Brazil – Measures Affecting Imports of Retreaded Tyres

(WT/DS332)

Oral Statement of the United States at the Third Party Session of the First Substantive Meeting of the Panel with the Parties

July 6, 2006

Mr. Chairman, members of the Panel:

1. I am pleased to appear before you today to present the views of the United States as a third party to this proceeding. In its third party submission, the United States focused on two legal issues: the proper analysis of "necessity" under Article XX(b) of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), and Brazil's argument that the discriminatory application of the measures only to Members that are not parties to Mercosur is permitted under GATT 1994 Article XXIV:5. In today's statement, the United States will focus on Brazil's Article XX(b) argument and certain additional issues discussed in submissions by other third parties to this proceeding and the *amicus curiae* submission of Humane Society International.

2. The EC argues – and Brazil does not dispute – that Brazil's ban on importation of retreaded tires is inconsistent with GATT 1994 Article XI, and that certain additional restrictions imposed at the federal and state level are inconsistent with GATT 1994 Articles XI and III:4. Thus, the question remains as to whether Brazil's measures are nonetheless permissible under GATT 1994 Article XX.

3. Brazil asserts that the import ban is "necessary to protect human, animal or plant life or health," and that it satisfies the requirements of the chapeau to Article XX. As discussed in the

U.S. third party submission, certain aspects of Brazil's analysis of its measures under Article XX(b) do not accord with a proper interpretation of that provision. In particular, the United States disagrees with Brazil's arguments that disposal obligations imposed on domestic producers are relevant to establishing necessity, that the EC bears the burden of proof in establishing that the alternative measure it described is reasonably available, and that the test under Article XX(b) is whether any such alternative measure must be less trade restrictive.

4. In addition to these legal issues, as the EC, Japan,[1] and Korea[2] have observed, Brazil's characterization of the effect of the import ban raises several important factual questions. These questions may also bear on the Panel's analysis of the measures under Article XX(b).

5. While Brazil asserts that "[f]or every retreaded tyre that is not imported into Brazil, there is one more used tyre that is collected in Brazil and retreaded,"[3] it elsewhere says that retreaded tires in Brazil are often derived from *imported* used tires.[4] Therefore, the ban may not result in retreading of additional domestic used tires but may simply increase the number of used tires being imported and retreaded in Brazil. As a result, Brazil may have the same number of tires to dispose of as it would without the ban. Furthermore, while Brazil argues that "a retreaded tyre has a shorter lifespan than a new tyre" because new passenger car tires can be retreaded only once,[5] it also acknowledges that most new passenger car tires produced in Brazil are not in fact

[1] *Third Party Submission of Japan*, 19 June 2006, paras. 31-33.
[2] *Third Party Submission by the Republic of Korea*, 19 June 2006, para. 12.
[3] *First Written Submission of Brazil*, 27 April 2006, para. 107.
[4] *Id.*, para. 153.
[5] *Id.*, para. 16.

retreaded,[6] and therefore, under Brazil's reasoning, typically have a lifespan comparable to that of a retreaded tire. Brazil also acknowledges that a retreaded truck tire can be retreaded several times;[7] therefore, it does not necessarily have a shorter lifespan than a new tire.

6. Given these various assertions, even if one accepts for the sake of argument that a reduction in waste tires is a relevant test for Article XX(b) purposes, it is unclear whether the ban in fact results in an appreciable reduction in waste tires, as Brazil asserts. Should the Panel conclude that the ban does not in fact result in an appreciable reduction in waste tires, this factor may appropriately weigh against a finding that the measure is "necessary": the ban would not contribute appreciably to the end pursued.[8] Similarly, such a conclusion may also, as Korea suggests, indicate that the measure does not fall within the range of policies designed to protect human, animal or plant life or health.

7. Finally, with respect to the *amicus curiae* submissions received by the Panel, pursuant to the authority given to the Panel under DSU Article 12 to establish its own working procedures, the Panel may consider these submissions to the extent they are relevant to issues in dispute in this proceeding. Should the Panel choose to consider the submission of Humane Society International in this proceeding, the United States would like to clarify one reference to a statement made by the U.S. Environmental Protection Agency (EPA). The statement, which

[6] *Id.*, para. 79.
[7] *Id.*, para. 16.
[8] *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006, para. 74 (in context of Mexico's Article XX(d) defense, stating that "a measure that is not suitable or capable of securing compliance", or whose design does not "contribute 'to secur[ing] compliance,' is not "necessary").

appears in paragraph 10 of the Humane Society submission, describes certain "downsides" to exporting "scrap tires". The United States would like to note that it does not consider marketable retreaded tires to be "scrap tires"; therefore, the EPA statement does not relate to the exportation of the products subject to the measures at issue in this dispute.

8. Mr. Chairman, this concludes our statement. Thank you for your attention.