 34.

¹⁷⁹ Cf. European Communities' second written submission, footnote 174.

at the same time that the lack of precision of Brazil's arguments must weigh to Brazil's detriment, taking into account that Brazil has the burden of proof in relation to the defence under Article XX(b).

392. Moreover, while Brazil supports its arguments with some documents, which are attached to its submissions, that is not the case of the Humane Society International, which has attached none of the documents that it refers to as evidence.

393. In relation to the mosquito-borne diseases, it is clear that they do not pose any threat to plant life or health. Brazil and the Humane Society seem to acknowledge that the diseases only affect human and animals.¹⁸⁰ However, Brazil does not identify the animal species affected by dengue, yellow fever, malaria and West Nile virus, probably because its first written submission was limited to the consequences of the first three diseases on humans only.¹⁸¹ The difficulty of that identification is obvious in relation to malaria, which only has humans as hosts. According to the evidence provided by Brazil, "humans are the main amplifying host of the [dengue] virus, although studies have shown that in some parts of the world monkeys may become infected and perhaps serve as a source of virus for uninfected mosquitoes".¹⁸² Similarly, in relation to yellow fever, Brazil's evidence shows that "humans and monkeys are the principal animals to be infected" and that "in tropical rainforests, yellow fever occurs in monkeys that are infected by wild mosquitoes".¹⁸³ Brazil has not explained the dispersion of these two diseases among monkeys in Brazil, but, in any case, they seem to be infected in their natural environment, independently of the presence of waste tyres. Brazil has provided no evidence on how the West Nile Virus affects animals.

394. The submission by the Humane Society International also refers generally to the fact that some mosquito-borne diseases affect animal populations.¹⁸⁴ The four studies on which it seems to base its arguments are not attached, making it impossible for the European Communities to respond to them. The submission also refers to *Aedes albopictus* as "an aggressive biter that attacks livestock, amphibians, reptiles and birds",¹⁸⁵ but it does not seem that these bites have negative consequences for the life and health of these species.

395. In relation to hazardous emissions arising from waste tyre fires, neither Brazil nor the Humane Society International explain and, even less, demonstrate, how they affect animal and plant life or health. Their main argument seems to be that, because those emissions are hazardous, they necessarily produce negative consequences on fauna and flora. This inference is wrong and based on no risk assessment of the potential fires,¹⁸⁶ including an analysis of the dimension and location of the site, and on no study of the "critical loads" of the habitats potentially affected or "critical levels" of concentrations of pollutants in the air.¹⁸⁷ It does not take into account either the dispersion in the air

¹⁸⁰ Brazil's answer to panel question No. 35, second sentence, and the Humane Society International submission, paras. 22 to 25.

¹⁸¹ Brazil's first written submission, section III.A.1. Moreover, Brazil refers to four diseases in its answer to the Panel question, though the West Nile was not mentioned in its first written submission, paras. 22 to 28.

¹⁸² Exhibit BRA-13, p. 1, at the bottom.

¹⁸³ Exhibit BRA-22, p. 1, at the bottom, and p. 2, first bullet point.

¹⁸⁴ To the four diseases mentioned by Brazil in its answer to the Panel question, the Humane Society International adds, without further explanation, "filariosis" and "canine heart worm".

¹⁸⁵ The Humane Society International submission, para. 25.

¹⁸⁶ An example of an elementary risk assessment for the seven most important waste tyre sites in the UK may be found in Exhibit BRA-136, at p. 10.

¹⁸⁷ Article 1 of the Protocol to the 1979 Convention on Long-range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-level Ozone, signed in Gothenburg on 30 November 1999 defines "critical load" as the "quantitative estimate of an exposure to one or more pollutants below which significant harmful effects on specified sensitive elements of the environment do not occur, according to present knowledge", and "critical levels" as "concentrations of pollutants in the atmosphere above which direct adverse

of those emissions or the measures that should be implemented, once a fire has occurred, to fight against it and to avoid pollution of surface waters. Moreover, some of the arguments, like those related to soil and groundwater pollution, are not necessarily related to the protection of animal and plant life or health but to the protection of the environment.

396. In relation to co-incineration in cement kilns, Brazil claims that "the same pollutants [as in tyre fires] are released", a statement that does not take into account the huge differences in the level of emissions arising from both activities. The Humane Society International affirms "that the U.S. Environmental Protection Agency found that controlled burns using waste tyres in poorly-designed combustors caused serious concern that air emissions would be more like those from the open burning of tyres rather than a well-designed and managed combustor".¹⁸⁸ This is a question of the technology used and a regulatory question, and the European Communities is not proposing to co-incinerate waste tyres in poorly-designed combustors. Moreover, neither Brazil nor the Humane Society International explain how state-of-the-art combustors co-incinerating waste tyres in compliance with regulatory emission standards would damage fauna and flora more than if they did not burn waste tyres, but only coal or peat coke. As the European Communities has already explained,¹⁸⁹ the evidence presented by Brazil in this respect corresponds to installations using old technology, like the wet cement kilns, or burning other fuels.¹⁹⁰

397. Finally, Brazil's argument that artificial reefs made of waste tyres produce leachate that harms rainbow trout and other forms of aquatic life has already been answered by the European Communities in paragraph 132 of its second written submission and Exhibit EC-106. The report produced by HR Wallingford Ltd., in March 2005, for the UK Department of Trade and Industry and the Environment Agency concluded that the overall risk of damage to the environment of waste tyres in port, coastal and river engineering is expected to be reduced to near zero. More specifically, the study concluded that, in relation to leachates from waste tyres used for those purposes, "the magnitude of consequences is estimated to be negligible, except where slow or stationary waters are the receptor where it might be estimated to be mild".¹⁹¹

Question 111. To Brazil.

Please clarify the current legal status of :

- (a) *Portaria DECEX No. 8 in light of the subsequent amendment by Portaria MICT No. 370;*
- (b) *Presidential Decree No. 3.179 as amended by Presidential Decrees No. 3.919 and No. 4.592; and*
- (c) *Law No. 12.114 of the State of Rio Grande do Sul in light of the subsequent amendment by Law No. 12.381?*

Response of Brazil

398. Portaria DECEX No. 8, as amended by Portaria MICT No. 370/94, is legally in force, with the exception of its Articles 19 to 21 and 29 to 32, which were revoked by Article 55(II) of Portaria SECEX No. 17/03. The parts revoked do not affect trade in used or retreaded tyres.

399. Presidential Decree No. 3.179, as amended by Presidential Decrees No. 3.919 and No. 4.592, is legally in force.

effects on receptors, such as human beings, plants, ecosystems or materials, may occur, according to present knowledge" (Exhibit EC-126).

¹⁸⁸ The Humane Society International submission, para. 20.

¹⁸⁹ European Communities' second oral statement, para. 84.

¹⁹⁰ European Communities' second written submission, para. 118 and footnote 119.

¹⁹¹ Exhibit EC-103, section 7.3.2., at p. 105.

400. State Law No. 12.114, as amended by Law No. 12.381, is formally in force, at present. However, as Brazil explained in its responses to Questions 56, 57, and 62 from the Panel, the law has no legal effect because Brazilian states have no authority to regulate interstate or international trade under Brazil's Constitution. State authorities simply cannot authorize or prohibit imports because import licenses are issued by the federal government, not by the states. Neither can state authorities impede sales of imported products. If they attempted to restrict these sales, Brazil's Executive or a private party would have easily obtained an injunction against the state.

401. Finally, the European Communities is flatly wrong to suggest that the state law could affect an import ban because it could be considered a disposal measure.¹⁹² Even if the disposal provisions of the measure were enforceable, the import-related provisions are exclusively within the jurisdiction of the Federal Government and have no effect.

Comments of the European Communities

402. As regards Law No. 12.114 of the State of Rio Grande do Sul, Brazil repeats its earlier claim that this law "has no legal effect". This statement is plainly wrong. In this respect, the European Communities can refer to its earlier submissions.¹⁹³

403. Brazil also claims that the European Communities is wrong to suggest "that the state law could affect an import ban because it could be considered a disposal measure".¹⁹⁴ The European Communities is surprised by this objection, because it has made no such argument. The European Communities has not argued that the state law "affects" the import ban. Rather, the European Communities has argued that to the extent that the ban imposes disposal obligations, these obligations may be considered to fall under the concurrent jurisdiction of the Brazilian states for environmental protection, and therefore not be unconstitutional.¹⁹⁵ The European Communities notes that Brazil has never contested this argument of the European Communities, and even in its reply to the Panel's question has again conceded that the disposal obligations might be enforceable.¹⁹⁶

404. The European Communities notes that the challenged State law of Rio Grande do Sul is a separate measure from the import ban, which could remain in force even if the ban were removed. In this case, the discriminatory disposal obligations contained in the State Law would still negatively affect, or even make impossible, the marketing of imported retreaded tyres in Rio Grande do Sul. For this reason, the Panel should equally rule on the State measure.

Question 112. To Brazil.

Please confirm whether Portaria DECEX No. 8 and Resolution No. 23 are currently legally in force. If so, does the import prohibition on used tyres as stipulated in Article 4 of Resolution No. 23 also still apply to "retreaded tyres"?

Response of Brazil

405. Portaria DECEX 8/1991 is in force. *See* Brazil's response to Question 111. CONAMA Resolution 23, which is also in force, regulates management and importation of wastes into Brazil. Used tyres – traded under code 4012.20 and expressly referred to in Annex 10 of Resolution 23 – are wastes while retreaded tyres are not. For this reason, there was no nominal reference to retreaded tyres in the resolution. It does not mean, however, that Brazil permitted the importation of retreaded

¹⁹² *See* European Communities' second oral statement, at para. 115.

¹⁹³ European Communities' second oral statement, para. 114 et seq.; European Communities' second written submission, para. 198.

¹⁹⁴ Brazil's answer to panel question No. 111, para. 44.

¹⁹⁵ European Communities' second oral statement, para. 115.

¹⁹⁶ Brazil's answer to panel question No. 111, para. 44.

tyres before the adoption of the 2000 import ban or that retreaded tyres do not pose specific environmental risks. According to the Brazilian legislation, retreaded tyres are used goods, imports of which were prohibited by Portaria DECEX 8/1991.

Comments of the European Communities

406. In its reply to this question, Brazil confirms that it considers that retreaded tyres are used goods the importation of which is prohibited by Portaria Decex 8/1991. While the European Communities does not agree that retreaded tyres are used goods, the European Communities considers that the Panel, on the basis of Brazil's interpretation of Brazilian law, should find that Portaria Decex 8/1991 is equally incompatible with Article XI:1, to the extent that it bans the importation of retreads.

Question 113. To Brazil.

Are import licenses required under Portaria SECEX No. 14 for the importation of retreaded tyres? If so, under what provision of Portaria SECEX No. 14 are such import licenses required?

Response of Brazil

407. Import licenses are only issued by the federal government *as provided for* in Portaria SECEX No. 14. Article 40 of the *portaria* explicitly provides that import licenses will not be granted for the importation of retreaded and used tyres, except for remoulded tyres from MERCOSUR countries. Import licenses for used and retreaded tyres have been issued only when ordered by the courts. Had imports of used and retreaded tyres been permitted, import licenses would have been required under Articles 9(II)(e) and 35 of Portaria SECEX No. 14. These provisions provide for "non-automatic licensing" for used goods, which means that import licenses are required to import these products.

Comments of the European Communities

408. The European Communities notes that Brazil's reply confirms the European Communities' understanding of the Brazilian law as set out in paragraph 57 of the European Communities' first written submission.

Question 114. To Brazil.

Could you clarify how exactly the environmental risks that you identify relate to the protection of "human, animal or plant life or health" within the meaning of Article XX(b)? (see statements in e.g. Brazil's first written submission paragraphs. 4, 6, 20, 21 and 22).

Response of Brazil

409. As Brazil explained in more detail in paragraphs 29-35 of its FWS, tyre fires release pyrolytic oil, which contains numerous toxic chemicals and heavy metals. This oil contaminates the ground over which it travels, and destroys the plant life. When the oil contaminates waterways, it harms fish and other life that exists within those waterways (often resulting in fish kills). The pollutants from the pyrolytic oil are also passed on to animals that drink the contaminated water.

410. Tyre fires also emit plumes that contain a number of hazardous substances, including dioxins and furans. Harms from these emissions, including cancer, reproductive problems, and reduced immune function (described in Brazil's FWS, at paragraphs 32-33), are not unique to humans and are equally experienced by animals. See Humane Society Brief, at para. 15 (Exhibit BRA-98).

411. Finally, mosquitoes that breed in waste tyres transmit diseases that affect animals, just as they do humans. See Humane Society Brief, at paras. 22, 24, 50. Brazil notes that this particular response

addresses only the risks to human, animal or plant life or health caused by the accumulation of waste tyres. The risks caused by the disposal of waste tyres are summarized in Brazil's response to Question 115 from the Panel.

Comments of the European Communities

412. Brazil has explained in its first written submission that tyres fires release pyrolytic oil and a number of other hazardous substances, but it has not demonstrated the negative consequences of those substances on animal and plant life or health. The reason for the absence of evidence on these questions is that the main negative consequences of tyre fires normally affect some specific elements of the environment, namely soil, surface water and groundwater, which are not already as such within the scope of Article XX(b).

413. Release of pyrolytic oil will produce environmental pollution if the site is incorrectly designed or if fire-fighters do not contain pyrolytic oil flows. This pollution may have harmful impacts on animal life only if a watercourse or lake with fish life runs or is located close and downhill to the site. The European Communities is not aware of any scientific evidence about cancer, reproductive problems or reduced immune function experienced by animals due to the hazardous substances in tyre fires plumes. Nor has Brazil provided a single piece of evidence in that respect.

414. In relation to mosquitoes, Brazil merely states, relying on the Humane Society Brief, that they transmit diseases that affect animals, without explaining which these animals are.¹⁹⁷ The European Communities has already explained that the evidence presented by Brazil only identifies monkeys as a species capable of being infected with dengue and yellow fever, though they seem to be infected in their natural environment, independently of the presence of waste tyres.¹⁹⁸

Question 115. To Brazil.

Could you indicate what are the exact risks to animal and plant life and health posed by the different disposal options, including information on possible direct harmful impacts?

Response of Brazil

415. Certain material recycling uses have been reported to harm the animal life. Studies have shown, for example, that artificial reefs made of waste tyres (a civil engineering use) produce toxic leachate that harms rainbow trout and other forms of aquatic life, as described in a report by the British Environment Agency.¹⁹⁹ The report also notes that when waste tyres are used on silage clamps, tyres degrade, at which point the rubber compound breaks down and wires become exposed. According to the agency, "[t]he wire is a direct danger to livestock, and the crumb gets into the silage and, in larger pieces, can also pose a risk to cattle."²⁰⁰

416. The most serious risks, however, are caused by toxic pollutants, such as dioxins and heavy metals, that are released when waste tyres are incinerated and when stockpiled tyres catch fire. These risks include cancer, reduced immune function, respiratory problems, miscarriage, and birth defects, among many others. See Humane Society Brief, at para. 15. The Humane Society Brief, at paragraph 16, also explains that particulate matter released during incineration and tyre fires makes water bodies acidic by decreasing their pH balance and changing their nutrient balance, with a consequent negative effect on the animals and plants that live in those water bodies. Emissions of particulate matter also deplete soil of its nutrients, which damages sensitive forests and farm crops, and also negatively affects the diversity of ecosystems.

¹⁹⁷ Brazil's answer to panel question No. 114, para. 49.

¹⁹⁸ European Communities' answer to panel question No. 110, para. 39.

¹⁹⁹ See Environment Agency (UK), Tyres in the Environment, at Section 4.3 (Exhibit BRA-1).

²⁰⁰ See id.

Comments of the European Communities

417. Once again, Brazil responds to a question with vague explanations unsupported by evidence and without rebutting the evidence provided by the European Communities.

418. In relation to artificial reefs, the European Communities has already explained that the overall risk of damage to the environment of waste tyres in port, coastal and river engineering is nearly zero and has provided a recent report to prove it.²⁰¹ Brazil has not rebutted the report and continues to rely on an older report, prepared in 1998, by the England and Wales Environment Agency, which refers to laboratory studies in Canada. The European Communities is also surprised to find that Brazil's only argument relies on the harm produced to the rainbow trout, which is an invasive fish in Brazil and that is only a native species in North America (Exhibit EC-127). Brazil has not provided any information on the possible negative consequences on animals and plants of the civil engineering use of waste tyres in its territory.

419. The European Communities considers that Brazil's comments on the risks of using waste tyres on silage clamps are irrelevant. This is a relatively unimportant alternative, although Brazil has not provided information on its farmers' practices on this matter. Moreover, irrespective of the risks posed to livestock by this use, farmers will certainly continue with this longstanding cheap practice.

420. The general and unsubstantiated comments by Brazil in relation to the risks posed by co-incineration, including the explanations given by the Humane Society Brief on risks from particulate matter, have already been answered in the European Communities' response to Question 110 from the Panel.²⁰² The European Communities would like to point out that Brazil uses here, again, the incorrect term "incineration".

Question 116. To both parties.

Assuming that there may be situations where risks are identified in relation to both 'human health or life' and 'animal or plant health or life', what would be the implication of the existence of such distinct risks, if any, for the analysis of Article XX(b), including in the "weighing and balancing" of different factors?

Response of Brazil

421. While, in theory, the risks to "animal or plant health or life" and "human health or life" can be distinguished, in reality, environmental degradation and harms to human life or health usually go hand in hand, as is in the case of waste tyres. Contamination of plants affects not only plant life and health, but also the life and health of animals and humans that consume the plants. In a similar manner, both animals and humans breathe the air contaminated by toxic compounds released during incineration or tyre fires. They also drink water contaminated by the pyrolytic oil and toxic leachate. In addition, many pollutants, such as dioxins, also move up the food chain and are ultimately passed on to animals that consume other animals, and to humans that consume animal meat.

422. Thus, the magnitude of the risks involved in the present case and the reality that risks to both human health and the environment are present means that the policy pursued has even more weight in this case and is therefore highly relevant for the Article XX(b) analysis.

²⁰¹ Report produced by HR Wallingford Ltd., in March 2005, for the UK Department of Trade and Industry and the Environment, to which the EC has referred in its SWS, para. 132, and attached as Exhibit EC-106. The EC mentioned also this report in its answer to panel question No. 110, para.43.

²⁰² European Communities' answer to panel question No. 110, para. 42.

Response of the European Communities

423. A precise and specific analysis of the negative consequences on the interests protected arising from the different risks from waste tyres (diseases, tyre fires and leaching) is important to carry out a correct assessment of the contribution that the import ban really makes. The analysis is also important in order to evaluate the different alternatives to the import ban. In both cases, an exact study of the different negative consequences will contribute to a clear explanation of these two factors when weighing and balancing them to verify whether the import ban is "necessary".

424. This should be done by differentiating between human life and health, on one side, and animal and plant life or health, on the other. The main reason for this distinction is that human life and health is generally a more important value, which merits a separate valuation.

425. For the same reason, the risks should also be assessed separately in relation to life or health in both groups. For example, while dengue is related to human life and health, though not to the same extent, there is no evidence on record proving that human life has ever been in danger as a result of waste tyre fires.

Comments of Brazil

426. The European Communities in its response states: "[T]here is no evidence on record proving that human life has ever been in danger as a result of waste tyre fires." This is an example of the flagrant disregard for facts – disregard that the European Communities has demonstrated throughout the proceeding.

