

BRAZIL – MEASURES AFFECTING IMPORTS OF RETREADED TYRES

ARB-2008-2/23

*Arbitration
under Article 21.3(c) of the
Understanding on Rules and Procedures
Governing the Settlement of Disputes*

Award of the Arbitrator
Yasuhei Taniguchi

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| <i>Brazil – Retreaded Tyres</i> | Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007 |
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| <i>Canada – Pharmaceutical Patents</i> | Award of the Arbitrator, <i>Canada – Patent Protection of Pharmaceutical Products – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS114/13, 18 August 2000, DSR 2002:I, 3 |
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| <i>Korea – Alcoholic Beverages</i> | Award of the Arbitrator, <i>Korea – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS75/16, WT/DS84/14, 4 June 1999, DSR 1999:II, 937 |
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| <i>US – Offset Act (Byrd Amendment)</i> | Award of the Arbitrator, <i>United States – Continued Dumping and Subsidy Offset Act of 2000 – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS217/14, WT/DS234/22, 13 June 2003, DSR 2003:III, 1163 |
| <i>US – Oil Country Tubular Goods Sunset Reviews</i> | Award of the Arbitrator, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS268/12, 7 June 2005, DSR 2005:XXIII, 11619 |
| <i>US – Section 110(5) Copyright Act</i> | Award of the Arbitrator, <i>United States – Section 110(5) of the US Copyright Act – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS160/12, 15 January 2001, DSR 2001:II, 657 |

ABBREVIATIONS USED IN THIS AWARD

| Abbreviation | Description |
|------------------------|---|
| Ad Hoc Working Group | MERCOSUR/GMC Resolution No. 25/08 of 29 June 2008, establishing an Ad Hoc Group for a Regional Policy on Tyres, Including Used and Retreaded Tyres (Exhibit BRA-181) |
| ADI | <i>Ação Direta de Inconstitucionalidade</i> (Direct Unconstitutionality Action) |
| ADPF | <i>Argüição de Descumprimento de Preceito Fundamental</i> (Allegation of Violation of Fundamental Precept) |
| Appellate Body Report | Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R |
| CAMEX | Câmara de Comércio Exterior (Chamber of Foreign Trade) |
| CMC | MERCOSUR's Common Market Council |
| Constitution | Constitution of the Federal Republic of Brazil |
| DECEX | <i>Departamento de Comércio Exterior</i> (Department of Foreign Trade of the Brazilian Ministry of Development, Industry, and Foreign Trade) |
| DSB | Dispute Settlement Body |
| DSU | <i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i> |
| GATT 1994 | <i>General Agreement on Tariffs and Trade 1994</i> |
| GMC | MERCOSUR's Common Market Group |
| MERCOSUR | Mercado Común del Sur (Southern Common Market) – a regional trade agreement between Brazil, Argentina, Uruguay, and Paraguay, founded in 1991 by the Treaty of Asunción, amended and updated by the 1994 Treaty of Ouro Preto |
| MERCOSUR exemption | Exemption from the import ban afforded by Brazil to imports of retreaded tyres originating in MERCOSUR countries |
| Panel Report | Panel Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/R |
| Portaria DECEX 8/1991 | Portaria No. 8 of the DECEX dated 13 May 1991 |
| Portaria SECEX 14/2004 | Portaria No. 14 of the SECEX dated 17 November 2004 |
| Portaria SECEX 36/2007 | Portaria No. 36 of the SECEX dated 22 November 2007 |
| SECEX | <i>Secretaria de Comércio Exterior</i> (Secretariat of Foreign Trade of the Brazilian Ministry of Development, Industry, and Foreign Trade) |
| WCO | World Customs Organization |
| WTO | World Trade Organization |

WORLD TRADE ORGANIZATION
AWARD OF THE ARBITRATOR

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

Parties:

Brazil
European Communities

ARB-2008-2/23

Arbitrator:

Yasuhei Taniguchi

I. Introduction

1. On 17 December 2007, the Dispute Settlement Body (the "DSB") adopted the Appellate Body Report¹ and the Panel Report², as modified by the Appellate Body Report, in *Brazil – Measures Affecting Imports of Retreaded Tyres*.³ At the meeting of the DSB held on 15 January 2008, Brazil stated that it intended to comply with the recommendations and rulings of the DSB in this dispute, and that it would need a reasonable period of time in which to do so.⁴

2. On 4 June 2008, the European Communities informed the DSB that consultations with Brazil had not resulted in an agreement on the reasonable period of time for implementation. The European Communities therefore requested that such period be determined through binding arbitration pursuant to Article 21.3(c) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU").⁵

3. The European Communities and Brazil were unable to agree on an arbitrator within 10 days of the matter being referred to arbitration. Therefore, by letter dated 16 June 2008, the European Communities requested that the Director-General appoint an arbitrator pursuant to footnote 12 to Article 21.3(c) of the DSU. The Director-General appointed me as arbitrator on 26 June 2008, after consulting the parties.⁶ I informed the parties of my acceptance of the appointment by letter dated 30 June 2008 and undertook to issue the award no later than 29 August 2008.

¹Appellate Body Report, WT/DS332/AB/R.

²Panel Report, WT/DS332/R.

³WT/DS332/12.

⁴WT/DSB/M/244, para. 11.

⁵WT/DS332/14.

⁶WT/DS332/15.

4. By letters dated 1 July 2008, Brazil and the European Communities each agreed that this award will be deemed to be an arbitration award under Article 21.3(c) of the DSU, notwithstanding the expiry of the 90-day period stipulated in Article 21.3(c).⁷

5. Brazil filed its written submission on 9 July 2008. The European Communities filed its written submission on 18 July 2008. An oral hearing was held on 5 August 2008.

II. Arguments of the Parties

A. *Brazil*

6. Brazil requests that I determine the "reasonable period of time" for implementation of the recommendations and rulings of the DSB in this dispute to be 21 months from the date of adoption by the DSB of the Panel and Appellate Body Reports⁸, that is, until 17 September 2009.

7. Brazil recognizes that Article 21.3(c) of the DSU provides that "the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report."⁹ Yet, referring to the proviso in the third sentence of Article 21.3(c), that the period of time may be shorter or longer depending on the particular circumstances in Article 21.3(c) of the DSU, Brazil asserts that the unique circumstances of this case require a period of time longer than 15 months for implementation.¹⁰

8. Brazil proposes to implement the DSB's recommendations and rulings in this dispute by taking the following steps. First, Brazil states that it would "halt imports of used tyres through court injunctions" and submits that the reasonable period of time for revoking the preliminary court injunctions granted in the present and past cases and to prevent new preliminary injunctions from being granted in the future would be 21 months from the date of adoption of the Appellate Body Report.¹¹ Secondly, Brazil argues that it was necessary to "establish new regulatory disciplines for used and retreaded tyres within MERCOSUR"¹² and submits that 19 months from the date of adoption of the Appellate Body Report would be a reasonable period of time for negotiating a new regime for

⁷The 90-day period following adoption of the Panel and Appellate Body Reports expired on 17 March 2008. The parties concluded a procedural agreement on 11 February 2008 regarding the extension of the time period under Article 21.3(c) of the DSU. (WT/DS332/13) According to this agreement, an award issued later than 90 days after the date of adoption of the recommendations and rulings by the DSB shall be deemed to be an award of the arbitrator for purposes of Article 21.3(c) of the DSU.

⁸Brazil's submission, paras. 5, 34, 36, 44, 47, 54, and 55.

⁹*Ibid.*, para. 23.

¹⁰*Ibid.*, para. 23.

¹¹*Ibid.*, paras. 33 and 34.

¹²Mercado Común del Sur ("MERCOSUR") (Southern Common Market).

used and retreaded tyres with its MERCOSUR partners.¹³ Thirdly, Brazil would "declare the unconstitutionality of state measures that purport to regulate imports of retreaded tyres", which, in Brazil's submission, would require a time period of 21 months from the date of adoption of the Appellate Body Report.¹⁴

9. Brazil emphasizes that Article 21.3(c) leaves to the implementing Member the decision as to how a measure should be brought into compliance within the Member's own legal system and that the reasonable time needed for that purpose may vary depending on the means of compliance selected by the implementing Member.¹⁵ Making reference to previous Article 21.3(c) arbitration awards, Brazil recognizes that the reasonable period of time should be the "shortest period possible within the legal system of the Member".¹⁶ Yet, Brazil also submits that this is not to be understood as requiring the implementing Member to have recourse to extraordinary procedures.¹⁷ Finally, Brazil states that the 15-month period in Article 21.3(c) is to be understood as a "guideline" rather than an "outer limit" for the reasonable period of time.¹⁸

1. Proceeding before the Federal Supreme Court Concerning Preliminary Court Injunctions

10. Brazil contends that, in order to stop imports of used tyres effectively, the Government of Brazil has initiated Federal Supreme Court proceedings.¹⁹ The President of Brazil initiated an *Argüição de Descumprimento de Preceito Fundamental* ("ADPF") (Allegation of Violation of Fundamental Precept) proceeding in September 2006, requesting a ruling from the Federal Supreme Court that used tyre imports infringe on the fundamental constitutional right to a balanced environment.²⁰ Brazil argues that a favourable ruling by the Federal Supreme Court in this case will

¹³Brazil's submission, paras. 33 and 35.

¹⁴*Ibid.*, paras. 33 and 36.

¹⁵*Ibid.*, para. 25 (quoting Award of the Arbitrator, *Australia – Salmon*, para. 35; and referring to Award of the Arbitrator, *Korea – Alcoholic Beverages*, para. 45; Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 48; Award of the Arbitrator, *EC – Tariff Preferences*, para. 30; Award of the Arbitrator, *Chile – Price Band System*, para. 32; Award of the Arbitrator, *US – Oil Country Tubular Goods Sunset Reviews*, para. 26; Award of the Arbitrator, *Japan – DRAMs (Korea)*, para. 25; Award of the Arbitrator, *EC – Chicken Cuts*, para. 49; and Award of the Arbitrator, *EC – Hormones*, para. 38).

¹⁶*Ibid.*, para. 30 (referring to Award of the Arbitrator, *Chile – Price Band System*, para. 34; Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 48; Award of the Arbitrator, *EC – Hormones*, para. 26; and Award of the Arbitrator, *EC – Tariff Preferences*, para. 26).

¹⁷*Ibid.*, para. 30 (referring to Award of the Arbitrator, *EC – Chicken Cuts*, para. 49; Award of the Arbitrator, *Korea – Alcoholic Beverages*, para. 42; Award of the Arbitrator, *US – Section 110(5) Copyright Act*, para. 32; Award of the Arbitrator, *Canada – Patent Term*, para. 39; Award of the Arbitrator, *EC – Tariff Preferences*, para. 42; and Award of the Arbitrator, *Japan – DRAMs (Korea)*, para. 25).

¹⁸*Ibid.*, para. 31 (quoting Award of the Arbitrator, *US – Hot-Rolled Steel*, para. 25).

