Brazil – Measures Affecting Imports of Retreaded Tyres

(AB-2007-4)

Third Participant Submission of the United States

September 28, 2007

BEFORE THE

WORLD TRADE ORGANIZATION

APPELLATE BODY

Brazil – Measures Measures Affecting Imports of Retreaded Tyres

(AB-2007-4 / DS332)

THIRD-PARTICIPANT SUBMISSION OF THE UNITED STATES

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Table of Contents

I. INTRODUCTION AND EXECUTIVE SUMMARY 1

II. ARGUMENT 1
- A. The Panel's Assessment of the Mercosur Exemption For Purposes of GATT 1994 Article XX(b) Is Flawed 1
  - 1. The Panel Improperly Disregarded the Mercosur Exemption in its "Necessity" Analysis 1
  - 2. The Panel's Evaluation of the Mercosur Exemption for Purposes of the Chapeau to Article XX Is In Error 3
- B. In the Event the Appellate Body Reaches EC Claims Regarding Articles I and XIII, Any Reliance by Brazil on Article XXIV of the GATT 1994 is Misplaced 5

III. CONCLUSION 6

Table of Reports Cited

EC – Asbestos (AB)	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/AB/R, adopted 5 April 2001
US – Gasoline (Panel)	Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, adopted 20 May 1996, as modified by the Appellate Body Report, WT/DS2/AB/R
US – Gasoline (AB)	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. The United States welcomes this opportunity to provide its views on certain issues raised in this appeal. While continuing to express no view as to whether, under the facts of this dispute, the measures at issue are consistent with the WTO Agreement, the United States makes this third-participant submission in order to provide its views on certain issues raised in the Appellant Submission of the European Communities ("EC"), in particular the manner in which the Panel considered the exemption of Mercosur importers in its analysis under Article XX of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994").

2. First, the United States agrees with the EC that, in a number of respects, the manner in which the Panel considered the exemption of Mercosur countries from the ban on retreaded tires for purposes of its GATT 1994 Article XX analysis was in error. The Panel improperly disregarded the Mercosur exemption in its "necessity" analysis. Second, the Panel's evaluation of the Mercosur exemption for purposes of the chapeau to Article XX contains a number of errors, including in its consideration of the volume of trade from Mercosur countries and the significance it attaches to the fact that the exemption was adopted following a decision by a Mercosur tribunal. Finally, should the Appellate Body reach the EC's claims under Articles I and XIII, the United States submits that Brazil may not rely on GATT 1994 Article XXIV as a defense. Mercosur has not been notified under GATT 1994 Article XXIV as a customs union within the meaning of that provision, as required by GATT 1994 Article XXIV:7. Members that opt not to subject a customs union of which they are a part to the procedures contained in Article XXIV and the Understanding through the formal notification process are not entitled to invoke that provision as a waiver of the WTO obligations it addresses.

II. ARGUMENT

A. The Panel's Assessment of the Mercosur Exemption For Purposes of GATT 1994 Article XX(b) Is Flawed

3. The United States agrees with the EC that, in a number of respects, the manner in which the Panel considered the exemption of Mercosur countries from the ban on retreaded tires for purposes of its Article XX analysis was in error.

1. The Panel Improperly Disregarded the Mercosur Exemption in its "Necessity" Analysis

4. In proceeding to examine factors for consideration in its "necessity" analysis under Article XX, the Panel stated that it would not "consider situations in which the ban does not apply (i.e. the exemption of MERCOSUR importers)", because (citing the Appellate Body report in *US – Gasoline*) "what is to be reviewed under the paragraph of Article XX that is being invoked, is the specific measure that has been found inconsistent with other GATT provisions in the first place."[1] Yet, as both the EC and Brazil appear to have recognized during the panel

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[1] Panel Report, para. 7.106-107.

proceedings, the Mercosur exemption is contained in Portaria SECEX 14/2004, and in its report, the Panel found that very measure inconsistent with Article XI:1 of GATT 1994.[2]