427. Brazil has extensively documented the dangers that tyre fires pose to human health in paragraphs 29-37 of its first written submission. To quote from a report by the US Environmental Protection Agency, cited by Brazil in its oral and written statements and submitted as Exhibit BRA-26:

"Air emissions from open tyre fires have been shown to be more toxic (e.g., mutagenic) than those of a combustor, regardless of the fuel. Open tyre fire emissions include "criteria" pollutants, such as particulates, carbon monoxide (CO), sulfur oxides (SO_x), oxides of nitrogen (NO_x), and volatile organic compounds (VOCs). They also include "non-criteria" hazardous air pollutants (HAPs), such as polynuclear aromatic hydrocarbons (PAHs), dioxins, furans, hydrogen chloride, benzene, polychlorinated biphenyls (PCBs); and metals such as arsenic, cadmium, nickel, zinc, mercury, chromium, and vanadium. Both criteria and HAP emissions from an open tyre fire can represent *significant acute (short-term) and chronic (long-term) health hazards to firefighters and nearby residents*. Depending on the length and degree of exposure, these health effects could include *irritation of the skin, eyes, and mucous membranes, respiratory effects, central nervous system depression, and cancer*.

Open tyre fire emissions are estimated to be... 13,000 times more mutagenic than coal-fired utility emissions with good combustion efficiency and add-on controls."²⁰³

428. Brazil has also introduced into evidence reports and statements by the environmental agencies of the European Communities' Member States that recognize the dangers of tyre fires to human health. The British Environment Agency, for example, notes:

²⁰³ Environmental Protection Agency (US), Air Emissions from Scrap Tyre Combustion (viii)-(ix) (1997) (Exhibit BRA-26).

"Tyres ... can be a fire risk affecting the air with toxic fumes, and watercourses, which fire quench waters can run into. Some landfill tyre fires have been burning for years."²⁰⁴

Comments of the European Communities

429. Brazil's answer to this question is partial and too general. It is partial because, as in other Brazilian responses, the answer does not deal with the negative consequences of mosquito-borne diseases for plants and animals. The European Communities has already explained that neither plants nor animals seem to be affected by dengue, yellow fever or malaria.²⁰⁵

430. The answer is also too general because, first, it does not take into account the low level of emissions from co-incineration installations complying with regulatory standards or the remedial actions taken in case of waste tyre fires. In this latter context, it is absurd to claim that animals and humans will drink water contaminated by pyrolytic oil. If that pollution takes place, the first initiative adopted by the relevant authorities should be to take all measures necessary to avoid the consumption of polluted water.

431. The answer does not explain either any specific links between the different pollutants and their consequences on plants and animals. As an example, plants are not affected by dioxins, they only serve as deposit to this substance, and the negative consequences of dioxins on animals have only been studied in laboratory animals for the purposes of research in relation to humans.

432. In reality, even if it were considered, for the sake of argument, that the policy pursued by the import ban on retreaded tyres is the protection of human, animal or plant life and health, *quod non*, the interests protected are not as wide as Brazil pretends. Nor is the magnitude of the risks involved in relation to co-incineration and open fires high, contrary to the exaggerated statement made by Brazil in its answer.

Question 117. To Brazil.

Please comment on the following arguments of the European Communities in its second oral statement, in relation to the economic analysis provided by Brazil on the impact of the import ban on the reduction of the number of waste tyres in Brazil:

- (a) *the assumption of a rate of retreading of domestic casings between 44% and 92% (para. 36 of the second EC oral statement);*
- (b) *the lack of coverage of truck and aircraft tyres (para. 38 of the second EC oral statement).*

Response of Brazil

(a)

433. The economic analysis provided by Brazil considered actual data for the period of analysis collected from reliable sources, identified in Table 1 of the report. For the period 2002-2003, the average share of retreaded tyres in the replacement market (what the study refers to as "retreading rate") was 42.4 per cent, which is obtained in the following manner:

(Retreaded tyres in Brazil, in tonnes) / (New tyres domestic sales, in tonnes + New imported tyres, in tonnes) = $(53,642 / (97,355 + 29,045)) = 0.424$ or 42.4%

²⁰⁴ Environment Agency (UK), TyreWatch Program (Exhibit BRA-39).

²⁰⁵ European Communities' answer to panel question No. 110, para. 39.

434. The criticism presented by the European Communities is most probably due to a partial and incomplete understanding of the demonstration presented in the diagrams that depict the hypothetical cases in which imports of retreaded and/or used tyres would be allowed. In addition, as Brazil demonstrates in Exhibit BRA-162, the vast majority of tyres retreaded in Brazil were made from domestic casings.

435. Diagrams 7 to 9, which refer to the scenario "Imports allowed: new+retreaded", should be viewed as a depiction of the immediate impact of a lifting of the ban on imports of retreaded tyres. In that scenario, in a first stage, there would be an oversupply of retreaded tyres (the sum of those retreaded in Brazil and imported), as the volume of retreaded tyres in period t1 – depicted in the diagram – is a function of new tyre sales in year t0. In the following years, and as the market adjusts to a smaller sale of new tyres (our graphical demonstration is not a dynamic model, with multi-period interrelations or adjustments), the total number of retreaded tyres would fall, with a latter corresponding increase in the number of new tyre sales, until a new equilibrium is found.

436. Nonetheless, what is relevant for the Panel to analyze and conclude is that in spite of these intertemporal adjustments, which are expected to occur as any change in policy occurs, the equation of waste volume will hold for the entire period, from the initial phase until the end of the adjustment period:

$$\text{Waste volume} = R + RI + (N - R)$$

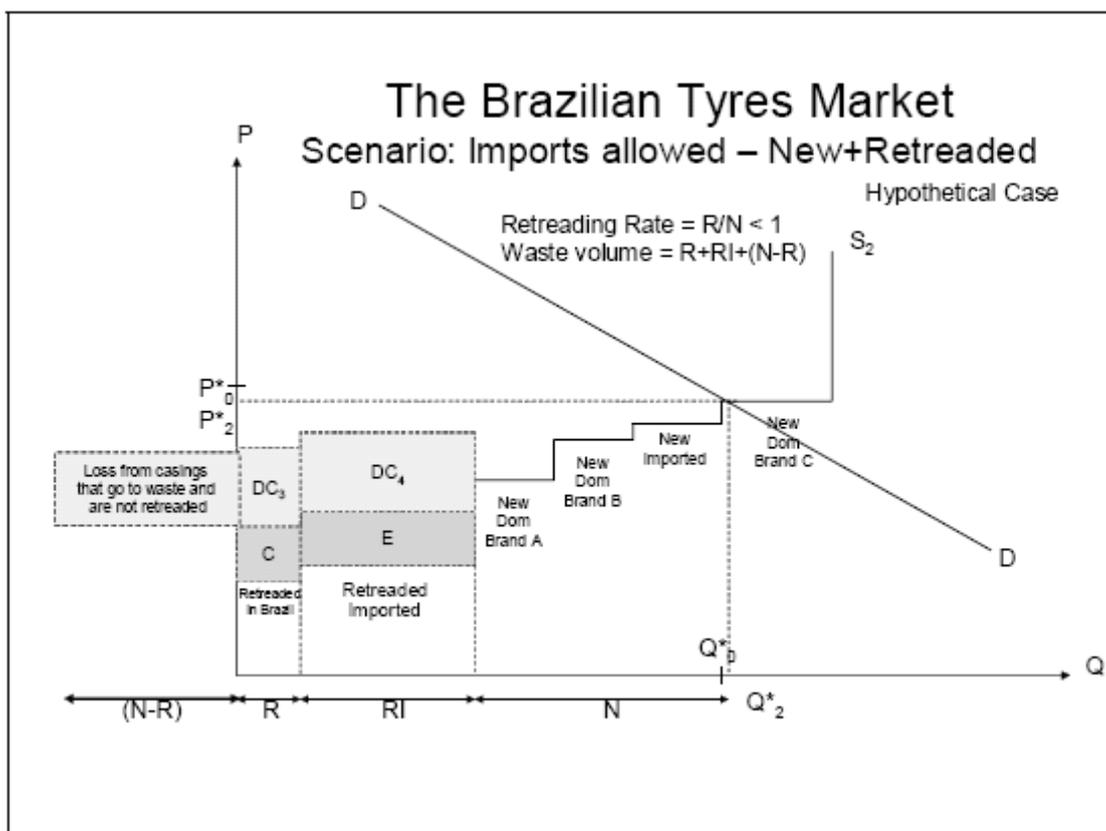
where,

R is the number of tyres retreaded in Brazil,

RI is the number of retreaded tyres imported, and

N is the total number of new tyre sales.

437. Therefore, if the parcel denominated R ends up smaller after the intertemporal adjustments, the parcel (N-R) becomes larger, which is exactly what has been described during the last Panel meeting – as imports of used tyres were allowed temporarily by judicial decision, the rate of retreading from domestic casings reduced, and the waste volume increased. This is explained by the fact that it is much easier, and less costly, for a retreading company to source its raw material (casings) in a concentrated manner, at import delivery ports of entry, than to collect them in a continental size country such as Brazil. After the market adjustments mentioned above had happened, which is the basis of the observation made by the European Communities, Diagram 9 could be depicted in the following way:



438. Thus, it can be observed that allowing for imports of retreaded tyres will increase the total waste volume, as indicated by the equation above, and the impact of additional waste volume can be visualized by the areas indicated in this diagram. The demonstration of how retreaded tyre imports affect 'waste volume' holds for the initial period depicted in the economic analysis, as well as for the end of the adjustment period, as indicated above.

(b)

439. The economic analysis concentrated on passenger car tyres since they represent the majority of imports in the period of analysis (2002-03):

Imports of retreaded tyres (average in units)

| | | |
|--------------------|---------|-------|
| Passenger cars | 271,587 | 99.8% |
| Trucks and lorries | 410 | 0.2% |
| Aircraft | 20 | 0.0% |
| Total | 272,017 | |

Source: Aliceweb/MDIC

Comments of the European Communities

440. In its response, Brazil first speaks of "the average share of retreaded tyres in the replacement market (what the study refers to as 'retreading rate')".²⁰⁶ This is incorrect, because the "study" speaks of the retreading rate as being the R/N ratio between retreads made in Brazil from domestic casings (R) and new tyres sold in Brazil (N).²⁰⁷ This was a useful rough definition for the concept of "retreading rate" because it expresses, over time, the percentage of formerly new tyres that are retreaded after being used on Brazilian roads.²⁰⁸ The "share of retreaded tyres in the replacement market" which Brazil now speaks about²⁰⁹ would be $R/(N+R-N_{\text{fitted on new cars}})$. Brazil however maintains R/N in its calculation²¹⁰ and therefore makes two further mistakes if it intends to designate the "share of retreaded tyres in the replacement market": Brazil first overlooks that the entire replacement market, the denominator, has to include sales of retreads. Second, Brazil overlooks those new tyres that are fitted on new cars in Brazil which do not belong to the replacement market.

441. As said, R/N would be roughly correct if Brazil in reality speaks not of the market share but of the ratio between retreads made in Brazil from domestic casings (R) and new tyres sold in Brazil (N), which is what Exhibit BRA-146 consistently does. In that case, too, however, the numbers which Brazil uses and obtains in its calculation, are incorrect, as the European Communities will show in the following explanation.

442. By dividing the tonnage of tyres "retreaded in Brazil" by the total tonnage of new tyres sold in Brazil, as listed in Table 1 of Exhibit BRA-146, Brazil arrives at a ratio of 42.4 %.²¹¹ As the European Communities identified in the analysis on the "study" contained in Exhibit BRA-146, submitted to the Panel as Exhibit EC-122, the question remains whether the quantity of domestic passenger car retreads produced in Brazil in Table 1 (53,642 tonnes in 2002/2003, on average) includes those retreads that are made in Brazil with imported casings (i.e. whether it stands for R or for R+UI, in Exhibit BRA-146). The tonnages for 2002 and 2003 in Table 1 of Exhibit BRA-146 correspond, respectively, to the 7.5 and 9 million passenger car retreads produced in Brazil reported by ABR in Exhibits BRA-95 and BRA-157 (when using the arguably too low conversion factor of 6.5 kg per retreaded tyre). ABR's production numbers, clearly, designate the *totality* of that retread production in Brazil, in other words, it includes the retreads made with imported casings (i.e. R+UI).

443. Therefore, Brazil is fatally mistaken in its calculation that arrives at a result of 42.4 % as the "retreading rate" of Brazilian casings. In its calculation, Brazil thereby effectively misrepresents the large number of *imported* casings as *Brazilian* casings. This turns the facts on their head because casings that are imported into Brazil to be retreaded by definition cannot increase the rate at which *domestic* casings are retreaded.

444. Specifically on Diagrams 7-9 of Exhibit BRA-146, Brazil's new illustration "after market adjustments" seems to accept the European Communities' criticism (in para. 12 of Exhibit EC-122) that Diagrams 7-9 grossly overestimate the total market share of retreads and underestimates the sales of new tyres which directly contribute to the accumulation of waste (which is effectively N+RI).²¹² However, Brazil continues to overestimate the number of imports of passenger car retreads and thus the contribution which they could possibly make to waste accumulation. Indeed, Brazil is assuming that imports would take over most of the sales of retreads in Brazil and that the domestic industry

²⁰⁶ Brazil's answer to panel question No. 117, para. 55.

²⁰⁷ See para. 5.c on p. 1 of Exhibit BRA-146, as well as "Retreading Rate = R/N" in each of the Diagrams.

²⁰⁸ If one disregards the imprecision of this equation due to second hand cars that flow on to and away from the Brazilian market with their tyres, as well as dynamic effects such as an expanding fleet or changes in the respective market shares of new and retreaded tyres.

²⁰⁹ Brazil's answer to panel question No. 117, para. 55.

²¹⁰ *Ibid.*

²¹¹ Brazil's reply answer to panel question No. 117, para. 55, *in fine*.

²¹² Brazil's answer to panel question No. 117, paras. 57 et seq.

would be marginalised.²¹³ This is not plausible given that the Brazilian retreading industry appears to be quite competitive.

445. There are further important points on which Brazil's new graphical illustration²¹⁴ distorts the picture of the impact which the lifting of the import ban would have. For instance, it is assumed in the graph that the (overestimated) importation of retreads would cause a reduction in the retreading of domestic casings and that this would increase waste accumulation. This overlooks the fact which Brazil even mentions, namely that Brazil presently imports large numbers of casings for its production of retreads. Brazil's presentation is therefore equally incoherent as the legal reality on the ground, where Brazil closed the market for imported retreads, allegedly in order to reduce waste, and at the same time imports large numbers of casings for retreading.

446. On this latter point, Brazil claims that the growing importation of casings led to a reduced rate of retreading of domestic casings,²¹⁵ whereas it seems at least as true that the total production of retreads grew considerably in Brazil over the past years, with particular growth in the remoulding industry which produces high-quality retreads from imported casings, already conforming to the Portaria 133 requirements. The European Communities already repeatedly contested Brazil's allegations that it is easier or less costly for domestic retreaders to import the casings rather than to collect them "in a continental size country such as Brazil".²¹⁶ The European Communities would recall again that the importation of casings does not free a retreader from collecting casings in Brazil, on the contrary, the prior collection and disposal of domestic used tyres is a pre-requisite to the importation of casings (see Article 12A of CONAMA Resolution 258, as amended by Resolution 301).

447. Thus, Brazil's new graph appears to be another illustration without support in real economic facts. The illustration expresses inaccurate and debatable assumptions and interdependences that are not economically coherent. Many points of criticism explained at length in Exhibit EC-122 remain fully valid in relation to the new graph and need not be repeated.

448. The European Communities would emphasise the very important fact that Brazil in its reply does not at all respond to the Panel's question, which was an explicit invitation to Brazil to comment on the European Communities' argument that Brazil's "study" assumed rates of retreading between 44 % and 92 %. This can only be taken as admission by Brazil that the Exhibit BRA-146 is indeed flawed on these important points. Nor does Brazil respond on the many other weaknesses of Exhibit BRA-146, which the European Communities has explained in Exhibit EC-122.

449. In the absence of a reply by Brazil to the Panel's specific question, and in case this is of interest to the Panel, the European Communities would like to explain how it arrived, in its analysis in Exhibit EC-122, at the percentages of the retreading rate R/N which Exhibit BRA-146 displays. The European Communities took at face value the quantities represented in the graphs and obtained the assumed retreading rates R/N by dividing the width of R in millimetres by the width of N in millimetres in each of the graphs. To take the example of the "roughly 84 %" in Diagrams 13-15, N was measured to be ca. 19.8 mm wide and R ca. 16.8 mm. $168/198$ results in 0.8485.

450. In this context, it is worth adding that even in Brazil's "realistic scenario" in Exhibit BRA-162, page 1, the incorrectness of which the European Communities explained in its reply to the Panel's question no. 107, the retreading rate of Brazilian passenger car tyres is between 25 % and

²¹³ See R and RI in the graph in para. 59 of Brazil's answer to panel question No. 117.

²¹⁴ *Ibid.*

²¹⁵ Brazil's answer to panel question No. 117, para. 59.

²¹⁶ *Ibid.*

32 %, i.e. much lower than the lowest retreading rate assumed, even more wrongly, in Exhibit BRA-146. That "study" therefore remains completely unprobative for the purposes of this dispute.

451. Finally, in relation to the Panel's sub-question b), Brazil does not give a response, other than recalling the fact that most imports of retreads were passenger tyres. This response does not do justice to the European Communities' claims in this dispute, where the European Communities raised "as such" claims of WTO violations in relation to Brazil's import ban on retreads in its entirety. Irrespective of the numbers of past imports, the methodology of any demonstration therefore matters. As the European Communities pointed out in its opening statement at the second substantive meeting,²¹⁷ a separate demonstration of the contribution of the import ban on truck and aircraft tyres would be necessary, since such tyres can be retreaded multiple times, and therefore contribute less to the accumulation of waste tyres than passenger car tyres. Also, it seems that Brazil does not retread all of its truck and aircraft tyres.

Question 118. To both parties.

(a) *In your view, is the measure's contribution to the objective pursued, as envisaged by the Appellate Body in the context of determining the necessity of a measure under Article XX(b), intended to reflect the "actual" contribution of the measure in fact or does it relate rather to the measure's capacity, by design, to contribute to the objective?*

(b) *In this context, please clarify how the MERCOSUR exemption and the used tyre imports taking place pursuant to court injunctions should be considered by the Panel in the context of its analysis of the contribution of the measure to the objective under Article XX(b).*

(c) *Please also clarify whether the MERCOSUR exemption and the used tyre imports taking place pursuant to court injunctions should be considered by the Panel in the context of its analysis under paragraph (b) of Article XX, or under the chapeau of that provision, or both?*

Response of Brazil

452. The contribution analysis may involve both an evaluation of the measure's capacity, by design, to contribute to the desired objective and an evaluation of the actual contribution of the measure.

453. An effective contribution analysis will require an examination of the design of the measure – that is, whether the measure is capable of making a contribution – and the actual effect of the measure – that is, whether the measure actually contributes to achieving the goal pursued and, if so, to what extent.

454. Brazil explained in paragraph 96 of its second oral statement that while used tyre imports may detract somewhat from the overall contribution made by the import ban, they in no way negate that contribution. Moreover, the used tyre imports through injunctions are not part of the design of the measure. On the contrary, they are an attempt to undermine the measure's design and application.