¹⁹*Ibid.*, para. 38.

²⁰*Ibid.*, para. 40.

revoke the existing preliminary injunctions, prohibit the issuance of future injunctions, and thereby bring Brazil into compliance with its World Trade Organization ("WTO") obligations.

11. Brazil makes reference to decisions by the Federal Supreme Court involving individual preliminary injunctions.²¹ Brazil submits that the Federal Supreme Court has rejected several arguments advanced in favour of preliminary injunctions, including the arguments that: (1) a "*portaria*" is not an appropriate instrument to implement the import ban on used tyres; (2) the government agency that imposed the initial ban lacked the constitutional authority to do so; (3) the prohibition of imports of used, but not new, tyres violated the constitutional principle of isonomy, or equality of rights; and (4) the import ban on used tyres interfered with the constitutional principle of free enterprise because it restricted access to supplies of raw materials for domestic retreaders.²²

12. Furthermore, Brazil refers to two 2007 proceedings before the Federal Supreme Court, in which the President of the Supreme Court accepted the Solicitor General's request to suspend lower courts' rulings that allowed specific retreaders to import used tyres. Brazil contends that these decisions recognized that the importation of used tyres entailed environmental risks. Brazil submits that these cases were decided based on, *inter alia*, public interest in health and an ecologically balanced environment according to Article 225 of the Federal Constitution.²³ Brazil explains that these Federal Supreme Court cases involved specific preliminary injunctions and, therefore, did not have prospective application; yet, in Brazil's view, they indicated the Federal Supreme Court's view on the issue. Furthermore, Brazil explains that the ADPF, in contrast to the specific preliminary injunctions, would apply prospectively.²⁴

13. Brazil points out that the ADPF was initiated in September 2006, and submits that, on 31 January 2008, the Government of Brazil asked the Federal Supreme Court to take note of the WTO decision and to expedite its proceedings. A public hearing in this case took place on 27 June 2008.²⁵ Brazil asserts that, in any event, it will be 21 months after the adoption of the Appellate Body Report before the Federal Supreme Court issues its decision.²⁶

14. In support of its argument that 21 months is a reasonable period of time for Brazil to implement the recommendations and rulings of the DSB in this dispute, Brazil explains that the only ADPF action decided by the Federal Supreme Court of Brazil so far took 41 months from the day of

²¹Brazil's submission, para. 39.

²²*Ibid.*

²³*Ibid.*, para. 42, where Brazil refers to the Decision of the Plenary of the Federal Supreme Court in Case No. STA 118-AgR (Exhibit BRA-179 submitted by Brazil to the Arbitrator).

²⁴*Ibid.*, para. 43.

²⁵*Ibid.*, para. 46 and footnote 67 thereto.

²⁶*Ibid.*, para. 44.

the petition.²⁷ Furthermore, Brazil makes reference to the duration of the *Ação Direta de Inconstitucionalidade* ("ADI") (Direct Unconstitutionality Action), which it describes as a more frequently used, but similarly complex, constitutional action. Brazil surveyed 1,333 ADI actions submitted to the Federal Supreme Court between 1 January 1998 and 31 December 2003. Brazil submits that the average duration of these proceedings (not taking into account actions that are still pending or that have been rejected on procedural grounds) was 34 months.²⁸

15. Brazil contends that the ADPF involving imports of used tyres is "of like complexity" as the ADI concerning stem cell research. Brazil submits that it took the Federal Supreme Court 38 months to issue a decision in the ADI proceeding concerning stem cell research. Therefore, Brazil considers it reasonable to expect that the Federal Supreme Court's decision in the pending ADPF action concerning retreaded tyres would take at least 34 months.²⁹ Brazil envisages that a further two months would be required for implementation of the Federal Supreme Court's decision, in particular, notifying Brazil's federal courts of the decision and having prior licenses withdrawn by customs authorities. Subtracting 15 months (the period between the initiation of the ADPF procedure and the adoption of the Appellate Body Report) from the total of 36 months, leads Brazil to conclude that a total of 21 months from the date of the adoption of the Appellate Body Report would be a reasonable period of time to comply with the DSB's recommendations and rulings relating to preliminary court injunctions with respect to imports of used tyres.³⁰

2. Import Regime for Retreaded Tyres from MERCOSUR Countries

16. Brazil contends that, in order to comply with the DSB's recommendations and rulings with respect to the exemption from the import ban on retreaded tyres originating in MERCOSUR countries (the "MERCOSUR exemption") established in Article 40 of Portaria No. 14 of the *Secretaria de Comércio Exterior* ("SECEX") (Secretariat of Foreign Trade of the Brazilian Ministry of Development, Industry, and Foreign Trade) dated 17 November 2004 ("Portaria SECEX 14/2004")³¹, it would have to negotiate an agreement with its MERCOSUR partners.³² Brazil argues that removing the exemption from the import ban on retreaded tyres originating in MERCOSUR countries and restoring the original *erga omnes* application of the import ban on retreaded tyres would not be a

²⁷Brazil's submission, para. 45.

²⁸*Ibid.* and footnote 66 thereto.

²⁹*Ibid.*, para. 47.

³⁰*Ibid.*

³¹I note that in November 2006, Article 40 of Portaria SECEX 14/2004 was replaced by Article 41 of Portaria SECEX 35/2006, and subsequently by Article 41 of Portaria SECEX 36/2007. The text of the Article remains identical. (Appellate Body Report, footnote 158 to para. 122; European Communities' submission, para. 35)

³²Brazil's submission, para. 48.

viable option because it would conflict with the current MERCOSUR rules as interpreted by the MERCOSUR Tribunal.³³

17. In support of its argument that 19 months is a reasonable period of time for Brazil to achieve compliance with the DSB's recommendations and rulings, Brazil submits that a new MERCOSUR-wide tyres regime will have to be reviewed and approved by the Common Market Group ("GMC"), the executive body of MERCOSUR, and by the Common Market Council ("CMC")—MERCOSUR's highest body, vested with the authority to promulgate union-wide policies and regulations.³⁴

18. Brazil submits that, on 15-16 April 2008, it proposed a GMC Resolution to create an Ad Hoc Working Group for the Regional Policy for Tyres³⁵ (the "Ad Hoc Working Group"). Brazil further contends that the GMC approved the Resolution and established the group at a meeting held on 29 June 2008. Brazil maintains that the Ad Hoc Working Group on Tyres will present its results to the GMC in December 2008, and that the GMC's decision will then be submitted to the CMC for a vote, also in December 2008.³⁶ The GMC's decision establishing a new regime for the importation of retreaded tyres would then have to be submitted to MERCOSUR member states' legislative bodies for approval. Based on a survey of implementation of all 27 CMC Decisions and 188 GMC Resolutions adopted and incorporated into domestic law between 1998 and 2007, Brazil contends that the average period of time for incorporation of CMC Decisions and GMC Resolutions into national law was 34 months.³⁷ Brazil submits, however, that in the present case the benchmark should rather be the shortest period for legislative approval, which, according to Brazil, was six months.³⁸ Further, Brazil maintains that according to Article 40 of the Protocol of Ouro Preto on the Institutional Structure of MERCOSUR³⁹, an additional month is necessary for the regime to enter into force after it has been incorporated into the domestic legal system of the member states.⁴⁰

19. Summing up the time period required for designing a new measure and securing CMC approval (12 months), approval by MERCOSUR members' legislatures (6 months), and the new

³³Brazil's submission, para. 49.

³⁴*Ibid.*, para. 50.

³⁵*Ibid.*, para. 51 and footnote 70 thereto (referring to MERCOSUR/GMC Resolution No. 25/08 of 29 June 2008, establishing an Ad Hoc Group for a Regional Policy on Tyres, Including Used and Retreaded Tyres (Exhibit BRA-181 submitted by Brazil to the Arbitrator)).

³⁶*Ibid.* (referring to MERCOSUR/GMC Resolution No. 25/08, *supra*, footnote 35).

³⁷*Ibid.*, para. 52 and footnote 72 thereto.

³⁸*Ibid.*, para. 52 and footnote 73 thereto (referring to MERCOSUR/GMC Resolutions No. 35/98, No. 36/98, and No. 21/99).

³⁹Additional Protocol to the Treaty of Asunción on the Institutional Structure of MERCOSUR, done in Ouro Preto on 17 December 1994.

⁴⁰Brazil's submission, para. 52 and footnote 74 thereto.

measure's entering into force (one month), Brazil submits that 19 months would be a reasonable period of time for Brazil to comply with the DSB's recommendations and rulings.⁴¹

3. Proceeding before the Federal Supreme Court Concerning Laws Adopted by the State of Rio Grande do Sul

20. Brazil contends that certain state measures adopted by Rio Grande do Sul have no practical application because the state is not competent to issue such acts. Rather, the Brazilian Federal Government has exclusive competence to issue import licenses.⁴²

21. Nonetheless, Brazil submits that, with respect to a potential inconsistency of the state measures with the Brazilian Federal Constitution, Brazil's General Prosecutor has filed an ADI action with the Federal Supreme Court requesting the court to revoke the state measures.⁴³ According to Brazil, this action was filed in September 2006. In view of the Federal Supreme Court's practice of grouping together cases with related subject matters, Brazil asserts that this ADI action would most likely be decided together with the ADPF action involving tyre imports. Based on the assumption that both cases will be decided together, Brazil argues that the same period of time, namely 21 months, would be a reasonable period of time for compliance with respect to the measures adopted by the State of Rio Grande do Sul.⁴⁴

B. *European Communities*

22. The European Communities requests that I determine the "reasonable period of time" for implementation of the recommendations and rulings of the DSB in this dispute to be 10 months from the date of the adoption by the DSB of the Panel and Appellate Body Reports, that is, until 17 October 2008.⁴⁵

23. As an initial matter, the European Communities submits that Article 21.1 of the DSU calls for "prompt compliance" by the implementing Member. Therefore, in the European Communities' view, the default position is compliance in the shortest delay possible, should Brazil fail to meet its burden of proving that a longer period is indeed necessary. The European Communities argues that the average time periods referred to by Brazil for certain of its proposed implementation steps are not relevant, but that, instead, implementing measures have to be adopted in the shortest possible manner.⁴⁶ Furthermore, the European Communities argues that failure to begin adequately

⁴¹Brazil's submission, para. 53.

⁴²*Ibid.*, para. 54.

⁴³*Ibid.*

⁴⁴*Ibid.*

⁴⁵European Communities' submission, para. 1.

⁴⁶*Ibid.*, para. 17.

implementation after adoption of the report must not result in advantage to the implementing Member and does not warrant granting of extra time.⁴⁷

24. The European Communities maintains that the most "obvious" way for Brazil to achieve compliance with its WTO obligations would consist in repealing or modifying the measures found to be inconsistent with its WTO obligations (*actus contrarius*)⁴⁸, and advances several arguments with respect to the individual measures. In addition, the European Communities raises objections to the specific implementing steps proposed by Brazil.