5. Having found Portaria SECEX 14/2004 inconsistent with Article XI:1, the Panel was obliged to determine whether Brazil had established that the measure – Portaria SECEX 14/2004 – is justified under GATT 1994 Article XX, including by considering the aspect of the measure pertaining to the Mercosur exemption in its assessment of the factors relevant to establishing "necessity". The quotation from the Appellate Body report in *US – Gasoline* is inapposite. There, the Appellate Body stated that the entire Gasoline Rule was not the measure to be analyzed under Article XX, because only the baseline establishment rules of the Gasoline Rule were found by the panel to be inconsistent with Article III:4.[3] Here, the Panel's Article XI:1 findings regarding Portaria SECEX 14/2004 are not limited to some aspects of that measure, but rather encompass the entire document, and indeed, what the Panel elsewhere describes as the "principal current legal basis" of the ban is a single article that, in the same sentence, contains the exemption.[4] Nor is it evident from the Panel's findings that there exists a factual basis to distinguish the provision addressing the exemption from the provision setting forth the ban for purposes of identifying the "measure" complained of and found in breach of Article XI:1. While the United States does not express a view in this submission as to whether the particular facts of this case would support the conclusion that Brazil's measures are "necessary", the United States agrees with the EC that the Panel should have considered the fact that retreaded tires continue to be imported due to the Mercosur exemption in its assessment of the contribution of the measure to the end pursued, and that its failure to do so was inconsistent with its obligation to provide an objective assessment of the facts pursuant to DSU Article 11.[5]

6. The United States notes, however, that it does not agree with the EC's apparent position that the contribution of the measure to the end pursued must be evaluated quantitatively,[6] or that demonstrating a contribution requires "verifiable" evidence of whether the measure "actually" contributed to the end pursued.[7] While the United States agrees that mere speculation is not a sufficient basis for establishing that a measure is necessary to achieve its Article XX(b) objective, qualitative evidence may be relevant to assessing the contribution, and there is no basis under Article XX(b) to suggest that only quantitative evidence may be used to establish necessity, or even that such evidence is preferable to qualitative evidence. In *EC – Asbestos*, the Appellate Body stated, in response to Canada's argument that "risk" must be quantified, that "as with the *SPS Agreement*, there is no requirement under Article XX(b) of the GATT 1994 to quantify, as such, the risk to human life or health. A risk may be evaluated either in quantitative

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[2] Panel Report, para. 7.15.

[3] *US – Gasoline (AB)*, p. 13; *US – Gasoline (Panel)*, para. 8.1.

[4] Panel Report, para. 7.114. *See* Portaria SECEX 14/2004, Article 40 (Exhs. EC-29 and 31).

[5] *Appellant's Submission by the European Communities* (September 10, 2007) ("EC Appellant Submission"), para. 194.

[6] EC Appellant Submission, para. 173-74.

[7] EC Appellant Submission, para. 172-73.

or qualitative terms."[8] Similarly, Article XX(b) does not contain a requirement to quantify "necessity," and both quantitative and qualitative evidence may be relevant to necessity analysis, including an analysis of the contribution of the measure to the end pursued. Thus, for example, in *EC – Asbestos*, in considering the level of protection sought by the EC, the Appellate Body stated that "By prohibiting all forms of amphibole asbestos, and by severely restricting the use of chrysotile asbestos, the measure at issue is clearly *designed and apt to achieve* that level of health protection" chosen by the EC.[9] It did not require quantitative analysis to support this conclusion. Even if, as the EC argues, the question of whether waste tires would be reduced by the measure "can be answered empirically or by using economic methods," and that the issue of risk in *EC – Asbestos* could not, this does not support the conclusion that the former *must* be answered in this manner, or that Brazil was required to put forth "verifiable" evidence demonstrating that waste tires were in fact reduced as a result of the measure.