455. In practice, with the exception of 2004 and 2005, imports of used tyres through preliminary injunctions have not been particularly high, and the vast majority of retreads made in Brazil were made from domestic casings. See Brazil's response to Question 105 from the Panel.

456. In addition, an import ban on retreaded tyres and an import ban on used tyres are functionally separate measures. Less-than-perfect effectiveness of the ban on used tyres does not negate the effectiveness of the ban on retreaded tyres. Without the ban on retreaded tyres, the volumes of waste would have been even higher.

²¹⁷ Para. 38.

457. Third, it is relevant that Brazil's measure – by design – prohibits imports of both retreaded and used tyres. The measure, therefore, is designed to achieve the maximum level of waste reduction.

458. The MERCOSUR exemption is properly analyzed under Article XXIV and not under Article XX(b), including the contribution analysis. See Brazil's response to Question 131 from the Panel. Nevertheless, should the Panel consider the exemption in its analysis of the import ban's contribution, Brazil notes that any effect that the MERCOSUR exemption might have on the actual contribution of the import ban is not significant, because the volumes of waste tyres imported from MERCOSUR are very small. In 2005, Brazil imported a meagre 157,473 retreaded tyres from MERCOSUR. To compare, in the years preceding the 2000 import ban, anywhere between 2 million and 3.3 million retreaded tyres were being imported into Brazil – 13 to 21 times the MERCOSUR imports.

459. The MERCOSUR exemption is more relevant for the analysis under the chapeau of Article XX, but even in respect of the chapeau, the exemption does not lead to arbitrary or unjustifiable discrimination. The design of the MERCOSUR exemption is relevant to show that the original ban contained no exemptions and applied erga omnes, and that the MERCOSUR exemption was introduced later to comply with a ruling by a MERCOSUR tribunal. This demonstrates that Brazil's measures do not discriminate between MERCOSUR and non-MERCOSUR countries in a manner that is unjustifiable or arbitrary. It also demonstrates that by complying with the tribunal's ruling, Brazil did not raise trade barriers to third parties, but merely relaxed restrictions for its customs union partners.

Response of the European Communities

(a)

460. The Appellate Body has clarified that one of the aspects to be considered in determining whether a measure is "necessary" is the "extent to which the measure contributes to the *realization* of the end pursued".²¹⁸ The reference by the Appellate Body to the "realization" of the end pursued makes it clear that the contribution of the measure cannot be a purely theoretical or potential contribution. Rather, it must be demonstrated that the measure makes a real and verifiable contribution.

461. The design of the measure as such is therefore not sufficient to establish whether a measure makes a contribution. Rather, it must also be verified whether, in the concrete conditions it is applied, and taking into account other possible measures which might apply, the measure can make a real contribution to the end pursued. On the other hand, the design of the measure must of course not be such as to prevent the measure from achieving its stated goal.

(b)

462. Both the MERCOSUR exemption and the used tyre imports taking place pursuant to court injunctions are relevant for the contribution of the measure, and should be considered by the Panel in this context.

463. Both facts are relevant because the contribution of the ban to the reduction of any problems for human life and health resulting from waste tyres depends, at the very first level, on the contribution that the ban is making to the reduction of the number of waste tyres in Brazil. However, as the European Communities has already explained,²¹⁹ the ban will make such a contribution only to

²¹⁸ Appellate Body Report on *Korea – Beef*, para. 163 (emphasis added).

²¹⁹ European Communities' second written submission, para. 32.

the extent that it results in the replacement of an imported retreaded tyre either with a new tyre which will be retreaded or with a retreaded tyre which has been produced from a domestic casing.

464. As regards the MERCOSUR exemption, this exemption is relevant because none of the retreaded tyres imported from MERCOSUR are made with casings imported from Brazil (and most are in fact made with casings imported from the European Communities).²²⁰ Accordingly, to the extent that an imported retreaded tyre from the European Communities would compete with and replace a retreaded tyre imported from MERCOSUR, the import ban has no effect on the reduction of waste tyres in Brazil.

465. The importation of used tyres is equally relevant since the large majority of these tyres are used to produce retreaded tyres made in Brazil.²²¹ Once again, to the extent that an imported retreaded tyre replaces a domestic retreaded tyre produced with an imported casing, the ban cannot have the effect of reducing the number of waste tyres arising in Brazil.

(c)

466. The MERCOSUR exemption and the used tyre imports taking place pursuant to court injunctions should be taken into account by the Panel both in the context of its analysis under paragraph (b) of Article XX and under the chapeau of that provision.

467. As the European Communities has explained, both factors are relevant for determining whether the ban makes a contribution to the reduction of waste tyres in Brazil. Similarly, as the European Communities has equally explained, banning the importation of used tyres is a reasonable alternative to the import ban on retreaded tyres.²²² Finally, the existence of the MERCOSUR exemption is also relevant under the chapeau of Article XX since it amounts to discrimination between countries where the same countries prevail, namely MERCOSUR countries and other WTO Members.²²³ Moreover, the importation of EC casings for the purposes of retreading in Brazil equally amounts to discrimination, in this case between Brazil and other WTO Members, including the European Communities, and is therefore equally incompatible with the chapeau.²²⁴

Comments of Brazil

468. In its second set of responses Brazil noted that the President's Chief of Staff had directed the Union's Solicitor General to initiate actions for rescission of the injunctions currently in effect. Brazil reports to the Panel that the President of the Republic has signed and the Solicitor General has filed one of these actions in Federal Supreme Court on 21 September 2006. This challenge action, Allegation of Violation of Fundamental Precept, has the power to revoke all the judicial decisions that have allowed the importation of used tyres into Brazil and preclude future judicial decisions permitting new imports. The preliminary injunction requested by the President in this action will be decided in a matter of days. Brazil attaches documents to this proceeding as Exhibit BRA-173 and Exhibit BRA-174.

469. On a separate topic of the Rio Grande do Sul law, Brazil reports that the General Prosecutor of the Republic has presented to the Federal Supreme Court the Unconstitutionality Action recommended by the Chief of Staff Minister (Exhibit BRA-169). The Unconstitutionality Action received the identifying code ADIN3801 in the Federal Supreme Court.

²²⁰ Cf. European Communities' first written submission, para. 83-84.

²²¹ Cf. European Communities' second written submission, footnote 43.

²²² European Communities' second written submission, para. et seq.

²²³ European Communities' second written submission, para. 151 et seq.

²²⁴ European Communities' second written submission, para. 167 et seq.

Comments of the European Communities

470. In its Reply to the Panel's Question, the European Communities has explained that what is relevant is whether the measure makes a real contribution to the end pursued. The European Communities has equally explained that the MERCOSUR exemption and the imports of used tyres are relevant both for the Panels' analysis under Article XX(b), and under the chapeau of Article XX.

471. As regards the imports of used tyres, Brazil has denied the relevance of these imports because used tyre imports are not "part of the design of the measure".²²⁵ However, as the European Communities has explained, what matters for the contribution analysis is not only the design, but also the practical application and effect of the measure. If an imported retreaded tyre merely replaces a domestic retreaded tyre which is produced with an imported casing, then the ban to this extent makes no contribution to the reduction of the number of waste tyres in Brazil. Accordingly, the relevance of the importation of used tyres cannot be denied.

472. Moreover, Brazil has claimed that "with the exception of 2004 and 2005, imports of used tyres have not been particularly high".²²⁶ In this context, the European Communities would remark that the numbers of imported used tyres for 2000 to 2005 were as follows (from January to July 2006, imports of casings were 4.54 million):²²⁷

| 2000 | 2001 | 2002 | 2003 | 2004 | 2005 |
|-----------|-----------|-----------|-----------|-----------|------------|
| 1,407,618 | 2,396,898 | 2,659,704 | 4,240,474 | 7,564,360 | 10,478,466 |

473. The European Communities has stressed on many occasions how much these imports have increased in the recent past. The European Communities, however, does not see on what basis Brazil qualifies these numbers as "not particularly high" for the years other than 2004 and 2005, also against the background that Brazil imported 2-3 million retreaded tyres per year before it imposed the import ban. In addition, the European Communities has already remarked that the rising numbers of imports are a reflection of the adaptation by Brazilian industry to the higher standards of Portaria INMETRO 133. The earlier higher utilisation of domestic casings is therefore no longer representative for the current situation. Finally, Brazil's measure must be evaluated as of the time of the Panel's establishment. The most relevant figure is therefore the one for the last calendar year before the Panel's establishment, namely 2005, and in that year, Brazil imported 10.5 million used tyres.

474. As regards the MERCOSUR exemption, Brazil argues that this exemption is properly analyzed under Article XXIV and not under Article XX.²²⁸ The European Communities disagrees with this statement. As the European Communities has shown, the MERCOSUR exemption is first of all relevant as regards the contribution analysis, since, to the extent that an imported retreaded tyre replaces a retreaded tyre imported from MERCOSUR which is not produced from a casing originating in Brazil, the ban does not contribute to the reduction of waste tyres in Brazil.²²⁹

475. Brazil also has doubted the relevance of the MERCOSUR exemption for the contribution analysis by arguing that in 2005, Brazil imported "a meagre 157,573 retreaded tyres" from MERCOSUR. The European Communities finds this reference to 157,573 tyres as "meagre"

²²⁵ Brazil's answer to panel question No. 118, para. 64.

²²⁶ Brazil's answer to panel question No. 118, para. 65.

²²⁷ According to Brazilian official ALICE statistics, which Brazil has also submitted in this dispute.

²²⁸ Brazil's answer to panel question No. 118, para. 68.

²²⁹ European Communities' answer to panel question No. 118, para. 51.

surprising considering that at the same time, Brazil has argued that even 500 additional waste tyre would justify the imposition of the import ban on retreaded tyres.²³⁰

476. The point is also one of legal principle and of the design of Brazil's measure, given that imports of retreads from MERCOSUR are permitted without any quantitative limitation. The fact that they are currently fewer than imports from the European Communities have been before the import ban rather seems to be due to supply, not demand constraints, or to questions of competitiveness of the Uruguayan and Paraguayan retreaders, as compared to Brazilian retreaders. Other than that, it is absolutely possible that MERCOSUR imports of retreads will increase in the future. Uruguay's more recent challenge of Argentina's import ban suggests that its industry has the willingness and capability to increase its production and exportation.

477. Moreover, it should be noted that the MERCOSUR tyres are only one factor, and in fact the smallest, which reduces the effectiveness of the ban. The bigger factors are in fact the large number of retreaded tyres produced in Brazil with imported casings, plus the fact that the overwhelming majority of domestic passenger car casings in Brazil are not retreaded after their first use. Due to these factors seen in combination, the contribution of the ban to the reduction of waste passenger car tyres is in fact minimal at best.

478. Brazil concedes that the MERCOSUR exemption is "more relevant" under the chapeau, but repeats its statement that the "original design" of the measure did not include the exemption, and that this exemption was only introduced to comply with a MERCOSUR arbitral tribunal.²³¹ As regards the argument that the exemption was only introduced in 2002, i.e. two years after the ban was adopted, the European Communities fails to see the relevance of this argument. The European Communities is not challenging the ban as in force in 2000, but as in force at the time of establishment of the Panel. At that date, the MERCOSUR exemption was in force and therefore needs to equally be taken into account by the Panel. As regards the argument that the compliance with the MERCOSUR arbitral tribunal means that the measure does not constitute arbitrary and unjustifiable discrimination, the European Communities has already rebutted this argument in its earlier submissions, to which it hereby refers.²³²

Question 119. To both parties.

Please elaborate on the manner in which the "weighing and balancing" under Article XX(b) is to be conducted. Specifically, what considerations should guide the Panel in assessing the relative weight to be given to the different factors in this process?

Response of Brazil

479. The weighing and balancing exercise requires that the relative strength or weakness to be given to the factors be informed by the circumstances of the case and, in particular, by the value pursued by the impugned measure. Indeed, the consideration of the interest protected by the import ban must be given prominence in the weighing and balancing exercise. This factor – listed first among the four factors by the Appellate Body – provides context for the weighing and balancing of the other factors. Thus, a measure that seeks to safeguard government revenue, for example, is likely to carry less weight than a measure that seeks to protect human health and the environment – values that the Appellate Body has called "vital and important *in the highest degree*."²³³ What this means in practical terms is that when a measure protects a less important interest, the panel will be more

²³⁰ Brazil's second oral statement, para. 78.

²³¹ Brazil's answer to panel question No. 118, para. 69.

²³² Cf. European Communities' second oral statement, para. 92 et seq.; European Communities' second written submission, para. 156 et seq.

²³³ Appellate Body Report on *EC – Asbestos*, at para. 172 (emphasis added).

exacting in its examination of the remaining factors. Conversely, when a measure protects an interest that is "vital and important in the highest degree" – such as protection of human health and the environment – the panel should ascribe more weight to that factor and relatively less weight to the remaining factors, such that the measure is more likely to be found to be "necessary" within the meaning of Article XX(b) even if the trade impact is higher, or the degree of "necessity" is closer to the pole of making a contribution than to the pole of indispensable.

480. The Appellate Body has reliably adhered to this principle. It held in *European Communities – Asbestos* that "the more vital or important the common interests or values pursued, the easier it would be to accept as 'necessary' measures designed to achieve those ends."²³⁴ In *Korea – Various Measures on Beef*, the Appellate Body issued a similar holding within the context of Article XX(d).²³⁵

481. Availability of less restrictive alternatives is another factor that provides context to the weighing and balancing analysis. Where less restrictive alternatives are available, a more exacting scrutiny is appropriate with respect to the remaining factors. However, where no such alternatives are reasonably available – as is the case in the present dispute – a panel should exercise great caution to avoid finding against the only measure available, thereby leaving the WTO Member with no tools at its disposal to counter the threat to public health and the environment.

482. The two remaining factors are contribution and trade impact. With respect to the contribution, the Appellate Body has rightly said that "[t]he greater the contribution, the more easily a measure might be considered to be 'necessary.'"²³⁶ This means that the strength of this particular factor – contribution – may offset the relative weakness of other factors, just as the strength of another factor would have offset the relative weakness of contribution. The contribution needs not be absolute or infallible. On the contrary, the Appellate Body has explained that the measures must "contribute, *at least to some extent*, to addressing these concerns."²³⁷ This sensible standard ensures that a panel will not find a measure unnecessary because of its failure to achieve a level of contribution that is unattainable in the real life.

483. Finally, with respect to the trade impact of the measure, a less restrictive impact may favor a finding of necessity²³⁸, but a more restrictive impact would not preclude such a finding. The European Communities incorrectly argues that it would: "[The highest negative impact of the import ban] *makes it impossible* to consider as 'necessary' the measure challenged in this case."²³⁹ The European Communities would have been correct only if the trade impact were the sole determinative factor of the measure's necessity. However, the Appellate Body has made it abundantly clear that trade impact is but one of several factors that must be weighed and balanced.²⁴⁰ Not only does the European Communities' argument have no basis in the WTO jurisprudence, but it also represents a complete about-face from the European Communities' position in *EC – Asbestos*, in which the European Communities argued that the French total import ban on asbestos was, in fact, necessary.

²³⁴ See Appellate Body Report on *EC – Asbestos*, at para. 172.

²³⁵ See Appellate Body Report on *Korea – Various Measures on Beef*, at para. 162.

²³⁶ Appellate Body Report on *Korea – Various Measures on Beef*, at para. 49.

²³⁷ Appellate Body Report on *US – Gambling*, at para. 6.494 (emphasis added).

²³⁸ See Appellate Body Report on *Korea – Various Measures on Beef*, at para. 163.

²³⁹ See European Communities' first written submission, at para. 115 (emphasis added).

²⁴⁰ See Appellate Body Report on *Korea – Various Measures on Beef*, at para. 164; Appellate Body Report on *EC – Asbestos*, at para. 172; Panel Report on *Canada – Wheat Exports and Grain Imports*, at para. 6.223; Appellate Body Report on *US – Gambling*, at paras. 306, 307; Appellate Body Report on *Dominican Republic – Cigarettes*, at para. 69.

Response of the European Communities

484. "Weighing and balancing" of the four factors that the Appellate Body has identified to assess the "necessity" requirement in Article XX(b) should start by verifying the importance of each of the factors individually in the context of the case at issue. In this respect, an important weight should be given to the fact that the risks Brazil pretends to eliminate or reduce are linked not to retreaded tyres, which is the product affected by Brazil's import ban, but to improperly managed waste tyres from all origins.

485. The European Communities would recommend that this process be carried out in the order followed by Brazil in its first written submission:²⁴¹ the interest protected by the import ban, the contribution of the import ban to the protection of that interest, trade impact of the import ban and alternatives to it, in order to move from the factors that are more closely linked to measure to those that are more separated from it.

486. All factors have a relative weight, in the sense that no single one of them can generally be decisive by itself to determine whether the measure is necessary or not to achieve the aims that Brazil is claiming to achieve. However, a measure, like the import ban before the Panel, that is not closely linked to life and health protection, that plays no significant role in that protection, that has an extremely severe impact on import trade, and for which alternatives are available, cannot merit being considered as "necessary" for the purposes of Article XX(b).

Comments of Brazil

487. In its response to the Panel's question, the EC again asserts that "the risks Brazil pretends to eliminate or reduce are linked not to retreaded tyres, which is the product affected by Brazil's import ban, but to improperly managed waste tyres from all origins."²⁴² As Brazil has extensively demonstrated throughout these proceedings, retreaded tyres are shorter-lifespan products that increase the volumes of tyres waste that accumulate and must be disposed of in Brazil. Certain health and environmental risks inherent to waste tyre accumulation and disposal – specifically, those arising from transportation, temporary stockpiling, and incineration – cannot be eliminated through "proper management." It is, therefore, necessary to reduce the waste tyre volumes to reduce these risks.

488. The fact that the risks posed by retreaded tyres may be indirect does not make these risks less significant or the measures taken to reduce these risks less legitimate. Neither the GATT nor the WTO jurisprudence have required a direct link between the product and the health and environmental risks it causes for a measure designed to address these risks to be justified under Article XX(b).

Comments of the European Communities

489. At the outset, the European Communities would point out that Brazil's Answer to the Question from the Panel changes the order in which the different elements of the "weighing and balancing" under Article XX(b) were analysed by the Appellate Body in *Korea – Various Measures on Beef*: interests protected, contribution, trade effects and alternatives,²⁴³ which was followed by Brazil in its first written submission.²⁴⁴ Brazil now places the alternative assessment before the contribution, separating in that way the three elements of the "weighing and balancing" that are closely linked to the measure and giving a more prominent place to the analysis of alternatives, which should only be initiated once the analysis of the different facets of the measure is completed.

²⁴¹ Brazil's first written submission, para. 97.

²⁴² See European Communities' answer to panel question No. 119, at para. 55.

²⁴³ Appellate Body Report on *Korea – Various Measures on Beef*, paras. 162 to 166.

²⁴⁴ Brazil's first written submission, para. 97 and paras. 99 to 129.