1. Repealing the Inconsistent Measures

25. First, with respect to Portaria No. 36 of the SECEX dated 22 November 2007 ("Portaria SECEX 36/2007"), the European Communities argues that Brazil could lift the import ban on retreaded tyres by repealing Article 41 of that *portaria*.⁴⁹ *Portarias* are sub-legislative normative acts, adopted by the Executive without involvement of Congress. The European Communities submits that a *portaria* can be modified or repealed within weeks or a few months. In support of this argument, the European Communities makes reference to Brazil's implementation of a 2002 MERCOSUR arbitral award through modification of the respective *portaria* within two months following the ruling of the MERCOSUR arbitral tribunal. The European Communities claims that the implementation obligation in the context of the present dispute is similar to that concerning the 2002 MERCOSUR arbitral award as both relate to a binding ruling by an international organization and concern the same subject-matter, the same action (lifting an import ban), and the same type of legal act.⁵⁰ Furthermore, the European Communities lists several *portarias* adopted in 2007 as examples illustrating that the two-month period estimated by the European Communities is the usual period of time for the adoption of *portarias*.⁵¹ The European Communities also argues that an implementing Member is required to take full advantage of the flexibility inherent in its legal system in order to ensure that implementation takes place in accordance with the requirement of promptness in Article 21 of the DSU. In the European Communities' view, the absence of mandatory time periods within which steps must be taken under Brazil's law to amend or revoke *portarias* demonstrates the existence of flexibility and supports the view that implementation can be achieved within a short period of time.⁵²

⁴⁷European Communities' submission, para. 33 (referring to Award of the Arbitrator, *US – Section 110(5) Copyright Act*, para. 46).

⁴⁸*Ibid.*, para. 34.

⁴⁹*Ibid.*, para. 35.

⁵⁰*Ibid.*, para. 38 and footnotes 33 and 34 thereto.

⁵¹*Ibid.*, para. 39.

⁵²*Ibid.*, para. 41.

26. Secondly, the European Communities asserts that Presidential Decree 3.179 as amended by Presidential Decree 3.919 should be repealed. According to the European Communities, this could be achieved in less than two months. In support of its argument, the European Communities lists five presidential decrees modifying decrees that had been issued up to one-and-a-half months before the respective presidential decrees were issued.⁵³ The European Communities further argues that the repeal of Presidential Decree 3.179 as amended by Presidential Decree 3.919 could be conducted in parallel to the modification of Portaria SECEX 36/2007.⁵⁴

27. Thirdly, the European Communities maintains that, to the extent Portaria No. 8 of the *Departamento de Comércio Exterior* ("DECEX") (Department of Foreign Trade of the Brazilian Ministry of Development, Industry, and Foreign Trade) dated 13 May 1991 ("Portaria DECEX 8/1991") banning the importation of used products has been applied to imports of retreaded tyres, Brazil is required to change its practice of interpretation and application. In the European Communities' view, this would not entail modification of legislation and therefore would not require any specific amount of time.⁵⁵

28. Fourthly, the European Communities submits that, pursuant to Article XXIV:12 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994") and Article 22.9 of the DSU, Brazil is obliged to take the necessary steps to ensure that Law 12.114 as amended by Law 12.381 of the State of Rio Grande do Sul is brought into compliance with Brazil's obligations under the covered agreements. The European Communities argues that the reasonable period of time should be calculated based on the time required for the state legislator to remove the WTO inconsistency, if that is the shortest possible option; it should not be based on the time required for the Brazilian Federal Government to prompt the State of Rio Grande do Sul to modify its legislation. The European Communities maintains that state laws can be amended within approximately two months, and lists three recent examples of state laws that have been adopted within less than two months in support of its argument.⁵⁶

2. Implementation Proposed by Brazil

29. The European Communities contends that the means proposed by Brazil are not achievable within the timeframe of 15 months set out in Article 21.3(c) and raises several objections to the specific implementation steps proposed by Brazil.

⁵³European Communities' submission, para. 43 and footnote 40 thereto.

⁵⁴*Ibid.*, para. 44.

⁵⁵*Ibid.*, para. 45.

⁵⁶*Ibid.*, para. 48 (referring to Laws 12.979, 12.949, and 12.761 of the State of Rio Grande do Sul). The European Communities identifies the website <www.al.rs.gov.br/legis> as the source for this information. (*Ibid.*, footnote 41 to para. 48)

(a) Proceeding before the Federal Supreme Court Concerning Preliminary Court Injunctions

30. The European Communities considers Brazil's proposal to stop imports of used tyres through a Federal Supreme Court proceeding that would invalidate existing preliminary injunctions and prohibit the issuance of new injunctions to be "quite extravagant".⁵⁷ The European Communities asserts that it is the first time that a Member proposes to use domestic judicial action as a means of implementation. The European Communities argues that judicial action is not suitable to definitely stop the importation of used tyres into Brazil because Brazil would not have control over the outcome of that judicial action. The European Communities submits that the Government of Brazil's expectation that the Federal Supreme Court would declare the preliminary injunctions unconstitutional was speculative, given that the judges of the Federal Supreme Court are independent.⁵⁸ In the European Communities' view, the fact that a party goes to court is evidence of the existence of legal controversy and uncertainty.

31. In addition, the European Communities makes reference to the Award of the Arbitrator in *EC – Export Subsidies on Sugar*, holding that the chosen method must be such that it could be implemented within a reasonable period of time in accordance with the guideline contained in Article 21.3(c) of the DSU⁵⁹. The European Communities asserts that it is unclear what legal effects the ongoing ADPF lawsuit will have and that it has already taken longer than an average WTO dispute settlement proceeding. The only ADPF decided as yet took 41 months to complete. In the European Communities' view, this does not correspond to the timeframe set out for compliance measures in Article 21.3(c) of the DSU.⁶⁰

32. The European Communities argues that, in order to prevent domestic courts from issuing preliminary injunctions permitting the importation of used tyres, Brazil could instead adopt a formal law that would elevate the existing import ban on retreaded tyres from the level of a *portaria* to that of a parliamentary act. The European Communities maintains that a respective law could be adopted through the two chambers of the Brazilian Congress within no more than 10 months.⁶¹

33. Furthermore, the European Communities makes reference to Article 62 of the Brazilian Federal Constitution concerning "provisional measures". This provision enables the Brazilian President to declare provisionally applicable a bill submitted to Congress, thereby pressing the legislature to vote on the bill rapidly. The European Communities submits that this procedure is

⁵⁷European Communities' submission, para. 56.

⁵⁸*Ibid.*, para. 57.

⁵⁹*Ibid.*, para. 18 (referring to Award of the Arbitrator, *EC – Export Subsidies on Sugar*, para. 69).

⁶⁰*Ibid.*, paras. 58 and 61.

⁶¹*Ibid.*, para. 63 and footnote 51 thereto.

frequently used in Brazil and can therefore not be regarded as an "extraordinary measure". The European Communities states that compliance with the recommendations and rulings of the DSB should give rise to comparable urgency as is regularly applied in internal matters in Brazil.⁶²

(b) Import Regime for Retreaded Tyres from MERCOSUR Countries

34. The European Communities submits that Brazil's proposal to negotiate a MERCOSUR-wide tyre import regime to be adopted by the CMC and subsequently approved by the Brazilian Congress does not constitute a valid basis for calculating the reasonable period of time under Article 21.3(c) of the DSU.⁶³ The European Communities argues that, in the present case, negotiating a modification of an international legal framework is not an acceptable basis for the calculation of the reasonable period of time pursuant to Article 21.3(c), because alternative options for implementation are available and Brazil has not demonstrated that negotiating a MERCOSUR-wide regime is indispensable to achieve compliance.⁶⁴ The European Communities asserts that banning the importation of retreaded tyres originating in MERCOSUR countries would merely require an *actus contrarius* to the exemption provided in Portaria SECEX 36/2007. In response to Brazil's argument that removing the MERCOSUR exemption and restoring the original *erga omnes* application of the import ban on retreaded tyres would conflict with MERCOSUR rules, the European Communities asserts that, in the summer of 2007, and again in the summer of 2008, Brazil restricted imports of retreaded tyres from MERCOSUR countries without any amendment to MERCOSUR rules.⁶⁵

35. The European Communities questions whether Brazil actually intends removing the MERCOSUR exemption from the import ban on retreaded tyres. It alleges that Brazil, rather, envisages a regime under which all MERCOSUR countries would ban the importation of used and retreaded tyres from outside the bloc while, at the same time, letting tyres of all types be traded freely within MERCOSUR.⁶⁶ The European Communities argues that, while it is not up to the Arbitrator to assess the WTO-consistency of the implementation measure, the Arbitrator cannot allot time for a measure that obviously would not bring about compliance.⁶⁷

⁶²European Communities' submission, para. 66.

⁶³*Ibid.*, para. 80.

⁶⁴*Ibid.*, para. 77.

⁶⁵*Ibid.*, para. 68 (referring to Brazil's submission, para. 49; Brazil's appellee's submission, para. 225; and Exhibit BRA-175 submitted by Brazil to the Appellate Body); footnote 55 to para. 68 (stating that, on 22 August 2007, Brazil adopted Resolution No. 38 limiting imports of retreaded tyres from Uruguay to 130,000 and from Paraguay to 120,000 per year); footnote 61 to para. 78 (stating that Brazil further increased the import quota for retreaded tyres from Uruguay and Paraguay in the summer of 2008).

⁶⁶*Ibid.*, para. 69 (referring to a newspaper article in Argentina's *La Nación*, 22 February 2008, p. 16 (Exhibit EC Arbitration-1 submitted by the European Communities to the Arbitrator)).

⁶⁷*Ibid.*, para. 70.

36. Referring to the Award of the Arbitrator in *EC – Chicken Cuts*, the European Communities maintains that an implementing Member is not entirely free to choose among different options of achieving WTO compliance. The European Communities argues that, if the implementing Member does not prove that recourse to external elements (such as the adoption of a regional framework by MERCOSUR) is indispensable for achieving compliance, then the implementing Member must not receive grace time for such an external step especially if compliance can be achieved by that Member alone, without adopting a MERCOSUR-wide regime.⁶⁸

37. In addition, the European Communities asserts that a modification of the MERCOSUR trade regime for tyres is not something Brazil could control, and that means of implementation that require the agreement of other states are too hypothetical for determining the reasonable period of time. The European Communities adds that the timing and outcome of negotiations would be "completely uncertain", all the more because the intended negotiations were to take place within the diversity of interests of the different members of MERCOSUR. Furthermore, a decision would have to be ratified or transposed into the domestic legal system of all MERCOSUR countries. This would add to the uncertainty about the timing of the entry into force of a MERCOSUR-wide regime.⁶⁹

(c) Proceeding before the Federal Supreme Court Concerning Laws Adopted by the State of Rio Grande do Sul

38. The European Communities submits that the ADI action before the Federal Supreme Court challenging the state law of Rio Grande do Sul under the Brazilian Federal Constitution is not a suitable action that could serve as the basis for the determination of the reasonable period of time for implementation pursuant to Article 21.3(c) of the DSU. The European Communities points out that proceedings before the Federal Supreme Court are concerned with potential violations of provisions of the Brazilian Federal Constitution. Yet, the present dispute before the WTO does not concern possible violations by state measures of the Federal Constitution of Brazil but rather, exclusively, violations of Brazil's WTO obligations.⁷⁰

39. With regard to the ADI proceeding before the Federal Supreme Court, the European Communities raises the same objections it raised with respect to the ADPF proceeding above, namely, that the outcome of court proceedings is inherently unforeseeable, and that the time the court will take in this case to reach a decision is uncertain.⁷¹

⁶⁸European Communities' submission, para. 76 (quoting Award of the Arbitrator, *EC – Chicken Cuts*, para. 56) and para. 77.