2. The Panel's Evaluation of the Mercosur Exemption for Purposes of the Chapeau to Article XX Is In Error

7. The United States also agrees with the EC that there are a number of errors in the Panel's analysis of whether, with respect to the Mercosur exemption, the measure is applied in a manner that constitutes arbitrary or unjustifiable discrimination or a disguised restriction on international trade, for purposes of the chapeau to Article XX.[10] While the Panel correctly concluded that the exemption may be considered in its analysis of how the measure is applied (and therefore the mere fact that it is "foreseen in the very legal instrument containing the import ban itself" would not prevent the Panel from considering it for purposes of its chapeau analysis),[11] the manner in which it proceeded to evaluate the exemption is without basis in the text of Article XX.

8. First, in finding that the discrimination that resulted from the Mercosur exemption is not "arbitrary" discrimination, the Panel appeared to rely on the fact that the exemption was adopted to address a ruling by a Mercosur tribunal.[12] The United States agrees with the EC that the fact that the exemption was adopted for this reason does not support the conclusion that it does not constitute "arbitrary" discrimination.[13] The mere fact that a tribunal found that Brazil could not discriminate against its Mercosur partners is not a sufficient basis for concluding that Brazil's decision to discriminate against countries other than its Mercosur partners was not "arbitrary." Indeed, as the Panel acknowledges, the decision "only indicates that Brazil is required to adapt its internal legislation in light of the inconsistency found by the arbitral body" and "did not expressly provide for a particular course of action to implement the ruling."[14]

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[8] *EC – Asbestos (AB)*, para. 167.
[9] *EC – Asbestos (AB)*, para. 168 (emphasis added).
[10] EC Appellant Submission, paras. 312-352; Panel Report, paras. 7.281, 7.289, and 7.354.
[11] Panel Report, para. 7.237.
[12] Panel Report, para. 7.272.
[13] EC Appellant Submission, para. 318.
[14] Panel Report, para. 7.278.

9. More fundamentally, the Panel appears, without basis, to attach significance to the fact that the tribunal in question was convened pursuant to the Mercosur agreements. While "mak[ing] no determination as to whether MERCOSUR meets the requirements of Article XXIV in respect of customs unions" the Panel states that "this type of agreement is expressly recognized in Article XXIV."[15] As a factual matter, these two statements cannot be reconciled. Article XXIV does not "expressly recognize" *any and all* frameworks for Members to discriminate in favor of partners in customs unions or free trade areas, but rather recognizes particular agreements that meet the conditions specified therein. (As explained in Part II.B, below, Mercosur in fact does not meet the requirements of GATT 1994 Article XXIV.) Having made no findings as to whether Mercosur meets the terms of Article XXIV, the Panel could not conclude that Mercosur is a "type of agreement" "expressly recognized" in Article XXIV. This error infects the Panel's analysis throughout, as evidenced by its statement that its conclusions with regard to "arbitrary" discrimination are based on "the nature of the international agreement" and "of the ruling on the basis of which Brazil has acted."[16]

10. Second, in relying on the number of retreaded tires imported into Brazil from Mercosur countries as its basis for finding that the Mercosur exemption was not "unjustifiable" discrimination or a "disguised restriction on international trade," the Panel's analysis is flawed. With regard to these criteria, the Panel states that "If such imports were to take place in such amounts that the achievement of the objective of the measure would be significantly undermined, the application of the import ban in conjunction with the MERCOSUR exemption would constitute" unjustifiable discrimination or a disguised restriction on international trade.[17] The Panel then states that the volume of imports from Mercosur "appear not to have been significant," and that because "the measure's ability to fulfill its objective does not appear to have been significantly undermined" by imports from Mercosur, the exemption does not result in "unjustifiable discrimination" or a "disguised restriction on international trade."

11. As the EC correctly notes, the Panel fails to offer a meaningful analysis of what volume would be "significant" (other than to suggest, without analysis, that the volume of tires imported from the EC prior to the ban was "significant").[18] Furthermore, import volumes may change (and in fact the evidence suggests that imports from Mercosur have increased dramatically owing to the ban and exemption), and therefore simple reliance on this figure appears a dubious basis for the Panel's conclusion that the permitted imports will not "undermine" the objective of the measure. Fundamentally, under the chapeau, the Panel is obliged to evaluate whether "unjustifiable discrimination" or a "disguised restriction on international trade" exist, not simply whether the discrimination "undermines" the objective of the measure – the mere fact that the volume of tire imports that resulted from the Mercosur exemption was not significant as of 2004

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[15] Panel Report, para. 7.273.