490. For the rest, the European Communities and Brazil do not agree on the assessment of each of the four elements in this case. The European Communities considers that the interests protected by the import ban are not human, animal and plant life or health but the Brazilian tyre industry.²⁴⁵ The European Communities would highlight that Brazil has not once in this dispute even tried to rebut certain evidence in this respect, notably the statements by Brazil's Advocacia-Geral, including that "SECEX Portaria No 08/2000 prohibits the importation of 'retreaded' tyres not for the defence of public health and the environment, but to protect national trade and industry."²⁴⁶ The European Communities is also of the view that Brazil has not demonstrated that the ban has significantly contributed to protect life and health.²⁴⁷ The European Communities has proved that the import ban is the most restrictive trade measure that a WTO Member can take and that the comparison that Brazil makes of the case before the Panel and *EC – Asbestos* is completely misleading.²⁴⁸ Finally, the existence of reasonably available alternatives, which would solve the eventual risks not only arising from imported retreaded tyres but also from tyres of all origins, has been sufficiently explained by the European Communities.²⁴⁹

Question 120. To the European Communities.

In paragraphs 21 and 49 of your oral statement, you referred to the notion of "significant" contribution, with reference to the Korea – Beef case. Could you please clarify this notion and the role that it should play, in your view, in the Panel's assessment?

Response of the European Communities

491. In *Korea – Beef*, the Appellate Body clarified that the process of weighing and balancing in order to establish whether a measure is necessary "prominently" includes the contribution of the measure to the end pursued.²⁵⁰ Moreover, the Appellate Body also held that in order to be necessary, a measure had to be "located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'".²⁵¹ On this basis, it is clear that a measure which makes no significant contribution to the end pursued cannot be regarded as necessary within the meaning of Article XX (b).

492. Brazil's argument in the present case has been that waste tyres present risks for human life and health, and that the importation of retreaded tyres increases the number of waste tyres in Brazil, and thereby the health risks resulting from such tyres. At the same time, however, Brazil has claimed that it is "immaterial whether there are five hundred fewer tyres or five million".²⁵²

493. In a situation where Brazil itself acknowledges that it has over 100 million improperly managed waste tyres littering the countryside,²⁵³ it is not reasonable for Brazil to claim that an additional amount of 500 tyres will make any difference from the point of view of human life and health. This is why the European Communities has insisted that as a first step in the contribution

²⁴⁵ See, *inter alia*, the European Communities' comment to Brazil's answer to panel question No. 129.

²⁴⁶ See para. 164 of the European Communities' first written submission.

²⁴⁷ See, *inter alia*, the European Communities' comment to the Brazil's answer to panel question No. 12.

²⁴⁸ European Communities' first written submission, paras. 114 to 115, European Communities' first oral statement, paras. 49 to 52, European Communities' second written submission, paras. 63 to 65, and European Communities' second oral statement, paras. 51 to 58.

²⁴⁹ European Communities' first written submission, paras. 110 to 113, European Communities' first oral statement, paras. 53 to 82, European Communities' second written submission, paras. 66 to 143, and European Communities' second oral statement, paras. 59 to 89.

²⁵⁰ Appellate Body Report on *Korea – Beef*, para. 164.

²⁵¹ Appellate Body Report on *Korea – Beef*, para. 161.

²⁵² Brazil's second oral statement, para. 78.

²⁵³ Brazil's first written submission, para. 17.

analysis, Brazil must quantify the contribution, in terms of reduction of waste tyres, made by its import ban on retreaded tyres.²⁵⁴ Only once this contribution has been established is it then possible to determine what kind of contribution the ban might make to the prevention of problems for human life and health, and whether this contribution is likely to be significant.

Comments of Brazil

494. In its response to Question 120 the European Communities continues to assert that the measure's contribution must be "significant" for a measure to be necessary within the meaning of Article XX. As a factual matter, Brazil has demonstrated that the contribution is indeed significant.²⁵⁵ As a legal matter, however, Brazil has pointed out in its response to Question 121 that neither the text of the WTO Agreements nor the WTO jurisprudence establish a requirement that the contribution of a measure be "significant."

495. The European Communities argues that it is "not reasonable" for Brazil to claim that even a small reduction in the waste tyre volumes contributes to protecting human health when some waste tyres remain in the environment. First, the problem of tyres being dumped in the environment is not unique to Brazil – EC member States face the same problem.²⁵⁶ Second, the European Communities completely ignores the fact that Brazil has already made substantial progress in collecting waste tyres scattered in the environment. Brazil's collection and disposal initiatives, such as *ecopontos*, Paraná Rodando Limpo, and CONAMA Resolution 258, ensure that tyres that are already in the environment will be collected and tyres that reach their end of life will be disposed of properly. The resolution's goal of reducing the historic accumulation – in addition to the new arisings – is evident in its requirement to collect and dispose of more tyres than produced. To recall, Brazil's chosen level of protection requires Brazil to do everything possible to reduce the waste tyre risks. For this reason, Brazil must continue to collect the waste tyres already in the environment and must also reduce the overall waste tyre volumes. As Brazil has demonstrated, it is doing both.

496. Finally, Brazil emphasizes that the challenged measures protect human life and health – undoubtedly the most important interest that a government measure can protect. The European Communities' insistence on quantifying the ban's contribution would effectively require Brazil to demonstrate that a sufficiently high number of lives were saved and cases of disease prevented for the ban to be justified. This requirement would be plainly at odds with the WTO Members' right to choose a level of protection they consider appropriate. If a reduction in waste tyre volumes saves lives, regardless of the number, Brazil has the right under the WTO to take measures to achieve that reduction. The European Communities, however, seems to believe that there is a threshold below which the right of its exporters to ship retreaded tyres to Brazil matters more than the lives of Brazil's citizens. Brazil refuses to put a price tag on the lives of its citizens.

²⁵⁴ European Communities' second written submission, para. 26 et seq.

²⁵⁵ See Brazil's answer to panel question No. 121, at para. 77.

²⁵⁶ European Tyre & Rubber Manufacturers' Association, *End-of-life Tyres: A Valuable Resource with a Wealth of Potential* 4 (2006) (Exhibit EC-84) (Exhibit BRA-126).

Question 121. To Brazil.

In paragraph 11 of your second oral statement, you indicate that the ban makes a "significant contribution". Could you please clarify whether you agree with the view that the contribution made by the measure to the objective should be "significant" (see above the question to the European Communities)? Please elaborate on your position in light of your arguments in your second oral statement that "...it is immaterial whether there are five hundred fewer tyres or five million. ..." (paragraph 78) and "[S]o long as Brazil continues to retread some of the tyres it consumes rather than import them, the ban contributes to the goal of reducing the tyre waste to be disposed of" (paragraph 96).

Response of Brazil

497. The European Communities' argument that Brazil must demonstrate a "significant contribution" incorrectly assumes that necessity is a static concept. It is not. Rather, inherent in the notion of weighing and balancing is the flexibility necessary to take into account the specific facts and circumstances. Indeed, the Appellate Body in *Korea – Various Measures on Beef* pointed out that there is "a range of degrees of necessity" that lie on a continuum between "making a contribution" and being "indispensable."²⁵⁷ The Appellate Body explained that "[t]he more vital or important those common interests or values are, the easier it would be to accept [the measure] as 'necessary.'"²⁵⁸ Thus, when a measure pursues an important objective, the necessity is closer to the "making a contribution" pole.

498. Neither the text of the WTO Agreements nor the WTO jurisprudence establish a requirement that the contribution of a measure be "significant," as the European Communities claims. As Brazil explained in its Response to Question 119 from the Panel, a measure will satisfy the contribution requirement if it contributes "to some extent."²⁵⁹ The WTO Contracting Parties – undoubtedly well aware of the fact that government measures seldom achieve perfect efficiency – did not require a significant contribution. To require such a showing could have the effect of finding against legitimate measures that the WTO Members intended to permit.

499. In any event, Brazil has demonstrated that the import ban in fact makes a significant contribution to reducing the risks of waste tyre accumulation and disposal in Brazil. While it is impossible to precisely quantify the waste reduction achieved by the import ban²⁶⁰, Brazil has noted in its response to Question 40 from the Panel that imports of the shorter-lifespan retreads have shrunk to just one-tenth of the pre-ban levels. Without the import ban, increasingly higher volumes of retreaded tyres would have been imported into Brazil.

500. Throughout the dispute, the European Communities has argued – incorrectly – that Brazil must quantify the contribution made by the import ban. Brazil included the statement cited ("it is immaterial whether there are five hundred fewer tyres or five million") merely to illustrate that such quantification is unnecessary. This is so because Brazil's chosen level of protection requires Brazil to reduce the volumes of tyre waste to the maximum extent possible, in the same way that France decided to reduce the risks caused by asbestos to the maximum extent possible. The Appellate Body²⁶¹ – and indeed the European Communities itself²⁶² – have recognized that when it comes to selecting the level of protection, a WTO Member can set that level as low or as high as it finds appropriate. Every additional waste tyre that Brazil could have avoided increases the number of

²⁵⁷ See Appellate Body Report on *Korea – Various Measures on Beef*, at para. 161 (emphasis added).

²⁵⁸ See Appellate Body Report on *Korea – Various Measures on Beef*, at para. 162.

²⁵⁹ Appellate Body Report on *US – Gambling*, at para. 6.494 (emphasis added).

²⁶⁰ See Brazil's second oral statement, at para. 81.

²⁶¹ See Appellate Body Report on *US – Gambling*, at para. 308; Appellate Body Report on *EC – Asbestos*, at para. 174.

²⁶² See European Communities' second written submission, at para. 12.

waste tyres that will have to be temporarily stockpiled, transported, and ultimately incinerated in Brazil. Because each of these activities presents well-recognized risks to human health and the environment, even as few as five hundred waste tyres would increase the risk. This increase would "involve a continuation of the very risk" that Brazil seeks to reduce, even if that risk is low²⁶³ – and thus prevent Brazil from achieving its chosen level of protection because as long as there are some waste tyres that could have been avoided, there is also a risk that could have been avoided. To require Brazil to demonstrate a particular level of waste reduction would effectively amount to choosing, for Brazil, the level of protection that the Brazilian public should be afforded. This choice belongs to Brazil, not to the European Communities.

501. Notwithstanding the validity of the illustration, the actual waste reduction achieved by the import ban is in millions of waste tyres, not in hundreds, as Brazil explained above.

502. The second part of the cited statement ("So long as Brazil continues...") merely refers to the fact that Brazil must retread tyres it consumes for the ban to make a contribution to waste reduction. On this, Brazil and the European Communities agree.²⁶⁴ Brazil has demonstrated that it retreads a high number of tyres that it uses. Therefore, the ban makes a significant contribution to the goal of protecting Brazil's population from the risks of waste tyre accumulation and disposal.

Comments of the European Communities

503. With its peculiar interpretation of the contribution element within the necessity analysis Brazil departs from the Appellate Body in *Korea – Various Measures on Beef*, where it was clearly stated that "a 'necessary' measure is [...] located significantly closer to the pole of 'indispensable' than to the opposite pole of simply "making a contribution to" (emphasis added).²⁶⁵ It was on the basis of this wording that the European Communities has referred to this element, in a short way, as requiring a "significant contribution", i.e.: a contribution that is significantly closer to the pole of indispensable than to the opposite pole of simply making a contribution to.

504. On the contrary, Brazil pretends that, when a measure pursues an important objective, the necessity is closer to the "making a contribution" pole and that a measure will satisfy the contribution requirement if it contributes "to some extent". With that interpretation Brazil does not take into account that the Appellate Body explained in *Korea – Various Measures on Beef* that the "necessity" requirement found in Article XX(d) is less flexible textually than Article XX(g), which requires a measure "relating to the conservation of exhaustible natural resources". Brazil interpretation of the "necessity" requirement in Article XX(d) blurs this difference with Article XX(g) and virtually merges two requirements that are expressed in different Treaty language: a measure that contributes "to some extent" to achieve a certain objective is, in fact, a measure that is "related to" the achievement of that objective. Both ideas are the two sides of a same coin, and that is not what Article XX pretends when it uses different terms in (b) [and (a) and (d)] and (g).

505. Finally, the European Communities would recall that, contrary to what Brazil claims, the import ban does not make a significant contribution to reducing the risks arising from waste tyres. It is not even clear *if* it makes a contribution. Brazil has never quantified the contribution made by the import ban and has used the excuse that it pertains to Brazil to choose the level of protection. This argument does not take into account that a minimal contribution of the import ban to the reduction of the number of waste tyres in Brazil would also imply that the import ban would be disproportionate.

²⁶³ Appellate Body Report on *EC – Asbestos*, at para. 174.

²⁶⁴ See European Communities' second written submission, at para. 34.

²⁶⁵ Appellate Body Report on *Korea – Various Measures on Beef*, para. 164.

For further explanations, the European Communities refers to its previous submissions on these issues, where its arguments were developed at greater length.²⁶⁶

Question 122. To Brazil:

Please comment on the European Communities' statement at paragraph 69 of its oral statement of 4 September 2006. Please clarify, in this context, what potential role you see, as a matter of principle, for non-generation, management and disposal options respectively, as alternatives to the import ban.

Response of Brazil

506. The European Communities' statement at paragraph 69 addresses the risks of waste tyre accumulation – not the risks of disposal. As Brazil explained throughout this dispute, waste tyre collection in fact reduces the accumulation risks, but the collected tyres must then be disposed of and, at present, it is impossible to dispose of the existing volumes without harming human health and the environment.²⁶⁷

507. Contrary to what the European Communities suggests, Brazil's objectives are not only to reduce mosquito-borne diseases, tyre fires, and leaching, but also to reduce the risks of waste tyre transportation and, especially, the risks of dangerous emissions that occur when waste tyres are incinerated. Brazil has extensively demonstrated that only reduction of the overall waste tyre volumes can achieve these objectives. Essentially, the more tyre waste there is, the more tyre waste must be incinerated – and incineration is harmful. A comparable solution would, therefore, have to reduce the waste tyre volumes (e.g., by improving rates of retreading or reducing the overall use of tyres by encouraging public transportation) and not only help collect or dispose of waste tyres.

508. Brazil has chosen to reduce the waste tyre risks to the maximum extent possible. Because the risks of waste tyre accumulation and disposal increase with waste tyre volumes, Brazil seeks to reduce these risks by reducing the waste tyre volumes by as much as possible. To do that, Brazil must avoid the generation of every tyre that can be avoided. As Brazil explained in paragraph 51 of its second oral statement, the non-generation solutions proposed by the European Communities could be alternatives only if Brazil sought to reduce waste tyre volumes by a particular amount, and these solutions allowed Brazil to achieve that specific reduction. However, the chosen level of protection requires Brazil to reduce waste tyre volumes to the maximum extent possible. Other non-generation options proposed by the European Communities do not allow Brazil to attain this objective. They are, therefore, not alternatives within the meaning of Article XX(b) because without the import ban, some tyre waste that could have been prevented would not, in fact, be prevented. They are additional measures and, as Brazil explained in paragraph 104 of its second written submission, it has already implemented a number of measures that promote non-generation.

Comments of the European Communities

509. The European Communities would like to clarify that its statement at paragraph 69 of its second oral statement is not limited to "waste tyre accumulation", as Brazil has misinterpreted, but to all alternatives where waste tyres are managed, including those consisting in recycling and energy recovery.

510. Brazil states in its answer to this question that it "has extensively demonstrated that only reduction of the overall waste tyres volume can achieve these objectives", which are the reduction of

²⁶⁶ European Communities' first written submission, paras. 107 to 109 and 127 to 128, European Communities' first oral statement, paras. 21 to 48, European Communities' second written submission, paras. 17 to 62, European Communities' second oral statement, paras. 21 to 50.

²⁶⁷ See Brazil's first written submission, at para. 120; Brazil's second written submission, at para. 40.

mosquito-borne diseases, tyres fires, leaching and emissions from co-incineration (once again wrongly referred to as "incineration").

511. The European Communities has explained several times, and will continue to explain in its comment to Brazil's Reply to Question No. 123, that co-incineration of waste tyres does not increase emissions to the air of hazardous substances.

512. Leaching from waste tyres, either stockpiled or landfilled, does not pose a risk for life and health because it occurs in very limited quantities and, in any case, it is harmless for the environment. Brazil did not prove the contrary with the two documents attached to its second written submission²⁶⁸, as the European Communities explained in its second oral statement.²⁶⁹ Here, again, the European Communities has to recall that Brazil has provided no evidence on leachates from waste tyres in its territory.

513. For the rest, it is quite difficult to understand Brazil's argumentation. If the reduction of waste tyres by means of the import ban on retreaded tyres aims at reducing these problems (mosquito-borne diseases and tyre fires), how is it possible that, six years after the adoption of the import ban, Brazil has not been capable of attaining those reductions? The occurrence of dengue cases (and tyre fires, it seems) continues irrespective of the adoption and enforcement of the import ban on retreaded tyres. It suffices to have a look to the table of dengue cases attached by Brazil to one of its answers to the questions posed by the European Communities.²⁷⁰ This shows that the Brazilian policy, which seems to be limited to non-generation measures, is not capable to solve the problems that Brazil claims to be fighting. Brazil should try again to have recourse to waste tyre recycling and energy recovery. In other words, Brazil should have maintained in application the obligations imposed to importers of retreaded tyres by Resolution CONAMA No. 258/99 to collect and dispose of a certain number of waste tyres. This would have been more coherent with Principle 16 of the Rio Declaration on Environment and Development, as the European Communities already explained in its first written submission.²⁷¹

Question 123. To Brazil.

Please comment on the European Communities' arguments in paragraph 84 of its oral statement of 4 September 2006. Please address specifically co-incineration, as referred to by the European Communities.

Response of Brazil

514. First, the incineration was not safe ten years ago, and it still is not safe today. The studies provided by Brazil are the most recent studies available on the subject. The European Communities has only been able to provide one study that is more recent, which specifically addresses the safety of waste tyre incineration (Exhibit EC-86). That very study, as Brazil pointed out in paragraphs 86-89 of its second written submission, reported significant increases in dioxin emissions during the incineration of waste tyres. In addition, as Brazil pointed out in paragraph 35 of its second oral statement, a British report, dated 2002, prepared with the British Government's participation, observed that "public and regulatory concern over emissions makes consents [to incinerate tyres] difficult to

²⁶⁸ Brazil's second written submission, para. 61.

²⁶⁹ European Communities' second oral statement, para. 47.

²⁷⁰ Brazil's answer to the EC question No. 11, a).

²⁷¹ European Communities' first written submission, paras. 138 and 139, and Exhibit EC-53.

obtain."²⁷² Finally, the European Communities' own Environment Agency declared just five years ago, that waste tyres should be incinerated only "*if no other outlet is possible.*"²⁷³

515. Second, it is naïve – if not outright misleading – for the European Communities to suggest that a single EC directive²⁷⁴ would turn incineration into a benign, environmentally-friendly disposal method overnight, and would, thereby, solve the waste tyre disposal problem that the rest of the world continues to grapple with. In reality, the directive has not done this. To begin, the directive's stricter atmospheric emission standards will not become mandatory until 2008.²⁷⁵ Further, contrary to the European Communities' suggestion, even the new kilns will typically have to be fitted with the necessary equipment "to use end-of-life tyres as supplementary fuel, and still be in compliance with the atmospheric emission standards due to come into force in 2008."²⁷⁶

516. Third, as Brazil explained in paragraph 93 of its second written submission and in paragraph 14 of its concluding statement at the Second Panel Meeting, stricter emission standards may reduce harmful emissions from waste tyre incineration, but cannot eliminate it. The stricter the standards, the fewer incinerators will agree to burn tyres. Until there is a safer disposal option that can handle the existing waste tyre volumes, as Brazil has noted in its response to Question 97 of the Panel, governments simply cannot set emission standards at so high a level that incineration becomes economically unviable.