⁶⁹*Ibid.*, para. 78.

⁷⁰*Ibid.*, para. 83.

⁷¹*Ibid.*, para. 84.

40. In addition, the European Communities maintains that, even if, *arguendo*, the Federal Supreme Court rendered a decision confirming that Rio Grande do Sul's measure was inconsistent with the Brazilian Constitution, the legal effects of that decision on the state measures would be unclear. The European Communities questions whether these measures would be *ipso facto* repealed, or whether such decision would have to be enforced by the Federal Government, which would require additional time for Brazil to achieve compliance with its WTO obligations.⁷²

41. Finally, the European Communities refers to Brazil's statement that the average duration of ADI proceedings is 34 months.⁷³ The European Communities argues that this duration is significantly outside the 15-month "guideline" foreseen in Article 21.3(c) of the DSU as interpreted by previous arbitrators. In the absence of particular circumstances justifying the allocation of a time period that is not the shortest period possible, the European Communities submits that the calculation of the reasonable period of time should be based on the time needed by the State Assembly of Rio Grande do Sul to repeal the measure, rather than on the time expected for the conclusion of the ADI proceeding before the Federal Supreme Court.

42. In the absence of any alternative course of action proposed by Brazil, the European Communities maintains that the only possible implementation option is the repeal of the import ban on retreaded tyres, which, in the European Communities' submission, will not take longer than 10 months.

III. Reasonable Period of Time

A. Preliminary Matters

1. Mandate of the Arbitrator

43. The Panel and Appellate Body Reports in this dispute were adopted by the DSB on 17 December 2007. Pursuant to Article 21.3 of the DSU, Brazil informed the DSB of its intention to comply with the recommendations and rulings shortly thereafter.⁷⁴ Article 21.3 of the DSU establishes that, when it is "impracticable" for a Member to comply "immediately" with the recommendations and rulings of the DSB, that Member "shall have a reasonable period of time in which to do so". Brazil informed the DSB that it would require a reasonable period of time in this dispute. Given that the parties failed to agree on a period of time for implementation of the recommendations and rulings of the DSB, the Director-General appointed me as Arbitrator on

⁷²European Communities' submission, para. 85.

⁷³*Ibid.*, para. 86 (referring to Brazil's submission, para. 45).

⁷⁴WT/DSB/M/244, para. 11.

26 June 2008, after consulting with the parties⁷⁵, to determine a reasonable period of time, and I accepted the appointment on 30 June 2008.

44. In determining the reasonable period of time, I shall take due account of the relevant provisions of the DSU, in particular, paragraph 3(c) of Article 21, which reads:

[A] guideline for the arbitrator should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances. (footnote omitted)

45. I am mindful of the context in which this provision appears. Article 21.1 of the DSU provides that "prompt compliance" with recommendations and rulings of the DSB "is essential in order to ensure effective resolution of disputes to the benefit of all Members." Moreover, the introductory paragraph of Article 21.3 indicates that a "reasonable period of time" for implementation shall be granted only if "it is impracticable to comply immediately" with the recommendations and rulings of the DSB.

46. At the oral hearing in this arbitration, both Brazil and the European Communities accepted that Article 21.3 of the DSU requires "prompt compliance", and that a "reasonable period of time" for implementation shall be granted only if immediate compliance is "impracticable". The parties further agreed with the statement of the arbitrator in *EC – Hormones* that the reasonable period of time "should be the shortest period possible within the legal system of the [implementing] Member".⁷⁶

47. I also draw guidance from principles articulated in previous arbitration awards. Accordingly, my mandate relates to the *time* by when the implementing Member must have achieved compliance, not to the *manner* in which that Member achieves compliance. Yet, I consider that *when* a Member must comply cannot be determined in isolation from the chosen means of implementation. It closely relates to the question of *how* a Member intends to comply with the recommendations and rulings of the DSB. In that vein, the arbitrator in *US – 1916 Act* stated that, "[t]urning to the question of what would constitute the 'reasonable period of time' for implementation in this case, I need to look first at the type of measure proposed to be used for implementation."⁷⁷ Similarly, the arbitrator in *Japan – DRAMs (Korea)* found that, in order "to determine *when* a Member must comply, it may be necessary to consider *how* a Member proposes to do so."⁷⁸

⁷⁵WT/DS332/15.

⁷⁶Award of the Arbitrator, *EC – Hormones*, para. 26.

⁷⁷Award of the Arbitrator, *US – 1916 Act*, para. 34.

⁷⁸Award of the Arbitrator, *Japan – DRAMs (Korea)*, para. 26. (original emphasis)

48. Brazil and the European Communities hold divergent views with respect to the appropriate means of implementation. Yet, as a general premise, both parties agree with the statement of the arbitrator in *EC – Hormones* that the implementing Member has "a measure of discretion in choosing the *means* of implementation, as long as the means chosen are consistent with the recommendations and rulings of the DSB and with the covered agreements."⁷⁹ In my determination, I am also guided by the statements of the arbitrator in *EC – Export Subsidies on Sugar* that "the implementing Member does not have an unfettered right to choose any method of implementation", and that "the chosen method must be such that it could be implemented within a reasonable period of time in accordance with the guidelines contained in Article 21.3(c)."⁸⁰ As other arbitrators in the past, I also consider that the implementing Member is expected to use whatever flexibility is available within its legal system⁸¹; however, this does not necessarily include recourse to "extraordinary" procedures.⁸² Finally, I am mindful that it is beyond my mandate to determine the consistency with WTO law of the measure eventually *taken* to comply; this can only be judged in Article 21.5 proceedings. In making my determination pursuant to Article 21.3(c), the means of implementation available to the Member concerned is, however, a relevant consideration.⁸³ In particular, I must consider "whether the implementing action falls within the range of permissible actions that can be taken in order to implement the DSB's recommendations and rulings."⁸⁴ At the oral hearing in this arbitration, both Brazil and the European Communities agreed that these principles set out in previous arbitration awards are relevant for the determination of a reasonable period of time.

2. The Measures to be Brought into Conformity

49. I refer to the relevant findings of both the Panel and Appellate Body in this dispute. The Appellate Body found that the inconsistency of the import ban on retreaded tyres with Article XI of

⁷⁹Award of the Arbitrator, *EC – Hormones*, para. 38. (original emphasis) See also Award of the Arbitrator, *Japan – DRAMs (Korea)*, para. 25 (referring to Award of the Arbitrator, *EC – Chicken Cuts*, para. 49, in turn referring to Award of the Arbitrator, *Canada – Pharmaceutical Patents*, paras. 41-43; Award of the Arbitrator, *Chile – Price Band System*, para. 32; Award of the Arbitrator, *EC – Tariff Preferences*, para. 30; Award of the Arbitrator, *US – Oil Country Tubular Goods Sunset Reviews*, para. 26; Award of the Arbitrator, *US – Gambling*, para. 33; and Award of the Arbitrator, *EC – Export Subsidies on Sugar*, para. 69).

⁸⁰Award of the Arbitrator, *EC – Export Subsidies on Sugar*, para. 69. See also Award of the Arbitrator, *Japan – DRAMs (Korea)*, para. 27 (referring to Award of the Arbitrator, *EC – Chicken Cuts*, para. 56).

⁸¹See Award of the Arbitrator, *Japan – DRAMs (Korea)*, para. 25 (referring to Award of the Arbitrator, *EC – Chicken Cuts*, para. 49, in turn referring to Award of the Arbitrator, *Chile – Price Band System*, para. 39; Award of the Arbitrator, *EC – Tariff Preferences*, para. 36; and Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 64).

⁸²See *ibid.* (referring to Award of the Arbitrator, *EC – Chicken Cuts*, para. 49, in turn referring to Award of the Arbitrator, *Korea – Alcoholic Beverages*, para. 42; Award of the Arbitrator, *Chile – Price Band System*, para. 51; and Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 74).

⁸³*Ibid.*, para. 27.

⁸⁴*Ibid.*

the GATT 1994 falls within the scope of Article XX(b) but is not justified under the chapeau of Article XX of the GATT 1994.

- (a) In particular, the Appellate Body found that:
- (i) the imports of used tyres⁸⁵ under court injunctions have resulted in the import ban on retreaded tyres "being applied in a manner that constitutes arbitrary or unjustifiable discrimination within the meaning of the chapeau of Article XX" of the GATT 1994⁸⁶; and
 - (ii) the MERCOSUR exemption, which exempts imports of retreaded tyres from MERCOSUR countries from the general ban on imports of retreaded tyres into Brazil⁸⁷, has "resulted in the import ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination within the meaning of the chapeau of Article XX" of the GATT 1994.⁸⁸
- (b) The Panel found that:
- (i) the marketing prohibition and the disposal obligation concerning used and retreaded tyres contained in Law 12.114 of the State of Rio Grande do Sul, as amended by Law 12.381, are inconsistent with Article III:4 of the GATT 1994 and are not justified under Article XX(b) of the GATT 1994⁸⁹;
 - (ii) Presidential Decree 3.179, as amended by Presidential Decree 3.919, concerning the imposition of fines on the importation, marketing, transportation, storage, keeping, or warehousing of retreaded tyres is

⁸⁵I note that, in this dispute, the European Communities had challenged the import ban on retreaded tyres, but not the import ban on used tyres. (See Appellate Body Report, para. 123) Yet, as the Panel has pointed out, the import ban on retreaded tyres is related to the import ban on used tyres. The Panel found that the import ban on retreaded tyres can encourage domestic retreaders to retread more domestic used tyres than they might have done otherwise. (See Panel Report, para. 7.134) Therefore, the Panel and the Appellate Body considered imports of used tyres under court injunctions as a relevant element for the analysis of whether the import ban on retreaded tyres was applied consistently with the requirements of the chapeau of Article XX of the GATT 1994.

⁸⁶Appellate Body Report, para. 258(b)(iv).