517. Finally, Brazil has provided the list of companies authorized to process waste in Brazil as Exhibit BRA-166.

Comments of the European Communities

518. Brazil's insistence in considering co-incineration (not "incineration", as Brazil refers to) as an unsafe practice that is based on a handful of old documents produced by various sources. Moreover, Brazil has misrepresented the study by SINTEF presented by the European Communities so that an isolated study in relation to the rank of emissions of different substitute fuels is elevated to a general rule,²⁷⁷ omitting to quote what the SINTEF study says in the lines that followed directly thereafter:

Many other and more recent studies have concluded that the use of alternative fuels and raw materials doesn't influence or affect the emissions of PCDD/Fs (see chapter 6). In general, it seems that the ranges of PCDD/Fs emission concentration resulting from the use of conventional fuels such as coal and petcoke overlap with the ranges obtained with the use of secondary fuel, regardless of the type of secondary fuel (emphasis added).²⁷⁸

²⁷² A. B. Hird et al., Tyre Waste and Resource Management: A Mass Balance Approach 3 (2002) (Exhibit BRA-56).

²⁷³ European Environment Agency, Waste from Road Vehicles 2 (2001) (Exhibit BRA-108) (emphasis added).

²⁷⁴ Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the Incineration of Waste (Exhibit BRA-34)

²⁷⁵ See *id.* at II.1.

²⁷⁶ European Tyre & Rubber Manufacturers' Association, End-of-life Tyres: A Valuable Resource with a Wealth of Potential 4 (2006) (Exhibit EC-84) (Exhibit BRA-126).

²⁷⁷ Brazil's second written submission, para. 88.

²⁷⁸ Formation and Release of POPs in the Cement Industry, 23 January 2006, Exhibit EC-86, at p. 97.

519. The following paragraph at the same page of the SINTEF study is also revealing:

The UNEP Standardized Toolkit for Identification and Quantification of Dioxin (2003) and Furan releases gives the following summary about the effect of waste feeding:

"[...] It should be noted that the higher emissions measured in the USA were from wet kilns whereas the lower emissions (several hundred measurements) from European cement kilns were obtained from plants using the dry process".

520. This paragraph is sufficient evidence to show that those reports from the USA that Brazil attached to its first and second written submissions are not studies on the current state of the cement industry,²⁷⁹ which now prefers to use the dry process because of its far lower fuel consumption.²⁸⁰

521. Moreover, the SINTEF study concludes that.²⁸¹

The PCDD/F data presented in this report shows that:

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

522. Finally, Brazil refers again in its answer to a British report and to a declaration by the European Environment Agency taking them out of context. Thus the British report, prepared by a consultant in 2000/01 with 1998 as the base year for the study, does not reflect the current situation of co-incineration in the United Kingdom. The statement from the European Environment Agency is just a reflection of the hierarchy in the waste management principles and not a rejection of co-incineration as an unsafe alternative.

523. The European Communities comments on paragraphs 86 and 87 of Brazil's response to question no. 123 are integrated in the European Communities' comments to the answer provided by Brazil to Question 97 from the Panel.

524. Finally, the European Communities does not understand the reference that Brazil makes to the European Communities Waste Incineration Directive in its answer to the Question from the Panel, because the Directive is not mentioned in paragraph 84 of the European Communities' second oral statement, to which the Panel's Question refers. In any case, the European Communities would like to clarify that the emission standards laid down by the Directive applied for new plants as from 28 December 2002 and for existing plants as from 28 December 2005.²⁸² The date mentioned by the

²⁷⁹ Those studies are attached by Brazil as Exhibits BRA-26, BRA-48, BRA-49, BRA-50, BRA-51, BRA-141 and BRA-142.

²⁸⁰ The different technological processes in cement production are explained in the SINTEF Study, Exhibit EC-86, at pp. 33 to 41.

²⁸¹ Exhibit EC-86, at p. 179.

²⁸² Article 20 of Directive 2000/76/EC (Exhibit BRA-34).

European Tyre & Rubber Association in its publication is, therefore, incorrect. Neither is correct the reference made by Brazil to this publication, which does not declare that "even the new kilns will typically have to be fitted with the necessary equipments", as Brazil writes, but instead states that "new kilns are increasingly equipped to use end-of-life tyres as supplementary fuel". This is another example of the multiple distortions that Brazil has committed in its submissions and on which the European Communities already alerted the Panel in its Closing Statement at the second meeting.²⁸³

Question 124. To Brazil.

Please comment on the European Communities' observations in paragraph 74 of its second oral statement in relation to the 100% recycle and recovery rate achieved in 6 EC member States.

Response of Brazil

525. The European Communities' admission that only six of its 25 member States have achieved full recycling-recovery of their waste tyres forcefully reinforces the point made by Brazil throughout this dispute – that there is no good way to safely dispose of the existing volumes of waste tyres. If more than three-fourths of the European Communities states, with the wealth of resources and technology available to them, have not been able to achieve full recovery, how can the European Communities expect Brazil, a developing country, to achieve it? In addition, out of the six member states that have achieved full recovery, only two – Denmark and Finland – have accomplished this without a substantial reliance on incineration. These two countries, together, account for just 2.3 per cent of the European Communities' population, and presumably for 2.3 per cent of the European Communities' waste tyre arisings. Overall, nearly a third of used tyres in the European Communities continues to be incinerated.²⁸⁴

526. The European Communities also claims in paragraph 74 that "it is not true that, as today, some 20% of waste tyres are still being landfilled," and asserts that it was "the situation in 2004." However, the very report the European Communities relies on and Brazil cites (Exhibit EC-84), published in 2006, states, "*At present*, landfilling still accounts for 20%."²⁸⁵

Comments of the European Communities

527. The European Communities has already stated several times during this proceeding that its measures are not within the scope of the case before the Panel. This case is about the import ban on retreaded tyres adopted by Brazil and not about the waste tyre management policy of the European Communities or its 25 Member States.

528. In any case, as the European Communities already explained in its second written submission, neither the European Communities nor any of its 25 member States have adopted an import ban on retreaded tyres.²⁸⁶ Therefore, the European Communities and its members States remain free to decide on the different management alternatives concerning waste tyres and they are under no obligation to achieve full recycling and recovery of waste tyres. Thus, to use the situation in the 25 member States, as Brazil does to prove that full recovery is not possible, does not take into account that not all the member States have declared waste tyre recovery as one of the first priorities in their waste management policies. Most of the EC member States have given preference to the correct management of those waste tyres streams for which there is a EC compulsory regulatory framework, like waste oils, batteries, sewage sludge, packaging, vehicles, and electric and electronic equipment.

²⁸³ European Communities' closing statement, para. 4.

²⁸⁴ *Id.* at Annex II.

²⁸⁵ *See id.* at 6 (emphasis added).

²⁸⁶ European Communities' second oral statement, para. 74.

529. Finally, the European Communities does not share Brazil's rejection of co-incineration as one of the recycling and recovery alternatives.²⁸⁷ This position of Brazil contradicts the explanation given in its response to the Panel's question No. 43, where it declared that the disposal methods to be used under CONAMA Resolution 258 "are licensed by state environmental authorities according to their assessment of the best disposal alternatives available" and that "[t]he disposal methods usually approved by these authorities are: co-processing in cement kilns [...]". This latter answer corresponds to the consideration of energy recovery as an "environmentally appropriate disposal of unusable tyres", which is enshrined in Article 1, sole paragraph, letter c) of the IBAMA Ruling No 8 of 15 May 2002 (Exhibit EC – 48).

Question 125. To the European Communities.

In paragraph 74 of your second oral statement, you indicate that 6 EC member States "already recycle and recover 100% of their waste tyres". Could you please clarify what you mean by "recycle and recover"?

Response of the European Communities

530. By "recover" the European Communities means "energy recovery", which is the waste disposal method where waste tyres replace a percentage (around 15% to 20%) of the ordinary fuel in some industrial installations (cement kilns, steel furnaces and paper mills are the installations to which the European Communities has referred in this case). This process is also called "co-incineration" and must be differentiated from "incineration", where waste is burnt not as a fuel but just to reduce its volume or to eliminate or reduce its content in hazardous substances. Waste being incinerated pertains normally to the categories of municipal/household or hospital and other clinical wastes.

531. "Recycle" is the term used by the European Communities in the context of paragraph 74 of its second oral statement to describe some other waste tyres management methods, notably retreading and material recycling (including civil engineering applications). "Landfilling" does not belong to this category.

Comments of Brazil

532. Because the definition and the scope of the terms "recycle" and "recover" sometimes vary, depending on the source, an analysis of specific disposal options offers a more meaningful picture of waste tyre disposal in a given country. The statistics included in Annex I and II of the Exhibit EC-84 (also introduced as Exhibit BRA-126) provide detailed data on waste tyre disposal within the EC member States. Brazil has already pointed out that according to these statistics, only two EC members – Denmark and Finland – have been able to achieve full recycling/recovery without substantial reliance on incineration.²⁸⁸ At the same time, several EC members continue to landfill waste tyres and the majority continue to incinerate waste tyres. Spain, for example, recycled 42 kilotonnes of its waste tyres, incinerated 52 kilotonnes, and landfilled 144 kilotonnes. Poland recycled 10 kilotonnes, incinerated 56 kilotonnes, and landfilled 57 kilotonnes. Some member States landfilled *all* of their waste tyres. This reinforces Brazil's point that there is no good way to safely dispose of the existing volumes of tyre waste. For this very reason, Brazil prohibits imports of the shorter-lifespan retreads.

²⁸⁷ Once again, in its answer to panel question No. 124, Brazil uses the term "incineration" instead of the correct one, which is "co-incineration".

²⁸⁸ See Brazil's answer to panel question No. 124, at paragraph 88.

Question 126. To Brazil.

In response to the Panel's question 54, you had indicated that the consistency of the MERCOSUR exemptions under Article XXIV was not a relevant consideration for the purposes of assessing whether an "arbitrary or unjustifiable discrimination" exists under the chapeau of Article XX. In paragraph 107 of your second oral statement, you indicated that "Brazil's different treatment of its MERCOSUR partners is explicitly authorized under Article XXIV and, therefore, cannot be arbitrary and unjustifiable" (emphasis added). Could you please clarify whether you now consider that the measure's status under Article XXIV is a relevant or necessary consideration in the analysis of the import ban under the chapeau of Article XX?

Response of Brazil

533. There is no inconsistency between Brazil's response to Question 54 from the Panel and its position in paragraph 107 of its second oral statement. In its response to the Panel's question, Brazil's point was that a measure's compliance with the chapeau does not depend on the measure's justification under Article XXIV. The European Communities agreed. A measure that does not meet Article XXIV requirements can nevertheless meet the requirements of the chapeau if it is neither "arbitrary or unjustifiable" nor a "disguised restriction on international trade." However, when a measure does fulfil the requirements of Article XXIV, all else being equal, it is necessarily consistent with the chapeau because a measure expressly permitted under the WTO agreements cannot be "arbitrary or unjustifiable" or a "disguised restriction." This is the point that Brazil made in paragraph 107 of its second oral statement.

Comments of the European Communities

534. In response to the Panel's Question, Brazil argues that "when a measure does fulfil the requirements of Article XXIV, all else being equal, it is necessarily consistent with the chapeau because a measure expressly permitted under the WTO agreements cannot be "arbitrary or unjustifiable" or a "disguised restriction".²⁸⁹

535. This response is incorrect. As Brazil has itself recognised, Articles XX and XXIV are independent exceptions, and the fulfilment of the conditions of one does not depend on the fulfilment of the conditions of the other. Accordingly, there is no basis for assuming that a measure which is compatible with Article XXIV would for that reason also be compatible with Article XX.

536. Moreover, it is also recalled that, as the European Communities has shown²⁹⁰, the MERCOSUR exemption is not justified under Article XXIV. One of the reason why the exemption is not justified is precisely that Article XXIV:8 does not require elimination of internal trade restrictions which are justified under Article XX. In other words, if the measure were justified under Article XX, it could not at the same time be justified under Article XXIV. Brazil is thus turning the logical relationship between the two provisions on its head.

537. Accordingly, Article XXIV is of no relevance to the analysis under the chapeau of Article XX. This means at the same time that if Brazil's analysis were correct, and the compliance with an international agreement were sufficient to exclude arbitrary or unjustifiable discrimination under the chapeau of Article XX, this would have to apply to all international agreements, not just to those justified under Article XXIV. As the European Communities has already remarked,²⁹¹ Brazil's interpretation would therefore result in a considerable weakening of the chapeau of Article XX.

²⁸⁹ Brazil's answer to panel question No. 126, para. 90.

²⁹⁰ European Communities' second oral statement, para. 127 et seq.; European Communities' second written submission, para. 216 et seq.

²⁹¹ European Communities' second written submission, para. 157.

Question 127. To both parties.

In your view, what role do the intent and the effect of a measure play in assessing whether it is applied in a manner which would constitute a disguised restriction on international trade?

Response of Brazil

538. The Appellate Body observed in *Japan – Alcoholic Beverages* that the aim of a measure may not be easily ascertained.²⁹² Brazil agrees with the Appellate Body and does not believe that there exists a ready formula to help determine whether a measure is applied in a manner which would constitute a disguised restriction on international trade.

539. Both the intent and the effect of a measure can play a valuable role in the analysis under the chapeau of Article XX. The Appellate Body in *US – Shrimp* held that "the chapeau of Article XX is, in fact, but one expression of the principle of good faith."²⁹³ The examination of the measure's language – without reference to the broader context – will often be insufficient to determine whether a Member is acting in good faith. The measure's intent and effect provide that valuable context and permit a panel to gain a better understanding of what the Member seeks to achieve through the challenged measure.

540. The relative value of the intent of the measure, on the one hand, and its effect, on the other, depends on the nature of the specific measure at issue. The intent frequently provides valuable insight into the purpose behind the measure, which, in turn, allows a greater understanding of the manner in which the measure is applied. When it is abundantly clear that there is no intent to protect an industry or restrict trade to the benefit of national sectors, then there can be no doubt that the measure is applied in good faith and is not a disguised restriction. In other cases, the measure's effect may provide more valuable insight. Therefore, the specific facts of the case should determine factors that are most relevant to the "disguised restriction" analysis under the chapeau.

541. In the present case, the intent of the measure proves especially valuable to understanding why Brazil exempts MERCOSUR countries from the import ban. The instrument that presently contains the import ban – Portaria SECEX 14/2004 – does not explain the reasons behind the MERCOSUR exemption. However, the initial regulations that implemented the exemption – Portaria SECEX 2/2002 and Presidential Decree No. 4.592/2003 – clear that the exemption was introduced to comply with the ruling by the MERCOSUR Ad Hoc Tribunal.

Response of the European Communities

542. Both elements, intent and effect, should be taken into account to assess whether a measure is applied in a manner which would constitute a disguised restriction on international trade. As the Appellate Body explained in *US – Shrimp*, the "chapeau" of Article XX is an expression of the principle of good faith in international law.²⁹⁴ This requires that all aspects of the relevant measure have to be considered in order to prevent the abuse of the exceptions of Article XX. Thus, the conclusion that a measure is applied in a manner which constitutes a disguised restriction on international trade can be drawn because of a measure's intent, and it can also be drawn from the effects of the way in which a measure is applied. In the present dispute, the European Communities has submitted that both are the case.

²⁹² See Appellate Body Report on *Japan – Alcoholic Beverages*, at 30.

²⁹³ See Appellate Body Report on *US – Shrimp*, at para. 158.

²⁹⁴ Appellate Body Report on *US – Shrimp*, para. 158.

Comments of the European Communities

543. The European Communities does not agree with Brazil on the special value that it gives to the intent of the measure, which is driven by Brazil's peculiar understanding of the case.

544. As the European Communities will explain again in its comments to Brazil's answer to Question No. 129 from the Panel, the import ban has the intent to protect the Brazilian tyre industry through a measure that eliminates exports of retreaded tyres from the European Communities and other WTO members to Brazil. The fact that Brazil is constantly trying to dress up the protective measure as an initiative to protect life and health only confirms that the restriction is disguised.

545. In the same way, the intent of the MERCOSUR exemption from the import ban cannot make the exemption compatible with the chapeau of Article XX. A correct application of the good faith principle in this case would have implied that, following the MERCOSUR award, Brazil would have lifted the import ban on retreaded tyres for all WTO Members.

Question 128. To the European Communities.

The European Communities referred, in its second oral statement (para. 102), to the "distortion of international trade" in the context of assessing the existence of a disguised restriction to international trade under the chapeau of Article XX. Could you please clarify this notion and how it relates to the notion of "disguised restriction on international trade"?

Response of the European Communities

546. As explained to the Panel at the second meeting, the European Communities used the term "distortion" only to avoid repetition of the word "restriction". To avoid confusion, the GATT term "restriction" has been used in the final version of the European Communities second oral statement.

547. Among other things, the European Communities has identified a "disguised restriction on international trade" in the fact that the effect of Brazil's measures is the replacement of imported retreads from the European Communities with retreads made in Brazil (predominantly with imported casings) or imported from Uruguay (where they are predominantly made with imported casings), as well as with new tyres (most of which are made in Brazil).²⁹⁵

Question 129. To Brazil.

In paragraph 110 of your second oral statement, you submit that "[a statement by a trade official on the major objective of Brazil's 1991 broader ban on all used goods] was not about the 2000 import ban on used and retreaded tyres and contained no mention of retreaded tyres." Please elaborate on your argument in light of your answer to panel question 29 that "Brazil has banned imports of used and retreaded tyres since Portaria DECEX No. 8 of 10 May 1991. ... To safeguard the integrity of the prohibition, Brazil adopted Portaria SECEX 8/2000, which explicitly prohibited imports of retreaded and used tyres, whether imported as part -worn tyres or raw material for retreading.

Response of Brazil

548. Brazil has, in fact, banned imports of used and retreaded tyres since 1991. This original ban was effected through a measure that applied to all used goods and did not single out used and retreaded tyres, or any other type of good (Portaria DECEX 8/1991). The European Communities argues that the statement "clearly" demonstrated that Brazil banned used and retreaded tyre imports to protect national industries.²⁹⁶ This could not be further from the truth. In its SOS, Brazil called the

²⁹⁵ European Communities' second written submission, para. 172 et seq.; European Communities' second oral statement, para. 100 et seq.

²⁹⁶ See European Communities' second written submission, at para. 178.

attention of the panel to the fact that the statement presented by the European Communities dealt exclusively with the 1991 ban on *all* used goods and made no specific mention of used or retreaded tyres.

549. Regardless of any statement that may have been made by a trade official before the Brazilian National Congress, and wrongly used by the European Communities in these proceedings, what is relevant in this case is that Brazil clearly demonstrated that there is a legitimate environmental and health rationale behind the import ban. As the International Court of Justice affirmed in *Namibia (Legal Consequences)*, in a statement cited by the Appellate Body in *US – Shrimp*, at paragraph 130, fn. 109: "[a legal] instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation." Today, there can be no question that the purpose behind the import ban is to protect public health and the environment from harms caused by waste tyre accumulation and disposal.

Comments of the European Communities

550. Brazil's explanation that the statement presented by the European Communities in paragraph 178 of its SWS dealt exclusively with the 1991 ban on all used goods and made no specific mention of used or retreaded tyres is immaterial. In making that general reference to used goods the official of the Ministry of Development, Industry and Foreign Trade was also covering and referring to retreaded tyres, whose importation, as Brazil has acknowledged, was banned in 1991 because they were considered by Brazil as used goods. Indeed, Brazil has always insisted that the 2000 import ban on used and retreaded tyres merely served to clarify the prohibition already contained in the 1991 ban.²⁹⁷

551. Moreover, the European Communities has already explained that the Advocate-General of the Union also declared that "[...] SECEX Portaria 8/2000 prohibits the importation of 'retreaded' tyres not for the defence of public health and the environment, but to protect national trade and industry".²⁹⁸ It is worth noting that, to this date, Brazil has not once even commented on this and other statements by its own Advocacia-Geral. Other statements and documents, which are referred to in paragraph 10 of the European Communities SOS, also make clear that the real aim of the import ban on retreaded tyres is not the protection of life and health but the protection of Brazil's domestic industry.

552. Finally, as the European Communities has manifested in several occasions, this protectionist objective can be detected not only through the statements of different officials but also in the structure of the Brazilian legislation.²⁹⁹

553. Against that background, the European Communities cannot share Brazil optimistic statement that "[t]oday there can be no question that the purpose behind the import ban is to protect public health and the environment from harms caused by waste tyre accumulation and disposal".³⁰⁰ What the European Communities can understand is Brazil's desire, for reasons of litigation tactics, to present the facts as though this were the case. The historic facts, however, clearly show that the opposite is true.

²⁹⁷ Brazil's first written submission, paras. 65 and 77.

²⁹⁸ European Communities' first written submission, para. 164, and European Communities' second written submission, para. 178. The document where this declaration is made is Exhibit EC-52, para. 51.

²⁹⁹ See European Communities' first written submission, para. 162, and European Communities' second oral statement, paras. 11 and 12.

³⁰⁰ Brazil's answer to panel question No. 129, para. 96, *in fine*.

D. STATE MEASURES

Question 130. To Brazil.

Law No. 12.114 and Law No. 12.381 of Rio Grande do Sul use the term "carcass". Please clarify the meaning of "carcass" as used in these laws. For example, Article 1, Sole paragraph II of Law No. 12.114 refers to "the carcass of a used tyre recycled by retread, remoulding or recapping processes abroad and imported in that condition". (underline added) What is the scope of the product encompassed by this provision, retreaded tyres or used tyre carcasses in the sense of "the structural part of a used tyre" as defined by Brazil in its response to the Panel's question 1?

Response of Brazil

554. The word carcass refers to the structural part of a used tyre. This is the sense of Article 1, paragraphs I, II and III of Law 12.114. Nevertheless, paragraph II refers to carcass of a used tyre that has been 'recycled' by means of remoulding, retreading or recapping. The carcass of a used tyre that has been remoulded, retreaded or recapped is a retreaded tyre.

E. EXEMPTIONS

Question 131. To both parties.

Brazil submits in its second submission that the exemption is a separate measure because it was introduced at a later time than the import ban due to an arbitral award issued by an international tribunal and is justified under different GATT provisions than the import ban. The European Communities, for its part, makes separate claims in respect of the import ban and the exemption. In light of these elements, could you please clarify what is the relevance, if any, of the fact that the import ban and the exemption are contained in the same legal instrument (i.e. Article 40 of Portaria 14)? In answering this question, please address the impact this factors should have, in your view, on:

- (a) the Panel's assessment of the justification of the import ban under Article XX;*
- (b) the Panel's examination of the European Communities' separate claim in relation to the exemption.*

Response of Brazil

555. The import ban and the MERCOSUR exemption are distinct legal instruments that should be analyzed separately. As Brazil has explained, the import ban is properly examined under Article XX(b), while the MERCOSUR exemption is examined under Articles XXIV and XX(d). The fact that a finding against the exemption under Article XXIV does not affect the analysis of the import ban under Article XX, as Brazil explained in its response to Question 54, by itself demonstrates that the two are separate instruments.

556. While the import ban and the limited MERCOSUR exemption are presently contained in the same measure – Portaria 14/2004 – functionally, they are separate legal instruments, adopted at different times and for different reasons. The ban in its current form was enacted in 2000. The exemption was implemented two years later through two new measures – Portaria SECEX 2/2002 and Presidential Decree No. 4.592/2003. However, even if the two were adopted through the same measure, it would be formalistic to focus on that irrelevant fact to assess the consistency of these two distinct legal instruments. Portaria SECEX 14/2004 – the current measure that contains both the import ban and the exemption – merely consolidated the then-existing import regulations, as Brazil explained in paragraph 77 of its first written submission.

557. The European Communities agrees that the MERCOSUR exemption is a distinct legal instrument that requires an independent analysis. In its panel request, the European Communities

challenged separately "Brazil's exemption of retreaded tyres imported from other MERCOSUR countries from the import ban by means of Portaria No. 14 of 17 November 2004... and from the above-mentioned financial penalties by virtue of Presidential Decree No. 4592 of 11 February 2003, in response to the ruling of a MERCOSUR panel established at the request of Uruguay."³⁰¹ The fact that the European Communities lists the MERCOSUR exemption separately is an implicit admission by the European Communities that it is relevant that the exemption is a separate legal instrument and that it should be analyzed separately under different provisions. Finally, the European Communities has also treated the exemption as a distinct legal instrument in both its first and second written submissions, arguing that neither Article XXIV nor Article XX(d) justified the exemption.

Response of the European Communities

558. As the European Communities has explained in Reply to the Panel's Question No. 118, the MERCOSUR exemption is a relevant fact for the Panel's assessment under Article XX(b), both in terms of the necessity of the measure and in terms of the measure's compliance with the chapeau. The European Communities does not consider that the fact that the import ban and the exemption are now contained in the same measure, namely Article 40 of Portaria No. 14, is of any relevance to the Panel's analysis in the present context.³⁰²

559. Similarly, the European Communities does not consider the fact that the ban and the exemption are contained in the same instrument to be relevant for the Panel's examination of the European Communities' separate claim in relation to the exemption. The same measure, or aspects thereof, may violate several obligations of the covered agreements. In the present case, Article 40 of Portaria No. 14 violates, on the one hand, Article XI:1, and, on the other, Articles XIII:1 and I:1, and the European Communities has challenged each of these violations with a separate claim, as is normal litigation practice. The European Communities does not see what further relevance should be attached to whether the ban and the exemption are contained in the same measure, or, as used to be the case before the entry into force of Portaria Secex No. 17 of 1 December 2003,³⁰³ in two separate measures.

Comments of the European Communities

560. In its reply to the Panel's Question, Brazil appears to suggest that the MERCOSUR exemption should be examined under Articles XXIV and XX(d). While the European Communities agrees that the MERCOSUR exemption is the subject of separate claims under Articles XIII:1 and I:1, the European Communities would like to emphasise that this does not mean that the MERCOSUR exemption should not also be taken into account in the Panel's analysis under Article XX. In this respect, the European Communities can refer to its reply to the Panel's Question No. 118, as well as to its comments on Brazil's reply to the same question.

³⁰¹ See *Brazil – Measures Affecting Imports of Retreaded Tyres*, Request for the Establishment of a Panel by the European Communities, WT/DS332/4, 18 November 2005, at 1-2.

³⁰² As regards Brazil's argument that Portaria 40 was not "applied" in a discriminatory fashion because it itself contained the discrimination, the EC refers to its SWS, para. 153 et seq.

³⁰³ Cf. European Communities' first written submission, para. 73.

Question 132. To Brazil.

Please comment on the European Communities' arguments in relation to the compliance of MERCOSUR with the conditions of Articles XXIV:5 and 8. In addressing this question, please address specifically:

- (a) *the comments in paragraph 136 of the European Communities' oral statement concerning the coverage of "substantially all" the intra-MERCOSUR trade; and*
- (b) *the comments in paragraph 139 of the European Communities' oral statement on the adoption of non-tariff measures affecting extra-MERCOSUR imports and exports.*

Response of Brazil

561. Brazil demonstrated in paragraphs 166 of its FWS and 169-175 of its second written submission that MERCOSUR meets the requirements of Article XXIV:5 and 8. As Brazil explained in its second written submission, the Committee on Regional Trade Agreements (CRTA) has completed its factual inquiry on MERCOSUR.³⁰⁴ During the April 2006 meeting of the CRTA, the Committee Chairman noted that the Committee "seemed to have exhausted its factual inquiry," that the Secretariat would begin drafting the report on the examination of MERCOSUR, and that the examination would soon be concluded.³⁰⁵ In meetings of the CRTA, the European Communities has asked Brazil about how certain aspects of the customs union operate, but has not made any substantive objections.

562. In the context of this dispute, however, the European Communities argues that sugar and automotive sectors have not been fully liberalized. Nevertheless, as Argentina, acting as MERCOSUR's president pro tempore, pointed out at the April meeting, sugar's share of the intra-MERCOSUR trade is minimal – 0.001 per cent of the total. Argentina also explained that MERCOSUR members are in the process of liberalizing the intra-MERCOSUR trade in the automotive sector under the MERCOSUR Automobile Policy.³⁰⁶ The bilateral agreements between MERCOSUR members have already led, in practice, to duty-free trade in almost one hundred per cent of the commerce in the auto sector.

563. With respect to measures that affect extra-MERCOSUR imports and exports, Argentina, in its role as MERCOSUR's president pro tempore, submitted evidence to the CRTA indicating that MERCOSUR applies common external tariff to products in over 90 per cent of the tariff lines and has a specific timetable in place to cover the remaining categories of products by 2008.³⁰⁷ It can hardly be disputed that harmonizing external tariffs and regulations affecting more than 90 per cent of tariff lines amounts to application of "substantially the same duties and other regulations" under Article XXIV:8. Brazil also notes that extra-regional trade has increased by 239 per cent since the founding of MERCOSUR.³⁰⁸

564. The European Communities also argues that MERCOSUR parties maintain "non-tariff barriers." The "non-tariff barrier" presented by the European Communities is the import ban on retreaded tyres, which is the subject to this dispute. We note again that the ban was initially applied erga omnes, that it was not imposed on non-members as one step in the formation of MERCOSUR, and that it is justified by Article XX(b).

³⁰⁴ See Brazil's second written submission, at paras. 174-175.

³⁰⁵ See WT/COMTD/1/Add.16, at para. 14 (Exhibit BRA-170).

³⁰⁶ See WT/COMTD/1/Add.17, at 2 (Exhibit EC-121). See also Exhibit BRA-171 and Exhibit BRA-172.

³⁰⁷ See WT/COMTD/1/Add.17, at 2 (Exhibit EC-121).

³⁰⁸ See WT/COMTD/1/Add.16 (Exhibit BRA-170).

565. Brazil is puzzled why the European Communities is making these arguments now before this Panel rather than before the CRTA – the very body tasked with reviewing the customs union, and also the body that has meticulously examined countless documents in the course of its inquiry into MERCOSUR and developed an in-depth understanding of the relevant issues. At the time of the April 2006 meeting, the Chairman of the CRTA gave WTO Members until 28 April 2006 to submit any additional questions concerning the examination of MERCOSUR. This gave the European Communities and other WTO Members yet another opportunity to request more information or challenge MERCOSUR's consistency with Article XXIV. However, the European Communities has only asked MERCOSUR parties to clarify operation of certain aspects of the customs union, and has not substantively objected to the custom union's consistency with Article XXIV. Not only has the European Communities not challenged MERCOSUR's consistency before the CRTA, it began negotiations of a bi-regional free trade agreement with MERCOSUR. It is not clear how the European Communities expects to conclude a bi-regional free trade agreement with what it now claims not to be a properly-constituted customs union. The fact of the matter is that the European Communities' actions in Brussels and before the CRTA belie the arguments of the European Communities' litigation team in the context of this dispute.

566. In its Second Written Submission³⁰⁹, Brazil respectfully pointed the Panel to documents submitted by the MERCOSUR parties to the CRTA, which provide additional details on the MERCOSUR integration. The Panel can rely on the information contained in these documents, just as the panel in *US – Line Pipe* relied on the information submitted by the parties to the North American Free Trade Agreement (NAFTA) to conclude that the United States had established a prima facie case that NAFTA is in conformity with Article XXIV:5(b) and (c), and with Article XXIV:8(b).³¹⁰ The panel in *US – Line Pipe* also noted that the fact that the CRTA had not yet issued a final decision that NAFTA is in compliance with Article XXIV:8 was not sufficient to rebut the prima facie case established by the United States.³¹¹

567. Brazil has met its burden and adduced sufficient evidence to establish a prima facie case that MERCOSUR meets the requirements contained in Articles XXIV:5(a) and 8(b). The European Communities has not rebutted the presumption of conformity that Brazil has established.³¹²

Comments of the European Communities

568. In its reply to the Panel's Question, Brazil first notes that the Chairman of the CRTA concluded, during the April meeting of the Committee, that the Committee "seemed to have exhausted its factual inquiry" of MERCOSUR, and that the Secretariat would now begin drafting the report on the examination.³¹³ With these remarks, Brazil appears to want to suggest that this examination has resulted in a finding of compatibility of MERCOSUR with Article XXIV, which the Panel should not further question.

569. This suggestion is far removed from reality. First of all, the CRTA merely conducted a factual analysis of MERCOSUR, not a "substantive", legal analysis. Second, the CRTA did not reach any conclusions as regards the compatibility of MERCOSUR with Article XXIV, and is not likely to reach any such conclusions in the near future. As all WTO Members know, the CRTA's contrary suggestion notwithstanding, the Secretariat does not draft any reports on the examination of regional

³⁰⁹ See Brazil's second written submission, at para. 173.

³¹⁰ Panel Report on *US – Line Pipe*, at paras. 7.142-144.

³¹¹ Panel Report on *US – Line Pipe*, at paras. 7.144.

³¹² See Appellate Body Report on *US – Wool Shirts and Blouses*, at 13; more recently, Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, at para. 66.

³¹³ Brazil's answer to panel question No. 132, para. 101.

trade agreements, whose factual examination is concluded.³¹⁴ Therefore, the factual examination of MERCOSUR in the CRTA is of no relevance for the assessment of the fulfilment of the conditions of Article XXIV by the Panel in the present dispute.

570. Brazil also claims that the European Communities, in the meetings of the CRTA, did not make any "substantive objections" against MERCOSUR.³¹⁵ With this remark, Brazil appears to want to suggest that the European Communities has conceded in the CRTA that MERCOSUR is compatible with Article XXIV. This allegation is entirely unsubstantiated. Throughout the many years that MERCOSUR was discussed in the CRTA, the European Communities and other WTO Members raised numerous factual questions that were related to the compatibility of MERCOSUR with Article XXIV. At no point did the European Communities recognise that MERCOSUR was compatible with Article XXIV. The fact that the European Communities and other WTO Members, after more than 10 years of inconclusive discussions in the CRTA, allowed the factual examination of MERCOSUR to end does not mean that the European Communities and other WTO Members accepted the compliance of MERCOSUR with Article XXIV. Accordingly, the attempt of Brazil to prevent an assessment of MERCOSUR by the present Panel with reference to the discussions in the CRTA must fail.

571. Brazil has also repeated its earlier argument that by negotiating a bi-regional free trade agreement with MERCOSUR, the European Communities has recognised that MERCOSUR is in compliance with Article XXIV.³¹⁶ The European Communities has already shown that this argument is unfounded.³¹⁷ The European Communities would add that in the context of the negotiations, which are not yet completed, the European Communities has encouraged MERCOSUR to further accelerate and develop its internal integration, for instance through the completion of its customs union. Accordingly, the European Communities does not see in which way the bi-regional negotiations have a bearing on the question whether MERCOSUR is in compliance with Article XXIV or not.

572. In its reply, Brazil has also suggested that "the EC's actions in Brussels and before the CRTA belie the arguments of the EC's litigation team in the context of the present dispute".³¹⁸ The European Communities considers that this remark is entirely inappropriate. Apart from the fact that there is no contradiction between European Communities policy and the European Communities' submissions in the present dispute, it should be recalled that the European Commission, which is the European Communities institution responsible for representing the European Communities in the WTO, has decided to bring the present case against Brazil.³¹⁹ The European Commission has equally decided to appoint the agents which are representing it in the present case. It is therefore inadmissible for Brazil to suggest that the submissions of the European Communities before the Panel might not reflect the position of the European Communities.

573. As regards specifically the requirement that MERCOSUR must liberalise "substantially all" intra-MERCOSUR trade, Brazil has responded that MERCOSUR Members "are in the process of liberalizing the intra-MERCOSUR trade in the automotive sector", and has claimed that bilateral

³¹⁴ The last annual report of the CRTA confirms this: it says that for "49 RTAs the factual examination has concluded (see Attachment 2); no progress was made, however, on the completion of the corresponding examination reports" (WT/REG/15, of 3 November 2005, para. 5).

³¹⁵ Brazil's answer to panel question No. 132, para. 101.

³¹⁶ Brazil's answer to panel question No. 132, para. 105.

³¹⁷ European Communities' second written submission, para. 219.

³¹⁸ Brazil's answer to panel question No. 132, para. 106.

³¹⁹ Cf. European Communities' first written submission, para. 7 and Exhibit EC-3. It is equally noted that the TBR Report (Exhibit EC-2), on which the Commission's decision was based, stated on p. 30 that "it would be for Brazil to demonstrate that MERCOSUR is in compliance with paragraphs 5 and 8 of Article XXIV".

agreements between MERCOSUR Members have led to duty-free trade in almost 100% per cent of the commerce in the auto sector.³²⁰

574. In this regard, the European Communities first notes that it is not clear why MERCOSUR countries, more than 10 years after the formation of MERCOSUR, are still "in the process of liberalising trade in the automotive sectors". As the European Communities has explained, and Brazil has not contested, MERCOSUR can no longer claim to be entitled to a transition period leading to the formation of a customs union.³²¹ Accordingly, the process of liberalisation should already have been concluded.

575. As regards the bilateral agreements to which Brazil refers, the European Communities notes that Brazil has not provided copies of these agreements, nor explained how and to which extent they liberalise trade. In fact, it does not appear that the agreements in question have the affect of fully liberalising trade. As an example, the European Communities submits the recent automobile agreement between Argentina and Brazil, which was signed in June 2006 (Exhibit EC-128). Since 1 July 2006, Brazil and Argentina are allowed to export duty-free up to USD 2.1 per dollar imported, a value which will be further decreased to USD 1.95 per dollar imported from 1 July 2007 to 30 June 2008.³²² Trade exceeding these values will be subject to the existing preferential tariffs: 70 % of the common external tariff (CET) for automobiles and 75 % of the CET for auto parts.³²³ In other words, the agreement establishes a form of managed trade in automobiles and imposes quantitative limitations on duty-free trade, which cannot be regarded as a full liberalisation of trade in this sector.

576. As regards the other sector not currently liberalised, namely sugar, Brazil argues that sugar's share in intra-MERCOSUR trade is minimal.³²⁴ However, this very fact is due to, and in fact illustrates, the absence of full liberalisation in MERCOSUR. It should not be forgotten that Brazil is a major and very competitive producer of sugar. However, it currently does not export significant amounts to its MERCOSUR countries due to high tariff rates. It appears likely that if trade in sugar were liberalised within MERCOSUR, the share of sugar in intra-MERCOSUR trade would be far higher than what it is today.