⁸⁷The import ban as well as the MERCOSUR exemption from the import ban on retreaded tyres were established in Article 40 of Portaria SECEX 14/2004. Article 40 of Portaria SECEX 14/2004 was replaced by Article 41 of Portaria SECEX 35/2006, and subsequently by Article 41 of Portaria SECEX 36/2007. The text of the provision remained the same. (See Appellate Body Report, para 122 and footnote 158 thereto; and European Communities' submission, para. 35) I note that Article 41 of Portaria SECEX 36/2007 incorporates an annex setting out criteria for the distribution of the quota.

⁸⁸Appellate Body Report, para. 258(b)(ii).

⁸⁹Panel Report, paras. 7.447 and 8.1(c).

inconsistent with Article XI:1 of the GATT 1994 and is not justified under either Article XX(b) or under Article XX(d) of the GATT 1994⁹⁰; and

- (iii) Portaria DECEX 8/1991, to the extent that it prohibits the importation of retreaded tyres, is inconsistent with Article XI:1 and is not justified under Article XX(b) of the GATT 1994.⁹¹

50. The Appellate Body recommended that the DSB request Brazil to bring its inconsistent measures into conformity with its obligations under the GATT 1994.

B. *Factors Affecting the Determination of the Reasonable Period of Time*

1. Burden of Proof

51. As stated by previous arbitrators, I consider that it is for the Member seeking a reasonable period of time for implementation to establish that the proposed period indeed constitutes the "shortest period possible" within its legal system to implement the recommendations and rulings of the DSB. Failing that, the arbitrator must determine the "shortest period possible" for implementation, which will be "shorter than proposed by the implementing Member, on the basis of the evidence presented by all parties".⁹²

2. Choice of Method of Implementation

52. Brazil indicates that it will seek to implement the recommendations and rulings of the DSB by taking the following steps.

53. First, Brazil states that, in order to remedy the inconsistency found in paragraph 258(b)(iv) of the Appellate Body Report in respect of preliminary court injunctions, it will "halt imports" of used tyres through such injunctions through a decision of the Federal Supreme Court confirming the constitutionality of the import ban on used tyres. Brazil submits that the reasonable period of time for revoking the preliminary court injunctions granted in present and past cases, and preventing lower courts from granting new preliminary injunctions in the future, would be 21 months from the date of adoption of the Panel and Appellate Body Reports.⁹³

⁹⁰Panel Report, paras. 7.390 and 8.1(b); European Communities' submission, para. 42.

⁹¹Panel Report, paras. 7.29 and 8.1(a)(ii); European Communities' submission, para. 45.

⁹²Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 44.

⁹³Brazil's submission, paras. 33 and 34.

54. Secondly, in order to remedy the inconsistency found in paragraph 258(b)(ii) of the Appellate Body Report in respect of the MERCOSUR exemption, Brazil intends to "establish new regulatory disciplines for used and retreaded tyres within MERCOSUR"⁹⁴. Brazil submits that 19 months from the date of adoption of the Panel and Appellate Body Reports would be a reasonable period of time for negotiating a new regime for used and retreaded tyres with its MERCOSUR partners.⁹⁵

55. Thirdly, in order to remedy the inconsistency found in paragraph 8.1(c) of the Panel Report in respect of the measures taken by the State of Rio Grande do Sul, Brazil is seeking a ruling from the Federal Supreme Court declaring the "unconstitutionality of state measures that purport to regulate imports of retreaded tyres"⁹⁶. In Brazil's submission, this will require 21 months from the date of adoption of the Panel and Appellate Body Reports.⁹⁷

56. Finally, in order to remedy the inconsistencies found in paragraph 8.1(b) of the Panel Report with respect to the fines imposed through Presidential Decree 3.179, as amended by Presidential Decree 3.919, Brazil did not request a particular period for implementation and stated at the oral hearing that these measures were "totally accessory" measures that stand or fall with the import ban and do not have an independent life.⁹⁸

57. The European Communities contests that these steps are suitable to achieve compliance with the recommendations and rulings of the DSB, and suggests, instead, that Brazil repeal or modify the measures found to be incompatible through legislative or regulatory action.⁹⁹ In this respect, I note that, in principle, the implementing Member has "a measure of discretion in choosing the *means* of implementation" that it deems most appropriate.¹⁰⁰ This discretion includes the choice of either withdrawing or modifying the measure found to be inconsistent.¹⁰¹ Article 3.7 of the DSU provides that the *first objective* of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent. This implies that withdrawal is not the only option. Where withdrawal is impracticable, the Member may modify the measure, provided that this

⁹⁴Brazil's submission, para. 33.

⁹⁵*Ibid.*, paras. 33 and 35.

⁹⁶*Ibid.*, para. 33.

⁹⁷*Ibid.*, paras. 33 and 36.

⁹⁸With respect to the application of Portaria DECEX 8/1991 prohibiting imports of used consumer goods to the importation of retreaded tyres⁹⁸, which was found to be inconsistent in paragraph 8.1(a)(ii) of the Panel Report, Brazil does not request a particular period of time for implementation. According to the European Communities, to the extent that Portaria DECEX 8/1991 has been applied to retreaded tyres, Brazil could achieve compliance by changing its practice of interpretation or application without modification of its legislation. (European Communities' submission, para. 45).

⁹⁹European Communities' submission, paras. 61, 80, and 87.

¹⁰⁰Award of the Arbitrator, *EC – Hormones*, para. 38. (original emphasis)

¹⁰¹Award of the Arbitrator, *Japan – DRAMs (Korea)*, para. 37; Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 50.

is done in the shortest time possible and that the modifications are consistent with the relevant DSB recommendations and rulings and provisions of the covered agreements.¹⁰² In that respect, I concur with the statement of the arbitrator in *EC – Hormones* that, "[a]lthough withdrawal of an inconsistent measure is the *preferred* means of complying with the recommendations and rulings of the DSB in a violation case, it is not necessarily the *only* means of implementation consistent with the covered agreements."¹⁰³

58. I consider that, in this dispute, Brazil could, in principle, remain within the range of permissible actions to comply with the DSB recommendations and rulings by either lifting the import ban on retreaded tyres and thus removing the inconsistency with Article XI, or by modifying the existing import ban in a way that would rectify the inconsistencies with the chapeau of Article XX found by the Appellate Body in respect of the used tyre imports on the basis of preliminary court injunctions and the MERCOSUR exemption from the ban on imports of retreaded tyres. While it is not my role as an arbitrator to identify a particular method of implementation in my determination of *when* Brazil must comply, it is relevant to consider *how* it proposes to do so. Therefore, in determining what would be a reasonable period of time for Brazil to comply with the recommendations and rulings of the DSB, it is necessary for me to take into consideration aspects of Brazil's chosen means of implementation.

3. The Specific Steps of Implementation

59. I now turn to the examination of what would be a "reasonable period of time" within which Brazil could achieve compliance in the light of the specific means of implementation it has proposed. As noted earlier, Brazil requests a total of 21 months, that is, until 17 September 2009.

(a) Proceeding before the Federal Supreme Court Concerning Preliminary Court Injunctions

60. First, in order to prevent imports of used tyres on the basis of preliminary injunctions issued by lower courts, Brazil indicates that it has initiated an *Arguição de Descumprimento de Preceito Fundamental* ("ADPF") (Allegation of Violation of Fundamental Precept) proceeding before the Federal Supreme Court. Brazil contends that a ruling by the Federal Supreme Court confirming the constitutionality of the ban on imports of used tyres, and affirming that such imports infringe on the fundamental constitutional right to a balanced environment pursuant to Article 225 of the Constitution of the Federal Republic of Brazil (the "Constitution")¹⁰⁴, will revoke the existing preliminary

¹⁰²Award of the Arbitrator, *Japan – DRAMs (Korea)*, para. 37; Award of the Arbitrator, *EC – Tariff Preferences*, para. 30.

¹⁰³Award of the Arbitrator, *EC – Hormones*, para 38. (original emphasis; footnote omitted)

¹⁰⁴Brazil's submission, para. 40 and footnote 57 thereto.

injunctions, prohibit the issuance of future injunctions, and thereby bring Brazil into compliance with its WTO obligations. Brazil maintains that preliminary injunctions have been granted by lower courts based on various constitutional law grounds. Brazil further asserts that, in previous cases involving individual injunctions, the Federal Supreme Court has rejected several arguments on the basis of which preliminary injunctions have been granted by lower courts, including that: (i) a "*portaria*" is not an appropriate instrument to implement the import ban on used tyres; (ii) the government agency that imposed the initial ban lacked the constitutional authority to do so; (iii) the prohibition of imports of used, but not new, tyres violated the constitutional principle of isonomy, or equality of rights; and (iv) the import ban on used tyres interfered with the constitutional right of free enterprise pursuant to Article 170 of the Constitution because it restricted access to supplies of raw materials for domestic retreaders.¹⁰⁵

61. As regards the fourth argument, Brazil points out that, in 2007, the President of the Federal Supreme Court accepted a request to suspend certain individual injunctions allowing used tyre imports, relying, *inter alia*, on the right to a balanced environment under Article 225 of the Constitution. The plenary of the Court confirmed this decision by a majority of 7:3, albeit only in a preliminary injunction.¹⁰⁶ Brazil notes that these decisions concerned individual injunctions and did not have general and prospective application as would have a decision resulting from the ADPF proceeding at issue. Nevertheless, in Brazil's view, these cases give an indication of the likely outcome of the ADPF proceeding in terms of the environmental concerns raised by injunctions permitting used tyre imports. Therefore, Brazil is confident that, as a result of the pending ADPF proceeding, the Federal Supreme Court will revoke the existing injunctions and prohibit, with general and prospective effect, the issuance of injunctions by lower courts.¹⁰⁷

62. Brazil submits that the ADPF proceeding constitutes the only effective means to prevent lower courts from granting further preliminary injunctions authorizing used tyre imports. A favourable outcome of that proceeding would ensure that the import ban on retreaded tyres is applied in a manner that is consistent with Brazil's obligations under the covered agreements.

63. The European Communities argues that court action is not a suitable measure to prevent definitively the importation of used tyres into Brazil because the outcome of the legal proceeding is "completely uncertain".¹⁰⁸ Instead, the European Communities argues that "[t]he most 'obvious' way for Brazil to bring itself into compliance with its WTO obligations consists in repealing (*actus*

¹⁰⁵Brazil's submission, para. 39.

¹⁰⁶Exhibit BRA-179 submitted by Brazil to the Arbitrator.

¹⁰⁷Brazil's submission, para. 40.