577. As regards the requirement in Article XXIV:8 (a) (ii) to apply substantially the same duties and other regulations of commerce to trade with other countries, Brazil argues that the application of the same duties to 90% of the tariff lines is sufficient for complying with this requirement.³²⁵ In addition to the fact that Brazil has not supported its 90 % allegation in any fashion, the European Communities does not see on what precedent such a 90-per cent rule would be based. In this context, it is recalled that the Appellate Body in *Turkey – Textiles* held that the flexibility in Article XXIV:8 (a) (ii) was limited, and that this provision requires "something closely approximating 'sameness'".³²⁶

578. Moreover, it is also recalled that Article XXIV:8 (a) (ii) requires application of the "same regulations of commerce". The Appellate Body has clarified that "comparable trade regulations having similar effects" do not meet this standard, but that a higher degree of 'sameness' is required.³²⁷ In the present case, Brazil has not even alleged, let alone demonstrated, that MERCOSUR countries

³²⁰ Brazil's answer to panel question No. 132, para. 102.

³²¹ European Communities' second oral statement, para. 138.

³²² Cf. Article 12 of the Agreement (Exhibit EC-128).

³²³ Cf. Article 14 of the Agreement (Exhibit EC-128).

³²⁴ Brazil's answer to panel question No. 132, para. 102.

³²⁵ Brazil's answer to panel question No. 132, para. 103.

³²⁶ Appellate Body Report on *Turkey – Textiles*, para. 50.

³²⁷ Appellate Body Report on *Turkey – Textiles*, para. 50.

apply the same regulations of commerce to trade with third countries, as clearly illustrated clearly by the import ban on retreaded tyres at issue in the present dispute.³²⁸

579. Also, Brazil has not provided any response whatsoever to the European Communities' arguments on the "not on the whole higher" requirement in Article XXIV:5(a) in relation to other regulations of commerce (for both exports and imports). The European Communities is also not aware of any response to its argument regarding the internal liberalisation in relation to export duties and other restrictive regulations of commerce (on exports and imports).³²⁹

580. Finally, Brazil has also again referred vaguely to its submissions to the CRTA, and has asked to the Panel adopt the same approach as the Panel in *US – Line Pipe* and conclude that Brazil has made a prima facie case that MERCOSUR is compatible with Article XXIV.³³⁰ As the European Communities has already explained³³¹, this blanket reference to unspecified documents submitted to the CRTA is not a sufficient way of discharging Brazil's burden of proof. Moreover, the situation in the current dispute is not comparable to *US – Line Pipe*. In *US – Line Pipe*, Korea had argued that NAFTA could not be considered as compatible with Article XXIV because the CRTA had not yet issued a final decision to this effect.³³² In contrast, Korea had not contested that NAFTA was compatible with Article XXIV. This contrasts strongly with the present case, where the European Communities has repeatedly insisted that Brazil has not demonstrated compliance with the requirements of Article XXIV, and in addition has identified a number of specific open questions regarding the compatibility of MERCOSUR with Article XXIV.

581. The European Communities would also like to recall that the Appellate Body has clarified that, when examining a measure to be justified under Article XXIV, a Panel is expected to require the party invoking Article XXIV to establish that all of the conditions of this provision are fulfilled.³³³ The Panel should therefore reject Brazil's attempts to escape its burden of proof, and find that Brazil has not demonstrated that the MERCOSUR exemption is compatible with Article XXIV.

³²⁸ In Brazil's answer to panel question No. 132, para. 103, Brazil notes that the import ban was initially applied "erga omnes". However, apart from the fact that this is no longer the case, this is entirely irrelevant for the purposes of Article XXIV:8 (a) (ii) GATT. What matters is that at least two Members of MERCOSUR, namely Uruguay and Paraguay, are not applying a similar ban to trade with third countries.

³²⁹ Cf. European Communities' second oral statement, para. 139; European Communities' second written submission, para. 221.

³³⁰ Brazil's answer to panel question No. 132, para. 106.

³³¹ European Communities' second oral statement, para. 132.

³³² Panel Report on *US – Line Pipe*, para. 7.143.

³³³ Appellate Body Report on *Turkey – Textiles*, para. 59.

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

Question 1.

In paragraph 9 of its first oral statement, Brazil explains the rationale of its import ban as follows: "However, retreaded tyres are products that will become waste sooner than new tyres because they have a shorter remaining lifespan". Does Brazil consider that the same rationale could also justify import bans or marketing restrictions against other types of new products which produce waste which is difficult to dispose of, if it can be demonstrated that they have a shorter lifespan than other new goods for which they are substitutable (e.g. low-quality electronic consumer goods which have a shorter lifespan than comparable high-quality goods)?

1. Tyre waste differs from other waste streams in several important aspects. See Brazil's first oral statement, at paras. 80-82. These unique characteristics of tyre waste are what makes the import ban necessary in this specific factual situation. While Brazil cannot hypothesize on whether import bans on other products would conform to the WTO requirements, it notes that, unlike most products, retreads have a measurable and predictable difference in their remaining lifespan.

Question 2.

Does Brazil submit that all new tyres can be retreaded? Does Brazil agree that there are certain types of new tyres which are typically not suitable for retreading after use? If yes, has Brazil taken measures to restrict the importation and/or marketing of such tyres?

2. Information available indicates that between 10 and 30 per cent of new tyres are retreadable after the first use in countries such as the United Kingdom, France, the United States, Australia and Brazil. See Brazil's first written submission, para. 79 and fn. 125. Whether a tyre is retreadable after its first use depends on the condition of that use. Because it is impossible to predict whether a new tyre will be retreadable at the end of its first lifecycle, restricting importation of the potentially non-retreadable new tyres would require an import ban on *all* new tyres. This would be unduly restrictive. Retreaded tyres, on the other hand, require no conjecture or speculation about the potential retreadability: passenger car retreads will not be suitable for further retreading, and commercial vehicle retreads will have fewer remaining lifecycles. For this reason, Brazil places no restrictions on imports of new tyres, but prohibits imports of retreaded tyres.

Question 3.

What is the average market price in Brazil of a retreadable casing for a) a passenger car tyre; b) a truck tyre?

3. Brazil does not collect average market prices for retreadable or non-retreadable passenger car and truck casings.

Question 4.

What has been the market share of retreaded tyres in the market for passenger car replacement tyres in Brazil over the last ten years?

4. There are no official statistics on the market share of retreaded tyres in the market for passenger car replacement tyres in Brazil over the last ten years.

Question 5.

It appears that Brazilian government has recently withdrawn a bill (6.136/05) which would have codified the import ban on used and retreaded tyres in an act of the Brazilian parliament. Can Brazil explain the reasons for this withdrawal?

5. The Presidency of the Republic submitted to the National Congress a bill on the environmental management of tyres (see Exhibit EC-30) under a special legislative procedure denominated "constitutional urgency" (Brazil's Constitution, Art. 64, para. 1). The referred bill would consolidate in a norm of superior hierarchy the disciplines on waste tyre management in Brazil, which are currently dispersed in rules of low hierarchy (*portarias*, resolutions and decrees).

6. The Brazilian importers of used tyres, however, managed to convince some congressmen to request the annexation of the referred bill to another draft law on management of solid wastes, which is under debate in the Parliament since 1991. Because such procedural manoeuvre would create unexpected obstacles to the approval of the cited bill, the Government decided to withdraw its proposal. The Executive is now evaluating the appropriate legal instrument to resubmit the draft law to the National Congress.

Question 6.

Recently, the Social Affairs Committee of the Brazilian Senate approved a bill (216/03) which would authorise the importation of both used and retreaded tyres into Brazil. Similarly, the Special Commission on National Waste Policy has approved a bill (203/1991) which equally implies that the importation of used and retreaded tyres is permissible, subject to the fulfilment of certain disposal obligations. How do these legislative developments relate to Brazil's statements that

- (a) the import ban on retreaded tyres is an essential element of its waste management policy (e.g. Brazil's FWS, para. 18)?*
- (b) that the ban on used tyres is an essential element of Brazil's waste tyre management program, which will be enforced without exception in the future (Brazil's FWS, para. 154)?*

7. The "legislative developments" referred to have not changed Brazilian law and do not relate to Brazil's statements concerning the ban and its enforcement.

Question 7.

In paragraph 79, Brazil claims that its retreaders "process about 18 million used tyres, equivalent to a substantial part of the tyres consumed in Brazil each year". Can Brazil, with adequate proof, provide the following information:

- a) that 18 million is the total number of retreaded tyres produced at present in Brazil per year?*
- b) how many of these used tyres are imported, how many are domestic? how many of these tyres are passenger car tyres, how many are commercial vehicle or aircraft tyres?*

8. The information available to Brazil is present in Exhibit BRA-94. See also Brazil's Response to Panel's Questions 16 and 20.

Question 8.

In para. 82 of its FWS, Brazil states that the National Code of Traffic has "increased the frequency of tyre replacement". Could Brazil explain, with adequate evidence, what is the average frequency, in kilometers, of tyre replacement in Brazil for passenger vehicles, how this has evolved over the past and how these developments are related to the National Code of Traffic?

9. According to the Brazilian Code of Traffic (Law No. 9503 of 23 September 1997), the owner of a vehicle in Brazil must obtain an approval at the safety inspection, to be carried out by the competent state authorities, in order to obtain the mandatory annual licensing certificate (Article 130). Bill No. 5979/2001, currently before the National Congress, establishes general rules to be applied by the States in such activities and provides for mandatory biannual inspections for vehicles used in the transport of students and annual inspections for the others. ABNT (The Brazilian Association on Technical Rules) has already approved rules to be applied at the technical automotive inspection, among which is the NBR 14.040-1998 (Vehicular Safety Inspection – Light and Heavy Vehicles).

10. Although the general rules to be complied with by the States in the annual inspections are still under examination by the National Congress, the State of Rio de Janeiro – with a fleet of around 3.2 million vehicles – anticipated the implementation of the regular inspections foreseen by the Code of Traffic. Because these automotive inspections are an important instrument to increase the number of retreadable casings in the country, the step taken by one of the most populated States of the Federation has certainly contributed to an increased frequency of tyre replacement in the country. The same is expected to happen all over the country as soon as the National Congress approves the general rules necessary to implement annual automotive inspections in all States.

11. Moreover, the adoption of the Code of Traffic in 1997 permitted the approval by Brazil of a MERCOSUR regulation (GMC Resolution 75/1997) that aims to harmonize the regimes of automotive inspections for heavy vehicles in the international transport of cargo and passengers. This MERCOSUR regulation was introduced in the Brazilian legal system by means of Deliberation CONTRAN n° 35, of 4 June 2002. The strict compliance with the MERCOSUR and Brazilian regulations relating to inspections on heavy vehicles has also contributed to the increased frequency of tyre replacement in the country.

12. Brazil does not maintain the requested information on a kilometre by kilometre basis, nor is Brazil aware of any government that does so.

Question 9.

In para. 82 of its FWS, Brazil refers to a Bill before congress (No. 5.979/2001) which will replace state-specific vehicle safety requirements with national standards.

- (a) *Can Brazil provide copy of this Bill?*
- (b) *How will this bill improve the suitability of domestic used tyres for retreading?*
- (c) *Why has this bill, which dates from 2001, not yet been adopted?*
- (d) *Can Brazil explain what standards are currently applicable to vehicle inspections as regards tyres?*

13. Brazil will provide a copy of the bill.

14. According to the Brazilian Code of Traffic (Law No. 9503 of 23 September 1997), the jurisdiction to verify and inspect vehicles regarding their safety conditions (including tyres) remains with the state's traffic authorities. Bill 5.979 sets the general rules needed to implement the annual technical automotive inspection in all Brazilian States. In Brazil's view, the annual technical

automotive inspection, when fully implemented, will increase the number of retreadable casings in the national territory because owners will need to replace tyres more frequently than they do now and keep them in a better condition.

15. The Bill has not been approved until now because congressmen have not yet agreed on some important aspects of the proposal as, for example, the level of gradualism that must be observed in the implementation of the mandatory annual inspections.

16. Because the general rules to be applied by the Brazilian States are still under consideration of the National Congress, the States are applying their own technical guidelines in mandatory inspections, which occur when a vehicle is first licensed or when the ownership of a vehicle changes.

Question 10.

In its first written submission and first oral statement Brazil qualifies waste tyres as dangerous waste (see, for example, paragraphs 20 of the first written submission and 6 of the first oral statement) or as hazardous waste (paragraph 44 of the first written submission: "burning tyres and other hazardous wastes"). Could Brazil explain how this qualification matches with the classification of waste tyres as "inert waste" and not as "hazardous waste" in Article 4 in relation to Article 1 of CONAMA Resolution No 23 of 12 December 1996 (Exhibit EC-33) and with the fact that waste tyres destined to recovery, recycling and reclamation are not considered as hazardous waste in Annex IX, number B3140, to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal?

17. Waste tyres are not "hazardous waste" within the meaning of the Basel Convention or Brazil's internal regulations, such as CONAMA 23/1996. Rather, waste tyres are a dangerous waste. Brazil uses the term "dangerous" in reference to the dangerous effects of waste tyre accumulation and disposal, such as those described in the *Tyres in the Environment* report by the British Environment Agency (Exhibit BRA-1).

Question 11.

In paragraphs 24 and 26 of its first written submission, Brazil gives data on the reported cases in Brazil due to dengue until 2002 and declares that dengue cases increased in Brazil in the late 90's.

(a) Can Brazil provide more recent data (i.e.: from 2003 onward) concerning the number of reported cases in Brazil due to dengue, and

(b) Can Brazil explain why the increased imports of retreaded tyres in 1998 had an incidence in the higher number of dengue cases in the same year, as Brazil states in the last sentence of paragraph 26 of its first written submission?

(c) Can Brazil explain the relationship between dengue occurrence and the importation of retreaded tyres in light of the results of the programme Paraná rodando limpo?

18. a)

| 1992 | 1993 | 1994 | 1995 | 1996 | 1997 | 1998 |
|-------|-------|--------|---------|---------|---------|---------|
| 1,658 | 7,388 | 56,584 | 137,317 | 187,762 | 249,239 | 528,388 |

| 1999 | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 |
|---------|---------|---------|---------|---------|---------|---------|
| 209,668 | 239,870 | 428,117 | 794,000 | 346,118 | 107,168 | 214,171 |

19. b) Paragraph 26 reads:

"During the 1990s, the disease's rapid proliferation in Brazil seemed to coincide with increased used and retreaded tyre imports. In 1992, Brazil imported 5,862 tonnes of used and retreaded tyres and had 1,658 reported cases of dengue. As the imports increased six-fold by 1998, the dengue incidence skyrocketed to 528,388 cases".

20. The paragraph does not suggest that retreaded tyre imports during 1998 produced an increase in the dengue cases in the *same* year. Rather, the paragraph describes a trend of the growing dengue numbers that followed increased imports of used and retreaded tyres throughout the 1990s.

21. c) The programme *Paraná Rodando Limpo* is a private-sector program that complements Brazil's comprehensive effort to stamp out dengue by reducing the accumulation of waste tyres and eliminating other sources of mosquitoes, such as open water containers. Brazil described this effort in paragraphs 70-73 of its First Written Submission, and again, in its Oral Statement. The campaign has contributed to reducing the sources of mosquitoes and the incidence of dengue in the state of Paraná.

Question 12.

Are there any epidemiological studies showing that dengue or malaria cases in Brazil are linked to the presence of waste tyres in the relevant areas of dispersion of these two diseases? To what extent have former retreaded tyres, which have become waste, contributed in the past to the accumulation of waste in those areas? Please, provide any supporting evidence, notably studies.

22. The studies referred to by the European Communities do exist and Brazil is selecting the most relevant and translating them into English, in order to present before the Panel as soon as possible.

Question 13.

In paragraph 36 of its first written submission, Brazil gives some figures on tyre fires in Brazil. Could Brazil provide detailed information on the location, origin/causes, dimension and duration of those fires and other tyre fires in the last ten years?

23. Brazil does not have statistics for the past ten years that set forth the detailed information requested. Brazil provided that information in paragraph 36 of its first written submission to make clear that tyre fires are a genuine threat in Brazil as they are elsewhere in the world, including the European Communities. *See* Brazil's first written submission, para. 34; *see also* Exhibit BRA-10, at 8.

Question 14.

Are there any studies assessing the real negative consequences on human health and flora and fauna of waste tyres fires which have occurred in the past in Brazil? Please, provide them.

24. All of the health information available to Brazil, including information from the World Health Organization and member States of the European Communities, has made clear that there indeed are "real negative consequences" – indeed, potentially deadly consequences – "on human health and flora and fauna of waste tyre fires" in the areas in which they occur. Brazil is surprised that the European Communities would seem to doubt that this is the case.

Question 15.

Are waste tyres stockpiling installations subject in Brazil to compulsory environmental impact assessment (EIA), in any case? If not, please, provide the criteria for deciding when an EIA is requested in Brazil. In both cases, please provide the relevant domestic legislation.

25. Brazil has presented exhaustive evidence on the health and environmental risks that flow from the stockpiling of waste tyres. Stockpiling is a dangerous disposal method, as Basel Tyre Guidelines, as well as the European Communities' own reports recognize. Brazil is surprised that the European Communities would advise Brazil to stockpile waste tyres, while doing its best to divert its own tyres away from stockpiles.

Question 16.

Does the Brazilian legislation lay down emission limits for dioxins in relation to cement kilns, other kilns or waste incinerators? Please, provide those emission limits and a copy of the specific legal provisions on this issue.

26. See Exhibit BRA-104.

Question 17.

In paragraph 74 of its first written submission, Brazil declares that it "has licensed some 46 companies to process waste tyres". Could Brazil provide information on the following:

- (a) list of these companies, specifying the processing operations they carry out in relation to waste tyres and the location of the installations where these processing operations take place, and*
- (b) number of waste tyres processed by each of these companies in the last ten years, disaggregated by installations and year by year?*

27. Brazil believes that the information requested is not relevant to the issues before the Panel and that its production in the limited time available to answer these questions is unduly burdensome. If the Panel requests this information, however, Brazil will do its best to supply it.

Question 18.

With reference to 137 and 164 of Brazil's first written submission, why did Brazil, before the MERCOSUR Arbitral Tribunal in the dispute settlement proceedings instituted by Uruguay against the import ban on retreaded tyres, not invoke Article 50 (d) of the Treaty of Montevideo, which allows the application of measures regarding the protection of human, animal and plant life and health? Were there any legal impediments that prevented the invocation by Brazil of this provision, and if so, what were they?

28. As Brazil explained in paragraphs 77 and 137 of its First Written Submission, the dispositive question in the case was whether Portaria 8/2000 was a new import restriction, in violation of the Decision CMC 22/2000. While there was no legal impediment to the invocation of Article 50(d) of the Treaty of Montevideo, reliance on the article did not seem necessary at the time because this was a straight-forward question of legislative history. Brazil's attorneys believed that they needed only to show that the import prohibition had been in effect since 1991, and the 2000 regulation merely clarified the scope of that prohibition.

Question 19.

In para. 177 of its first written submission, Brazil refers to MERCOSUR as a "properly-notified customs union within the meaning of Article XXIV". Which document constitutes the notification within the meaning of Article XXIV:7(a)?