¹⁰⁸European Communities' submission, para. 61.

contrarius) or modifying the measures found to be incompatible" with WTO law.¹⁰⁹ The European Communities argues that, in order to qualify as an implementation action for which a Member may receive a reasonable period of time, the suggested action must give the implementing Member "control over the achievement of the intended objective".¹¹⁰ In the European Communities' view, the outcome of court proceedings is uncertain and "inherently speculative".¹¹¹ The European Communities submits that, in contrast to legislative or administrative acts, court proceedings are beyond the control of the government and therefore not a suitable means to achieve compliance. The European Communities further argues that the government has a considerably higher degree of control over legislative action than over judicial action because of the interplay between government and parliament in the preparation of legislation. Therefore, the European Communities submits that the only viable means for Brazil to implement the recommendations and rulings of the DSB is through regulatory or legislative action.¹¹² The European Communities suggests that Brazil adopt a formal law that would elevate the existing import ban on used tyres from the level of a *portaria* to the level of an act of parliament.

64. The European Communities further argues that Brazil could adopt provisional measures pursuant to Article 62 of the Constitution for a period of two months, renewable once. This provision enables the President of Brazil to declare provisionally applicable a bill submitted to Congress, thereby pressing the legislature to vote on the bill rapidly. The European Communities submits that this procedure is frequently used in Brazil and can therefore not be regarded as an "extraordinary measure". The European Communities states that compliance with the recommendations and rulings of the DSB should give rise to comparable urgency as is regularly applied in internal matters in Brazil.¹¹³

65. At the oral hearing, Brazil indicated that acts of the judiciary had to be attributed to the state just as acts of the legislature or of the executive. Therefore, the judiciary, like other branches of power, could contribute to achieving compliance with international obligations. Brazil considered "totally misplaced" the European Communities' focus on the government's ability to control the achievement of the intended objective of proposed implementation acts. Brazil argued that the Federal Government could not "ensure" that its intended results would be achieved, irrespective of whether it undertook action through the legislature or judiciary in order to implement the recommendations and rulings of the DSB, because both the legislature and the judiciary are separate from the executive. Brazil stated that, even though these two powers operate with a different degree

¹⁰⁹European Communities' submission, para. 34.

¹¹⁰*Ibid.*, para. 57.

¹¹¹*Ibid.*

¹¹²*Ibid.*, para. 61.

¹¹³*Ibid.*, para. 66.

of autonomy, there is no difference in the sense that Brazil's Federal Government cannot guarantee a certain outcome either in the National Congress or before the Federal Supreme Court.

66. Brazil further explained that lower courts could continue granting preliminary injunctions on certain constitutional grounds even if the ban was imposed in the form of a law. Brazil concedes that if the import ban on used tyres was imposed by means of a formal law, then preliminary injunctions permitting the imports of used tyres could not be granted on the grounds that a "*portaria*" is not an appropriate instrument to implement the ban; nor could preliminary injunctions be granted on the basis that the government agency imposing the import ban lacked constitutional authority to do so. However, Brazil emphasized that lower courts could still grant preliminary injunctions on the grounds that the import ban on used tyres violated the constitutional principle of isonomy or equality of rights, because imports of new tyres were allowed. Furthermore, lower courts could grant preliminary injunctions on the grounds that the import ban on used tyres interfered with the constitutional right of free enterprise, because it restricted access of domestic retreaders to supplies of raw materials. Brazil explained that only a Federal Supreme Court ruling, confirming the constitutionality of the import ban on used tyres with *erga omnes* effect, could invalidate existing injunctions and unequivocally prohibit lower courts from issuing new injunctions.¹¹⁴ For these reasons, enacting the import ban as a formal law rather than in the form of a *portaria* would not effectively prevent lower courts from granting preliminary injunctions on the constitutional grounds of the principle of isonomy and the right of free enterprise. Therefore, Brazil submits that provisional measures adopted by the President pursuant to Article 62 of the Constitution do not have a higher rank than formal laws. According to Brazil, it would not appear that such measures could effectively prevent lower courts from granting preliminary injunctions on the same constitutional grounds.

67. In considering these arguments of the parties, I recall the premise set out above¹¹⁵ that, in principle, the implementing Member has "a measure of discretion in choosing the *means* of implementation" that it deems most appropriate.¹¹⁶ This discretion includes the choice of either withdrawing or modifying the measure found to be inconsistent.¹¹⁷ It is not my task as Arbitrator to identify a particular means of implementation; I am called only to determine whether the steps proposed by Brazil fall within the range of permissible actions that can be taken to implement the recommendations and rulings of the DSB. At the oral hearing, Brazil did not contest that, if the ADPF proceeding initiated by the Federal Government before the Federal Supreme Court did not result in the intended ruling, Brazil might have to face the consequences foreseen under Articles 21

¹¹⁴Brazil's statement at the oral hearing, para. 18.

¹¹⁵*Supra*, para. 48.

¹¹⁶Award of the Arbitrator, *EC – Hormones*, para. 38. (original emphasis)

¹¹⁷Award of the Arbitrator, *Japan – DRAMs (Korea)*, para. 37; Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 50.

and 22 of the DSU. At the oral hearing, the European Communities did not contest that compliance could, in principle, be achieved by modification, but contended that withdrawing the import ban would be the only suitable means, since there was no certainty that alternative means would fully implement the DSB's recommendations and rulings and would achieve that result within the 15-month guideline set out in Article 21.3(c) of the DSU.

68. In previous arbitrations, implementing Members have usually proposed either legislative or regulatory means to implement DSB recommendations and rulings. However, I do not consider that implementation through the judiciary can be *a priori* excluded from the range of permissible action that can be taken to implement DSB recommendations and rulings and bring about compliance with a Member's obligations under the covered agreements. The degree of government control may well be different with respect to the executive, the legislative, and the judiciary branches of power. Implementation action, whether it is taken by the legislature, or the judiciary, may not be executed in the way envisaged by the government. Yet the possibility of failure to achieve the intended compliance has not been regarded by previous arbitrators as a reason to question the permissibility of implementation by means of legislation, nor, in my view, does it exclude judicial action from the range of a permissible means of implementation. Moreover, as noted earlier¹¹⁸, Brazil has pointed to recent decisions by the Federal Supreme Court interpreting the constitutional right to a balanced environment that, in Brazil's view, give an indication as to the likely outcome of the ADPF proceeding.

69. I now turn to the reasonable period of time requested by Brazil for completion of these proceedings before the Federal Supreme Court. Brazil argues that the ADPF proceeding will take at least 34 months to complete. Brazil requests another two months to implement that decision within the Brazilian legal system. This would involve notifying Brazilian courts of the Federal Supreme Court decision and having customs authorities withdraw prior import licenses. Brazil then subtracts 15 months, which is the period between the initiation of the ADPF proceeding on 21 September 2006 and the adoption by the DSB of the Panel and Appellate Body Reports on 17 December 2007. In sum, Brazil submits that 21 months as of the adoption of the Reports by the DSB is a reasonable period of time for implementation of the recommendations and rulings of the DSB in this dispute, thus expiring on 17 September 2009. By contrast, the European Communities, on the basis of its assertion that the only suitable means of implementation is the adoption of a formal law elevating the import ban on used tyres from the level of a *portaria* to the level of an act of parliament, submits that the reasonable period of time should be 10 months from the date of adoption by the DSB of the Panel and Appellate Body Reports, that is, by 17 October 2008.

¹¹⁸*Supra*, para. 61.

70. Brazil does not identify intermediate steps or time periods in the course of the ADPF proceeding that would add up to 34 months. Rather, Brazil's estimate is based on the average duration of a sample of *Ação Direta de Inconstitucionalidade* ("ADI") (Direct Unconstitutionality Action) proceedings that were initiated and completed between 1998 and 2003. Brazil explains that, to date, only one ADPF action has been decided on the merits¹¹⁹ and that it is appropriate to draw inferences from the average duration of ADI proceedings, because they are similar to ADPF proceedings in that both ADI and ADPF are procedures for the review of the constitutionality of a legal act.

71. I do not consider that the approach of calculating the average duration of a sample of proceedings from a past 5-year period under a different procedure than the one at issue in the present case provides an accurate and pertinent estimate of the time that the Federal Supreme Court will need to complete the pending ADPF proceeding. Brazil's table¹²⁰ listing ADI proceedings initiated as of 1998 and completed by 2003 indicates that the duration of ADI proceedings before the Federal Supreme Court varies enormously. Certain ADI proceedings were completed within 3 months, whereas other ADI proceedings were completed after more than 100 months. I consider that the relevance of Brazil's estimate is reduced by the fact that the table does not include ADI proceedings that were initiated after 1999 but not completed by 2003, or initiated after 2003. The relevance of the estimates is diminished further by the fact that the ADI is not the same procedure as the ADPF at issue here. In response to questions at the oral hearing, Brazil explained that the ADI procedure can be used to challenge the constitutionality of normative acts of general application, while the ADPF procedure covers also individual decisions by authorities. However, decisions in both ADI and ADPF proceedings produce *erga omnes* effect and have binding effect on other organs of the public power.¹²¹ More importantly, previous arbitrators have refused to rely on average time periods in determining the reasonable period of time because an average figure "inherently" represents more than the shortest possible period of time necessary within an implementing Member's legal system.¹²² For these reasons, I consider Brazil's estimate of the likely duration of the pending ADPF proceeding on the basis of an average of a sample of ADI proceedings not appropriate.

72. Instead, I believe that an assessment of the state of affairs in the particular ADPF proceeding permits a more accurate estimation of the time required for its completion, and thus a more appropriate basis for determining the reasonable period of time needed for the implementation of the

¹¹⁹Brazil's submission, para. 45, indicating that this ADPF proceeding took 41 months.

¹²⁰Exhibit BRA-180 submitted by Brazil to the Arbitrator.

¹²¹With respect to the ADI procedure, see Article 102(2) of the Brazilian Constitution and Article 28 of Law 9.868/99 governing the ADI procedure. With respect to the ADPF, see Article 10 of Law 9.882/99 governing the ADPF procedure.

¹²²The Arbitrator in *EC – Export Subsidies on Sugar* stated "that an average or median figure 'inherently represent[s] more than the shortest possible period of time necessary within [an implementing Member's] legal system'". See also Award of the Arbitrator, *EC – Hormones*, para. 26.

DSB recommendations and rulings. I note that the Federal Supreme Court held a hearing in this ADPF proceeding on 27 June 2008. Brazil confirmed at the oral hearing in this arbitration that the ADPF proceeding at issue requires only one hearing before the Federal Supreme Court. Brazil further explained that, when an ADPF case is filed with the Federal Supreme Court, a reporting judge will be assigned to the case. According to Brazil, that case will normally remain in queue, sometimes for a long time, without much substantive work being done due to the great workload of reporting judges. However, as soon as the reporting judge turns to the particular case, the proceedings will pick up. Brazil submits that, with the public hearing in June 2008, this ADPF case has entered its substantive phase. Brazil further explains that, when completing the report on a case, the reporting judge will ask the President of the Court to place the case on the agenda for a decision by the plenary. In response to questions at the oral hearing in this arbitration, Brazil stated, however, that it was difficult to give concrete estimates of the time needed by the reporting judge to complete the report and the date when the case will be placed on the agenda of the plenary, as this will depend on the overall workload of the Federal Supreme Court.¹²³

73. Brazil explained that, according to the Internal Rules of the Federal Supreme Court, the President has certain discretion as to when a particular case is put on the Court's agenda for voting. In this respect, I recall that the implementing WTO Member is expected to use whatever flexibility is available within its legal system to ensure that implementation takes place promptly in accordance with Article 21 of the DSU.¹²⁴ Brazil explained that, according to Internal Rules of the Federal Supreme Court, the reporting judge may request the President to give priority to certain types of cases and that the President has discretion to grant such request. Brazil further explained that according to Article 145 of the Internal Rules of the Federal Supreme Court, ADPF proceedings are eligible for such priority action. The existence of such a rule and practice demonstrates that there is flexibility to expedite proceedings before the Federal Supreme Court.¹²⁵ I am mindful of previous arbitrators' statements that recourse to "extraordinary" proceedings cannot be expected.¹²⁶ Yet, in the context of the present case, I do not consider that treating a specific case with priority at the Federal Supreme

¹²³I note that in accordance with Article 78(1) of the Internal Rules of the Federal Supreme Court, the court takes recess from 20 December to 1 January.

¹²⁴See Award of the Arbitrator, *Japan – DRAMs (Korea)*, para. 25 (referring to Award of the Arbitrator, *EC – Chicken Cuts*, para. 49, in turn referring to Award of the Arbitrator, *Chile – Price Band System*, para. 39; Award of the Arbitrator, *EC – Tariff Preferences*, para. 36; and Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 64).

¹²⁵See also *ibid.*, para. 47 (referring to Award of the Arbitrator, *US – 1916 Act*, para. 39; Award of the Arbitrator, *EC – Tariff Preferences*, para. 36; Award of the Arbitrator, *EC – Export Subsidies on Sugar*, para. 76; and Award of the Arbitrator, *EC – Chicken Cuts*, paras. 79 and 80).

¹²⁶See *ibid.*, para. 25 (referring to Award of the Arbitrator, *EC – Chicken Cuts*, para. 49, in turn referring to Award of the Arbitrator, *Korea – Alcoholic Beverages*, para. 42; Award of the Arbitrator, *Chile – Price Band System*, para. 51; and Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 74).

Court can be regarded as recourse to "extraordinary" procedures. I further note that, on 31 January 2008, the Government of Brazil asked the Federal Supreme Court to take note of the WTO decision and to expedite proceedings.¹²⁷

74. For these reasons, I consider it reasonable to expect that the ADPF proceeding before the Federal Supreme Court can be completed within a significantly shorter period of time than the 21 months suggested by Brazil.

(b) Import Regime for Retreaded Tyres from MERCOSUR Countries

75. In order to comply with the DSB's recommendations and rulings regarding the MERCOSUR exemption from the import ban on retreaded tyres¹²⁸, Brazil submits that it would have to negotiate a new regime for the importation of retreaded and used tyres with other MERCOSUR countries. Brazil asserts that negotiating an agreement with its MERCOSUR partners is necessary, because, if Brazil were to remove the MERCOSUR exemption from the import ban on retreaded tyres, this would conflict with current MERCOSUR rules as interpreted by the MERCOSUR Ad Hoc Tribunal. Therefore, Brazil argues that only after negotiating a MERCOSUR-wide tyre regime can it proceed to bring the MERCOSUR exemption into compliance with its WTO obligations by incorporating an agreement concluded with MERCOSUR countries into its national legal system. Brazil requests 12 months as of the adoption of the DSB recommendations and rulings for designing a new tyre regime in an Ad Hoc Working Group for the Regional Policy on tyres created for that purpose, and the review and approval of that measure by the Common Market Group ("GMC") and Common Market Council ("CMC") of MERCOSUR by December 2008. Brazil requests another six months for the approval of that measure by legislative bodies of MERCOSUR countries. Adding another month for the entry into force of the measure, Brazil requests that I determine a total of 19 months to be the reasonable period of time.

76. The European Communities alleges that Brazil is, in fact, seeking to establish a regime by which all MERCOSUR countries ban the importation of retreaded and used tyres from outside the region. The European Communities submits that this would not lead to compliance with the DSB recommendations and rulings in this dispute and that an Article 21.3(c) arbitrator cannot allot time for measures that obviously do not bring about compliance. Instead, the European Communities submits that compliance with the DSB recommendations and rulings concerning the MERCOSUR exemption

¹²⁷Brazil's submission, para. 44.

¹²⁸See Appellate Body Report, para. 258(b)(ii).

would merely require an *actus contrarius* eliminating the exemption, which, in the European Communities' view, could be achieved by regulatory action within two months.¹²⁹

77. I am called upon to determine whether negotiating a new tyre import regime with MERCOSUR countries falls within the range of actions that can bring the measure found to be inconsistent into compliance, and by when this could reasonably be achieved. Brazil explains that eliminating the MERCOSUR exemption and restoring the original import ban on retreaded tyres *erga omnes* would be inconsistent with its obligations under MERCOSUR. Therefore, it seeks to negotiate a new tyre regime with the other MERCOSUR countries. While the contours of the envisaged regime have not been clarified by Brazil, I do not believe that a MERCOSUR-wide tyre regime is outside the range of permissible action that could, in principle, bring the measure found to be inconsistent into compliance with Brazil's WTO obligations.

78. I now turn to consider the reasonable period of time required for the implementation of the DSB recommendations and rulings with respect to the MERCOSUR exemption from the import ban on retreaded tyres. As a first step towards implementation, Brazil proposes negotiations with MERCOSUR partners, for which it requests a period of 12 months. According to Brazil, these negotiations are underway in the framework of the MERCOSUR Ad Hoc Working Group on the Regional Policy on Tyres established on 29 June 2008. However, I note that these negotiations on a new MERCOSUR-wide tyre regime are an external process that is outside the law-making and regulatory system of Brazil. Yet, the recommendations and rulings of the DSB are addressed specifically to Brazil and not to its MERCOSUR partners. Article 3.3 of the DSU confirms that WTO dispute settlement is concerned with measures taken by a particular Member. The measure at issue, Portaria SECEX 14/2004, is a domestic regulatory act adopted by the SECEX, a subdivision of the Brazilian Federal Ministry of Development, Industry and Foreign Trade. The legal basis for Portaria SECEX 14/2004, as identified in its preamble, is Article 15 of Annex I to Decree No. 4.632 dated 21 March 2003, which, in turn, is a domestic legal instrument.¹³⁰ As noted by the arbitrator in *EC – Chicken Cuts*, "[b]ecause measures ... challenged originate in the decision-making organs of a WTO Member's own legal system, an arbitrator under Article 21.3(c) may reasonably expect that implementation would ordinarily be achieved by means entirely within the implementing Member's lawmaking procedures."¹³¹ This is all the more so with respect to Portaria SECEX 14/2004, as it

¹²⁹The Appellate Body addressed the question of the elimination of the MERCOSUR exemption from the import ban on retreaded tyres in the light of Article XXIV:8(a) in footnote 445 to paragraph 234 of its Report.

¹³⁰Exhibit BRA-84 submitted by Brazil to the Panel. As noted in *supra* footnote 31, in November 2006, Article 40 of Portaria SECEX 14/2004 was replaced by Article 41 of Portaria SECEX 35/2006, and subsequently by Article 41 of Portaria SECEX 36/2007. These changes, however, do not affect the qualification of the measure.

¹³¹Award of the Arbitrator, *EC – Chicken Cuts*, para. 51.

contains no indication of consultations or negotiations with MERCOSUR partners in the process of adopting that *portaria*.

79. Brazil argues that the award of the arbitrator in *EC – Chicken Cuts* must be distinguished from the present case, because the ruling of the World Customs Organization ("WCO") sought by the European Communities in that case was extraneous to the European Communities' implementation obligations, whereas, in this case, the steps taken by Brazil to modify its MERCOSUR commitments are not extraneous.¹³² I am not persuaded by this argument. In *EC – Chicken Cuts*, the European Communities argued that "a WCO decision [was] necessary as a prerequisite to further implementation internally by the Commission because implementation of the DSB's recommendations and rulings [would] require the European Commission effectively to reverse certain judgments of the European Court of Justice".¹³³ Therefore, the European Communities argued that "it [would] not take any action internally until it receive[d] a WCO decision."¹³⁴ Similarly, in the present case, Brazil seeks to modify MERCOSUR law before taking any internal action with respect to the DSB's recommendations and rulings relating to imports of retreaded tyres from MERCOSUR countries. I consider the situation in the present case similar to that in *EC – Chicken Cuts* in the sense that, in both cases, the DSB recommendations and rulings "will be no closer to being implemented unless—and until" Brazil takes action internally to implement them.¹³⁵ In both cases, recourse to external action would not exonerate the Member concerned of its obligation to comply with the DSB rulings. On the contrary, internal action by Brazil is indispensable in the present case as it was the case in *EC – Chicken Cuts*.

80. Therefore, I agree with the arbitrator in *EC – Chicken Cuts* that "[r]ecourse to such external processes will not ordinarily form part of the implementation of the recommendations and rulings of the DSB", and that recourse to external decision-making "is not entitled to the same deference as in the case of an implementation procedure that is entirely within that Member's domestic legal system."¹³⁶ In addition, the arbitrator in *EC – Tariff Preferences* stated that "[t]he mere fact that the European Communities has decided to incorporate the task of implementation within the larger objective of reforming its overall GSP scheme cannot lead to a determination of a shorter, or longer, period of time."¹³⁷ Similarly, in this case, Brazil seems to envisage negotiations on new MERCOSUR disciplines, which seems to include a wider spectrum than the MERCOSUR exemption from the ban on retreaded tyres at issue here. This is not to say that I would discourage the Member concerned

¹³²Brazil's statement at the oral hearing, para. 22.

¹³³Award of the Arbitrator, *EC – Chicken Cuts*, para. 50.

¹³⁴*Ibid.*, para. 55.

¹³⁵See *ibid.* See also Award of the Arbitrator, *EC – Export Subsidies on Sugar*, para. 81.

¹³⁶Award of the Arbitrator, *EC – Chicken Cuts*, para. 52.