29. Brazil and its MERCOSUR partners notified the customs union to the GATT with document L/6985. Brazil is not aware of any notification requirements in Article XXIV with which the MERCOSUR parties did not comply nor, in the more than ten years since that notification, has any such requirement been brought to their attention.

Question 20.

In para. 187 of its first written submission, Brazil claims that to the extent the State law of Rio Grande do Sul conflicts with the federal measure, the federal measure will prevail and trump the measure.

- (a) Could Brazil explain whether, and to which extent, it believes that the State law of Rio Grande do Sul conflicts with Brazilian federal law?*
- (b) If there is a conflict, could Brazil explain what are the consequences, in Brazilian law, of this conflict? Has the Brazilian government taken any action to prevent application of the State law?*
- (c) If the federal ban on the importation of retreaded tyres were removed, what consequences would this have for the application of the State law?*
- (d) How does Article 1 of the State law, which seems to prohibit the marketing of imported retreaded tyres, relate to Article 2 of the same law, which seems to authorise this marketing subject to certain disposal conditions?*

30. See Brazil's responses to the Panel's Questions 55-62.

ANNEX 3¹
**RESPONSES OF THIRD PARTIES TO QUESTIONS FROM THE PANEL FOLLOWING
THE FIRST SUBSTANTIVE MEETING**

Question 1. To the United States.

In paragraph 10 of your third party submission, you argue that the Understanding on the Interpretation of Article XXIV "makes clear that satisfaction of the notification requirement contained in Article XXIV:7(a) is a prerequisite to demonstrating that a regional arrangement is a customs union or free-trade area consistent with Article XXIV". Could you please clarify:

- (a) on what legal basis you claim that the legal consequence of a failure to notify an interim arrangement under Article XXIV:7(a) is to prevent a customs union member to demonstrate in a panel proceeding that the customs union in question is compatible with Article XXIV:5?*
- (b) what is, in your view, the relevance of the fact that WTO Members agreed, as expressed in the terms of reference adopted for the examination of MERCOSUR, to examine MERCOSUR under Article XXIV (as well as the Enabling Clause), and that the examination of MERCOSUR has in fact been conducted under that provision?*
- (c) what is the relevance of the fact that MERCOSUR parties did notify the agreement, although under a separate provision?*
- (d) can the fact that MERCOSUR is subject to examination before the CRTA be considered as satisfying the notification requirement?*

Response of the United States

a)

1. The United States would like to note at the outset that it agrees with Chinese Taipei that, if the Panel concludes that the import ban and fines are not consistent with the provisions of the GATT 1994 identified by the European Communities, and further concludes that these measures are not permissible under Article XX(b), the Panel may exercise judicial economy with respect to Brazil's argument regarding Article XXIV.

2. With regard to the Panel's question, paragraph 1 of the *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994* ("Understanding") provides that "[c]ustoms unions, free-trade areas, and interim agreements leading to the formation of a customs union or free-trade area, to be consistent with Article XXIV, must satisfy, *inter alia*, the provisions of paragraphs 5, 6, 7 and 8 of that Article." Therefore, in order to be consistent with Article XXIV, a customs union must satisfy the provisions of paragraph 7 of that article, which contains the notification obligation. Failure to notify in accordance with paragraph 7 does not merely render a customs union inconsistent with that paragraph; rather, under paragraph 1 of the Understanding, such a customs union is not "consistent with Article XXIV" as a whole. Thus, the special provisions applicable to customs unions under Article XXIV, including paragraph 5, are not available to it.

3. The text of Article XXIV and the Understanding both reflect the fact that, as an institutional matter, notification obligations are important components of the WTO agreements. Notification of a customs union under paragraph 7 triggers a comprehensive review process described in Article XXIV as well as the Understanding. Members that opt not to subject a customs union of which they are a part to the procedures contained in Article XXIV and the Understanding through the formal

¹ Footnotes in this section are those of third parties.

notification process are not entitled to invoke that provision as a waiver of the WTO obligations it addresses.

b)

4. While the MERCOSUR countries have consented to, and MERCOSUR is currently the subject of, a form of review in the Committee on Regional Trade Agreements, this process does not constitute notification consistent with paragraph 7 of Article XXIV. In the compromise reached between Members to initiate the review, Members, including Brazil, did not agree that such review was pursuant to the terms of paragraph 7.

5. Paragraph 7 of Article XXIV and the Understanding contain several requirements for Members notifying under that provision not specified in the terms of reference in the MERCOSUR review. For example, paragraph 7 includes the obligation to provide information to Members so that they may make reports and recommendations "as they may deem appropriate", and the obligation not to maintain or put into force a customs union agreement if the parties "are not prepared to modify it in accordance with" such recommendations. Article XXIV:7. Likewise, the Understanding contains several additional provisions governing reviews of notifications made pursuant to paragraph 7, none of which are specified in the MERCOSUR terms of reference.

6. Thus, it would be inappropriate to view the MERCOSUR review as sufficient to satisfy the notification requirement contained in paragraph 7 of Article XXIV.

c)

7. The fact that MERCOSUR parties notified the agreement pursuant to the Enabling Clause is irrelevant for purposes of determining whether MERCOSUR is a customs union consistent with Article XXIV. Nothing in the text of Article XXIV or the Understanding supports the conclusion that notification under the Enabling Clause satisfies the requirement to notify under paragraph 7 of Article XXIV.

d)

8. No. As noted above, in the compromise reached between Members, Members did not agree that such review was pursuant to the terms of paragraph 7, and that review is being conducted under terms of reference that are not the same as the text of Article XXIV and the Understanding.

Question 2. To Japan.

In paragraph 27 of Japan's third party submission, it calls for the Panel to "examine the applicability of Article XX(b) taking full account of a risk analysis based on a great deal of scientific evidence issued by credible international bodies and experts." Could you identify some examples of individuals or organizations who in your opinion could be considered as "credible international bodies and experts" on the matters of this dispute?

Response of Japan

9. While Brazil bears the burden to prove, with sufficient data including credible international bodies' or experts' risk assessment data, its assertion that all the methods for disposal of waste tyres, including energy recovery through incineration, are not safe, adequate or cost-effective, Japan's opinion is that credible international organizations include the World Health Organization and the United Nations Environmental Program, both of which deal with the issue of toxic air pollutants among others.

Question 3. To Australia.

In paragraph 8 of your oral statement, you state that "Australia encourages to evaluate carefully the factual evidence before it, including by drawing on expert opinion as necessary." On what specific issues does Australia consider that the Panel needs to seek expert views?

Response of Australia

10. Australia's remark was intended to be general in nature, underscoring the complex nature of the issues before the Panel related to determining the application of Article XX to the measures at issue.

11. We see expert opinion as being of potential value to the Panel in determining whether the Brazilian ban on retreaded tyre imports is necessary to protect human health, including in relation to the following questions:

- (a) What is the impact of the disposal of retreaded tyres on human health?
- (b) Does the import ban actually reduce the total number of tyres to be disposed of in Brazil? This goes to the question of the capacity of the import ban to achieve the policy objective cited by Brazil, and the extent to which it is necessary to achieve that objective.
- (c) Do any health risks related to the waste disposal of retreaded tyres increase in proportion to the volume of tyres disposed of?

12. Possible assessment by experts may also be relevant to any consideration by the Panel of whether alternative measures are available to Brazil to protect human health which would have less trade restrictive effects.

Question 4. To China.

In paragraph 18 of its third party submission and in paragraph 7 of its oral statement, China asks the Panel to consider that Brazil is a developing country. Could you please elaborate on the context in which the Panel should consider that Brazil is a developing country in relating to the issues presented in this case?

Response of China

13. It might be said that favorable differentiation toward developing countries is one of the fundamental policies of the multilateral trading system. With respect to environmental protection, the preamble of Marrakesh Agreement especially states that WTO should "seeking both to protect and preserve the environment and sustainable development and to *enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.*" (Emphasis added)

14. The guideline is relevant in particular when conducting the necessity test of Article XX(b). It is fair to argue that developed countries might have adequate technological and financial resources to recycle waste products, and therefore it might not be "necessary" for them to restrict the trade of waste or retreaded products to dealing with the environmental problems. But for developing countries lacking such advantages, certain rigorous measure with trade restrictive effect might be needed to achieve the same goal.

Question 5. To Korea.

Korea states in paragraph 38 of its written submission that "[T]he Article XX exceptions of the GATT 1994 can justify those measures that are inconsistent with the other provisions of the GATT 1994 and make them excusable, not consistent." What is the legal basis for the position that a GATT inconsistent measure that is 'excused' under Article XX cannot qualify as "laws or regulations which are not inconsistent with the provisions of [GATT 1994]".

Response of Korea

15. The legal basis for Korea's above position can be found in the textual interpretation of Article XX(d). Article 31 of the Vienna Convention on the Law of Treaties provides for interpretation in accordance with the ordinary meaning of the terms of the treaty in their context and in the light of its object and purpose.

16. The chapeau of Article XX provides that "nothing in [GATT 1994] shall be construed to prevent the adoption or enforcement by any contracting party of measures..." and Article XX(d) continues to state "...necessary to secure compliance with laws or regulations which are not inconsistent with the *provisions of [GATT 1994]* [emphasis added]." Looking at the ordinary meaning of such terms of Article XX(d), Korea considers that the scope of "[GATT 1994]" in the chapeau of Article XX and Article XX(d) would be the same.

17. Considering the context, object and purpose of Article XX which provides for "general exceptions" to the GATT 1994, "[GATT 1994]" in the chapeau of Article XX would refer to the substantive provisions of the GATT 1994, excluding Article XX grounds for excuses. Thus, the "provisions in [GATT 1994]" of Article XX(d) must also refer to the same, meaning that the "laws and regulations" in Article XX(d) must be consistent with the substantive provisions of the GATT 1994. However, Article XX presupposes a measure's inconsistency with such substantive provisions of the GATT and does not make such GATT inconsistent measures consistent.

18. Therefore, Korea considers that the textual interpretation of Article XX(d) leads to the conclusion that GATT inconsistent measures justified under Article XX cannot qualify as "laws or regulations that are not inconsistent with the provisions of [GATT 1994]."

Response of the United States

19. Without taking a position on whether the measure at issue satisfies the criteria in Article XX, the United States offers the following observations. The chapeau to Article XX provides that "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of" the type of measures listed there. Thus, if a measure satisfies the criteria of Article XX, it may be adopted and enforced. In other words, there is no inconsistency with the GATT 1994. The question under the covered agreements is whether a measure is consistent or inconsistent. Nowhere does the GATT 1994 or the covered agreements refer to a measure as being "excused." There is no textual basis for establishing a third category of "excused" measures.

20. If Korea's position were accurate, then a number of consequences would flow which would appear to be difficult to reconcile with the plain text of Article XX, and the fact that Members may adopt and enforce measures meeting Article XX's criteria. For example, under Article 19.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*, a panel or the Appellate Body would be required to find that the measure, even though it satisfies the requirements of Article XX, is "inconsistent" with a covered agreement and therefore recommend that it be brought into conformity with the covered agreement. If a Member may maintain the measure, then how could it be required to bring it into conformity?

Question 6. To Japan.

In paragraph 18 of its oral statement, Japan states "Brazil made serious efforts to convince MERCOSUR countries in the course of the Ad Hoc Tribunal proceeding..." What is the basis of this statement?

Response of Japan

21. In the course of the MERCOSUR Tribunal case in question, Brazil tried to justify its import ban to be consistent with its obligation under MERCOSUR agreement. This Brazilian justification of, or defense for, its measure during the trial itself should be deemed as "serious effort" in terms of the Appellate Body Report in *US – Shrimp*.²

22. It was desirable for Brazil to have consulted with major retreaded-tyre exporting countries that are not MERCOSUR countries when Brazil lifted the import ban for MERCOSUR countries in accordance with the Ad Hoc Tribunal in 2002. By that time, Brazil had exhausted the discussion concerning the import ban in question with MERCOSUR countries and, at the same time, it should have been fully aware of the necessity to justify the import ban under Article XX in the light of its obligation under the WTO Agreements. However, Brazil did not exploit its opportunity to seek consultations with non-MERCOSUR countries.

Question 7. To Japan.

How do you define "recycling"?

Response of Japan

23. Recycling" is generally to make an effective use of a used product, with or without additional processing to it, in a way usually different from its original use.

24. Specifically, (i) thermal recycling and (ii) material recycling are the two typical ways of recycling waste tyres in Japan.

25. Thermal recycling accounts for the most part of recycling of waste tyres in Japan. Under this method, tyres are utilized as fuels for producing cement, steel and paper.

26. Under the material recycling method, tyres are utilized as materials for road paving, retreaded tyre, and reclaimed rubber, etc.

Question 8. To Japan.

In paragraph 36 of its written submission, Japan states "Other example is recycling used retreaded tyres. In Japan, most of used tyres are recycled in various ways, about half of them are for fuels." Can this be attributable to the fact that Japan is an advanced country and thus more likely to have most of used tyres recycled?

Response of Japan

27. In Japan, nearly 90% of waste tyres are recycled. In order to achieve such a relatively high recycling rate, it is indispensable to establish systems ensuring appropriate collection and disposal of waste tyres. We believe that such systems can be introduced in many countries including Brazil, regardless of whether they are advanced countries or not, for the following reasons.

² Appellate Body Report on *United States – Shrimp*, para. 171.

28. An appropriate collection system is particularly important in recycling because collecting is the first step of recycling. In Japan, waste tyres are legally required to be collected through particular routes prescribed by law. When individual users wish to dispose of waste tyres, they must bring them to "designated dealers", such as tyre retailers, service stations, car dealers, car repair shops, automobile parts retailers. Then "designated dealers" shall transfer tyres they received to "waste tyre collectors". When relevant companies, such as transportation companies, wish to dispose of waste tyres, they shall bring them to "waste tyre collectors" directly. "Waste tyre collectors" shall then transport those tyres to "interim disposal contractors", who send them to "final disposal contractors" after having finished a half-way disposal process on the tyres they received.

29. Thus, waste tyres are required to be collected in the end at the places of disposal contractors under law. Introducing such a collection system does not require any particular advanced technology or cost.

30. The above-mentioned collection system works in collaboration with a system for ensuring appropriate disposal. Specifically, Japan adopts a "manifest system", under which the origin of a waste tyre and each process of its disposal can be tracked by referring to slips called "manifests". Under the system, each one who participates in the process of disposal, such as a transportation company, a waste tyre collector and a disposal contractor mentioned in paragraph 9 above, is required to keep a corresponding slip of a manifest coupon which contains necessary disposal information. When the final stage of disposal is completed, a "final slip" is delivered back to the person who originally disposed of tyres (a transportation company, for example), in order to confirm that the tyres have been appropriately disposed of. This system is designed to prevent illegal disposal of waste tyres and to promote their appropriate disposal. This kind of system does not require particular technology or cost, either.

31. Regarding a disposal method itself, thermal recycling is mainly employed in Japan. As stated in paragraph 6 in the answer to Question 7 above, under the thermal recycling method, waste tyres are utilized as fuels for burning in kilns to manufacture products such as cement, steel and paper. Japan considers that kilns are not expensive facilities for industrial manufacturers and are often found installed in factories in many countries to produce products such as cement, and that burning waste tyres as fuels in kilns does not require advanced technique.

32. Concerning the safety of incinerating tyres in kilns, Brazil argues in paragraph 122 of its first written submission that "... the inevitable consequence of [incineration for energy recovery] is dangerous, harmful emissions, even under its most controlled conditions".

33. Setting aside the question whether Brazil has provided enough data showing that incineration for energy recovery results in "dangerous and harmful" emissions "even under its most controlled conditions" or whether Brazilian industrial manufacturers cannot afford such incineration facilities, in the light of the composition of tyre material, we do not believe that incineration of waste tyres necessarily generates dangerous and harmful emissions. According to the Japan Automobile Tyre Manufacturers Association (JATMA), which consists of domestic major tyre manufacturing companies and also deals with the issue of waste tyre disposal including hazardous emissions, raw material weight composition of an average tyre is as follows:

| Material | Ratio |
|-------------------------|--------------|
| Rubber | 50.2% |
| Carbon Black | 25.7% |
| Tyre cord | 13.5% |
| Compounding ingredients | 5.9% |
| Bead wire | 4.7% |

34. The JATMA has experimental data regarding the emissions resulting from burning compounding ingredients of above-mentioned average tyres. In their experiment, they have incinerated waste tyres in a kiln and analyzed gas generated from such incineration. The result of the analysis shows that the quantity of dangerous and harmful emission from the incineration is very subtle and far below a safety standard for human health.³

35. Therefore, we believe that incineration is an efficient and safe recycling method available not only for Japan but also for Brazil.

Question 9. To Chinese Taipei.

In paragraph 7 of its written submission, Chinese Taipei states "[i]f the import ban and the fines are determined by the Panel to be inconsistent with provisions of the GATT, the exemption could not stand on its own as a separate measure. In this event, the Panel should exercise judicial economy on Brazil's Article XXIV defence for the exemption." Could you please elaborate on this statement.

Response of Chinese Taipei

36. The Appellate Body in *Australia – Salmon* clarified that,

"[t]he principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. This aim is to resolve the matter at issue and 'to secure a positive solution to a dispute.'¹⁷⁶ To provide only a partial resolution of the matter at issue would be false judicial economy. A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members.'^{177"} 4

¹⁷⁶DSU, Article 3.7.

¹⁷⁷DSU, Article 21.1.

37. Furthermore, in *United States – Shirts and Blouses*, the Appellate Body stated,

"[n]othing in [Article 11 of DSU] or in previous GATT practice requires a panel to examine all legal claims made by the complaining party...Given the explicit aim of dispute settlement that permeates the DSU, we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to "make law" by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute."⁵ (underline original)

38. The Appellate Body thus makes it clear that while the Panel may indeed address every claim and defense raised by the complainant and the respondent, the Panel has the discretion to only examine those claims and defenses necessary to assist the DSB in making recommendations and rulings that ensure prompt compliance and effective resolution of the dispute.

³ For example, as to dioxin emissions, the standard is set at 5 ng/m³ for waste incinerators with burning capacity of less than 2,000 kg under a relevant Japanese law.

⁴ Appellate Body Report on *Australia – Salmon*, para. 223.

⁵ Appellate Body Report on *United States – Wool Shirts and Blouses*, pp. 18-19.

39. In the present case, the complainant, the European Communities, has chosen to base its complaint on four separate measures of Brazil. One of the measures is an exemption for retreaded tyres from MERCOSUR countries from the application of import ban and fines that Brazil has imposed on retreaded tyres from other countries. The verb "to exempt", from which the noun exemption derives its meaning, is defined as to "[g]rant immunity...*from* a liability to which other are subject."⁶ (emphasis original) An exemption, by this definition, is tied to a liability, which in this case are the import ban and the fines, measures from which the exemption exempts. Without the import ban and the fines, the exemption is meaningless and cannot stand on its own as an independent measure.

40. If the Panel finds the import ban and the fines to be inconsistent with provisions of GATT and the conditions under Article XX have not been met, it would not be helpful to the resolution of the dispute for the Panel then to decide on the WTO consistency of the exemption, because the measures from which the exemption derive its existence have themselves already been found to be inconsistent. Under such a circumstance, the Panel would be justified in exercising judicial economy.

⁶ Shorter Oxford English Dictionary, Fifth Edition, Volume 1, 2002, p. 886.