¹³⁷Award of the Arbitrator, *EC – Tariff Preferences*, para. 31.

from consulting and coordinating with its trading partners in advance of a modification of an import regime, including in the context of implementing DSB recommendations and rulings that may affect them. The question before me, however, is whether this should be recognized as a "particular circumstance" that should be factored into my calculation of the reasonable period of time. In keeping with the premise set out by the arbitrator in *EC – Chicken Cuts*, I am of the view that an implementing Member seeking to go outside its domestic decision-making processes bears the burden of establishing that "this external element of its proposed implementation is necessary for, and therefore indispensable to, that Member's full and effective compliance with its obligations under the covered agreements".¹³⁸

81. Brazil asserts that negotiating a new import regime for retreaded tyres with its MERCOSUR partners is a required step because of a binding decision of the MERCOSUR Ad Hoc Tribunal with which alternative means of implementation would conflict. Brazil considers that the unilateral elimination of the MERCOSUR exemption is not a means of implementation that it may choose because in order to change Brazil's legislation in this respect, MERCOSUR disciplines would need to be modified. I am not persuaded by this argument of Brazil. First, I observe that the arbitral decision referred to by Brazil had been taken into account by the Panel and the Appellate Body in the underlying dispute. The Appellate Body stated that:

[B]efore the arbitral tribunal established under MERCOSUR, Brazil could have sought to justify the challenged Import Ban on the grounds of human, animal, and plant health under Article 50(d) of the Treaty of Montevideo.⁴⁴³ Brazil, however, decided not to do so. It is not appropriate for us to second-guess Brazil's decision not to invoke Article 50(d), which serves a function similar to that of Article XX(b) of the GATT 1994. However, Article 50(d) of the Treaty of Montevideo, as well as the fact that Brazil might have raised this defence in the MERCOSUR arbitral proceedings, show, in our view, that the discrimination associated with the MERCOSUR exemption does not necessarily result from a conflict between provisions under MERCOSUR and the GATT 1994.¹³⁹ (original footnotes 442, 444, and 445 omitted)

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

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

...

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

¹³⁸ Award of the Arbitrator, *EC – Chicken Cuts*, para. 52.

¹³⁹ Appellate Body Report, para. 234 and footnote 443 thereto.

82. While Brazil may disagree with this statement, I note that the arbitrator in *EC – Chicken Cuts* found that, "[w]here the Panel and the Appellate Body have expressed one view on issues relating to the substance of [the] dispute", an arbitrator, in fulfilling his limited mandate, is "not free ... to express another".¹⁴⁰ The statement of the Appellate Body quoted above does not suggest that Brazil would necessarily be required to work towards negotiating a MERCOSUR-wide tyre regime in order to comply with its WTO obligations while, at the same time, respecting its commitments under MERCOSUR. It is clear from the statement above that the decision of the Ad Hoc Tribunal relates to the specific procedural circumstances of that case, in which a particular litigation strategy was applied. The decision of that Tribunal does not, and did not need to, reflect and interpret all rights and obligations under MERCOSUR law that are relevant to the manner in which Brazil may choose to implement the DSB recommendations and rulings.¹⁴¹ As the arbitrator in *EC – Chicken Cuts* stated, the Member seeking to take steps "outside its domestic decision-making processes" bears the burden of establishing that these external elements of its proposed means of implementation are a requirement under the law of the external system.¹⁴²

83. In this context, I also note that Brazil has restricted imports of retreaded tyres from MERCOSUR countries by adopting CAMEX Resolution No. 38 of 22 August 2007, and again through CAMEX Resolution No. 46 of 3 July 2008¹⁴³, without prior modification of MERCOSUR law. Brazil conceded at the oral hearing that the 2007 import quota had not been introduced on the basis of negotiations with MERCOSUR countries. These changes were introduced through *portarias*, that is, in the form of regulatory action by Brazil and not through MERCOSUR-wide action. At the oral hearing, Brazil stated that it had consulted with MERCOSUR countries prior to increasing the import quotas for retreaded tyres from certain MERCOSUR countries in July 2008. This, however, does not change the fact that the modification was enacted through domestic regulatory action.

¹⁴⁰Award of the Arbitrator, *EC – Chicken Cuts*, para. 62.

¹⁴¹At the oral hearing, Brazil further referred to the MERCOSUR Permanent Tribunal of Review Award No. 1/05 of 20 December 2005 concerning an import ban on retreaded tyres adopted by Argentina. In that award, the Permanent Tribunal of Review rejected the defence invoked by Argentina under Article 50(d) of the Treaty of Montevideo. I consider that this award is binding only between the parties to that dispute, Uruguay and Argentina; Brazil was not a party to that dispute. Moreover, I note that the tribunal rejected Argentina's defence for reasons relating to the alleged lack of proportionality of particular aspects of the Argentine measure. It did not, in principle, rule out the applicability of Article 50(d) of the Treaty of Montevideo to an import ban imposed for the protection of health and the environment.

¹⁴²Award of the Arbitrator, *EC – Chicken Cuts*, para. 52.

¹⁴³See European Communities' submission, para. 68 (referring to Brazil's submission, para. 49; Brazil's appellee's submission, para. 225; and Exhibit BRA-175 submitted by Brazil to the Appellate Body); footnote 55 to para. 68 (stating that, on 22 August 2007, Brazil adopted Resolution No. 38 limiting imports of retreaded tyres from Uruguay to 130,000 and from Paraguay to 120,000 per year); and footnote 61 to para. 78 (stating that Brazil further increased the import quota for retreaded tyres from Uruguay and Paraguay in 2008).

84. In this case, Brazil has referred to the decision of the Ad Hoc Tribunal as the reason why Brazil would be obliged to negotiate modified rules with its MERCOSUR partners. However, the decision of that Tribunal did not involve Article 50(d) of the Treaty of Montevideo. Moreover, Brazil has introduced modifications to the MERCOSUR exemption by mere domestic measures twice since the circulation of the Panel Report in this dispute. In these circumstances, I do not believe that Brazil has established that negotiating such new disciplines in the ambit of MERCOSUR is in fact required under MERCOSUR law. Therefore, I do not consider that I should factor into my determination the time requested by Brazil for negotiations with MERCOSUR partners regarding a MERCOSUR-wide tyre regime.

85. For the same reasons, I do not consider that I should factor into my calculation, as a particular circumstance, the time requested by Brazil for ratification by MERCOSUR countries of a new MERCOSUR tyres regime, its incorporation in their domestic legal systems, and its entry into force.¹⁴⁴

86. Having said that, I wish to clarify that I am not suggesting that Brazil could not seek to negotiate a MERCOSUR-wide tyre regime with its MERCOSUR partners. My decision in no way is intended to curtail Brazil's discretion as to which means Brazil may choose to modify its import regime concerning retreaded tyres. Rather, my decision is limited to the question whether or not I should factor into my determination the 19 months requested by Brazil for negotiations with MERCOSUR countries and incorporation of the results into its legal system.

(c) Proceeding before the Federal Supreme Court Concerning Laws Adopted by the State of Rio Grande do Sul

87. With respect to the marketing prohibition and the disposal obligations concerning used and retreaded tyres contained in Law 12.114 of the State of Rio Grande do Sul, as amended by Law 12.381, Brazil seeks to implement the recommendations and rulings of the DSB through a different Federal Supreme Court proceeding. Brazil explains that the Prosecutor General filed an ADI action with the Federal Supreme Court in September 2006 requesting the court to revoke the state laws on the grounds that these laws violated the distribution of competences between the Federal State

¹⁴⁴In any event, even if I were to allocate time for ratification, I could take into account only the most prompt ratification process and not, as suggested by Brazil, an average period. Nor do I see a need to allocate time for Brazil to await entry into force pursuant to Article 40 of the Protocol of Ouro Preto on the Institutional Structure of MERCOSUR after completion of the incorporation process in all MERCOSUR countries. Brazil is expected to use the flexibility available in its legal system in order to comply promptly with the recommendations and rulings of the DSB, and could implement measures on a provisional basis. (In this respect, see *supra*, footnote, 81. See also Article 62 of the Constitution with respect to provisional measures as referred to in para. 66, *supra*, and Article 25 of the *Vienna Convention on the Law of Treaties* with respect to the provisional application of treaties.)

and the State of Rio Grande do Sul, and, in addition, infringed on the fundamental constitutional right to a balanced environment.¹⁴⁵ Brazil contends that, in view of the Federal Supreme Court's practice of grouping together cases with related subject-matters, this ADI action would most likely be decided together with the pending ADPF action relating to preliminary injunctions permitting used tyre imports. On this basis, Brazil requests me to determine that the same period of time, that is, 21 months, would be a reasonable period of time for Brazil to comply with the DSB recommendations and rulings relating to the measures adopted by the State of Rio Grande do Sul.

88. The European Communities argues that, for the same reasons advanced with respect to the ADPF proceeding before the Federal Supreme Court concerning preliminary injunctions granted by lower courts, Brazil's intention to implement the relevant DSB recommendations and rulings through judiciary action is not a suitable means to achieve compliance and thus should not serve as the basis for the calculation of the reasonable period of time. Instead, the European Communities submits that the reasonable period of time should be determined on the basis of the time needed for the State of Rio Grande do Sul to repeal the measure.¹⁴⁶

89. I understand that, in the ADI proceeding at issue, the Federal Government has challenged the ban imposed by the State of Rio Grande do Sul, on the grounds that, *inter alia*, it infringes the allocation of powers between the federal and the state levels, and also, infringes on the fundamental constitutional right to a balanced environment. I see no reason to question Brazil's assertion that, in view of the Federal Supreme Court's practice of grouping together cases with related subject-matters, this ADI action would likely be decided together with the ADPF proceeding challenging preliminary injunctions by lower courts allowing imports of used tyres. However, as I noted earlier, I do not agree with the method employed by Brazil for estimating the duration of the pending ADPF proceeding on the basis of the average duration of a particular sample of ADI proceedings initiated and completed between 1999 and 2003. Brazil relies on the same estimate with respect to the ADI proceeding challenging the ban imposed by the State of Rio Grande do Sul. As with the ADPF proceeding, I consider that this ADI proceeding can be completed in a significantly shorter period than 21 months.

¹⁴⁵Brazil identifies Articles 22(VIII), 24(VI), (VIII) and (XII), and 225 of the Constitution. (Brazil's submission, footnote 78 to para. 54) The European Communities argues that a longer period of time for implementation could not be justified on the basis of Article XXIV:12. I note that Brazil has not invoked Article XXIV:12 of the GATT 1994 relating to the scope of a Member's obligation to ensure the observance of the provisions of the GATT 1994 by regional and local governments and authorities within its territory.

¹⁴⁶European Communities' submission, para. 87.

(d) Related Measures

90. Finally, with respect to the fines imposed through Presidential Decree 3.179 as amended by Presidential Decree 3.919 and the application of Portaria DECEX 8/1991 to the importation of retreaded tyres¹⁴⁷, I note that Brazil has not requested a particular period of time to bring these measures into conformity with the recommendations and rulings of the DSB. I consider that these measures are accessory to and dependent upon the measures discussed above. Therefore, I am of the view that they can also be brought into compliance within the period of time specified below.

IV. Award

91. In the light of the above considerations, I determine that the reasonable period of time for Brazil to implement the recommendations and rulings of the DSB in this dispute is 12 months from the date of adoption of the Panel and Appellate Body Reports. The reasonable period of time will thus end on 17 December 2008.

Signed in the original at Tokyo this 20th day of August 2008 by:

Yasuhei Taniguchi
Arbitrator

¹⁴⁷See European Communities' submission, para. 45.