[16] Panel Report, para. 7.283.

[17] Panel Report, para. 7.287 and 7.353.

[18] Panel Report, para. 7.288 and 7.354; EC Appellant Submission, para. 348.

begs the question of whether Brazil's discrimination in this manner was "unjustifiable" or whether it constitutes a "disguised restriction on international trade". The United States agrees with the EC that permitting Members to discriminate in favor of certain WTO Members, simply because the trade volume in question is not "significant" by some standard not articulated by the Panel, would have serious consequences for basic obligations of nondiscrimination fundamental to the WTO system.[19]

12. For these reasons, the United States agrees with the EC that the Panel's analysis of Portaria SECEX 14/2004 under the chapeau was improper.

B. In the Event the Appellate Body Reaches EC Claims Regarding Articles I and XIII, Any Reliance by Brazil on Article XXIV of the GATT 1994 is Misplaced

13. Should the Appellate Body reach the EC's claims under Articles I and XIII,[20] the United States submits that Brazil may not rely on GATT 1994 Article XXIV as a defense. The EC notes that, in its submissions to the panel, Brazil did not dispute that the application of import restrictions to tires from Members that are not parties to Mercosur is inconsistent with Article I:1 and Article XIII of the GATT 1994. Rather, it argued that the exemption of Mercosur parties from its import ban on retreaded tires is authorized under GATT 1994 Article XXIV:5,[21] which provides that "the provisions of [the GATT 1994] shall not prevent … the formation of a customs union or of a free-trade area."

14. However, Mercosur has not been notified under GATT 1994 Article XXIV as a customs union within the meaning of that provision, as required by GATT 1994 Article XXIV:7. The *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994*, which is an integral part of the GATT 1994,[22] makes clear that satisfaction of the notification requirement contained in Article XXIV:7(a) is a prerequisite to demonstrating that a regional arrangement is a customs union or free-trade area consistent with Article XXIV. As Members agreed in Article 1 of the Understanding, "Customs unions, free-trade areas, and interim agreements leading to the formation of a customs union or free-trade area, to be consistent with Article XXIV, must satisfy, *inter alia,* the provisions of paragraphs 5, 6, 7 and 8 of that Article." Failure to notify in accordance with paragraph 7 does not merely render a customs union inconsistent with that paragraph; rather, under paragraph 1 of the Understanding, such a customs union is not "consistent with Article XXIV" as a whole. Thus, the special

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[19] EC Appellant Submission, para. 351.
[20] EC Appellant Submission, para. 371.
[21] EC Appellant Submission, para. 370; Brazil First Submission, para. 163 *et seq*.
[22] See GATT 1994 para. 1(c)(iv).

provisions applicable to customs unions under Article XXIV, including paragraph 5, are not available to Brazil.[23]

15. This reading of Article XXIV is consistent with the text of that provision and the Understanding, both of which reflect the fact that, as an institutional matter, notification obligations are important components of the WTO agreements. Notification of a customs union under paragraph 7 triggers a comprehensive review process described in Article XXIV as well as the Understanding. Members that opt not to subject a customs union of which they are a part to the procedures contained in Article XXIV and the Understanding through the formal notification process are not entitled to invoke that provision as a waiver of the WTO obligations it addresses.

16. Rather than notifying the arrangement under Article XXIV, Mercosur parties notified the Mercosur treaty instruments pursuant to paragraph 4(a) of the Ministerial Decision of 28 November 1979 regarding "Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries" (the "Enabling Clause").[24] In notifying the agreement pursuant to paragraph 4(a) of the Enabling Clause rather than GATT 1994 Article XXIV:7(a), Mercosur parties identified the agreement as an "action to induce an arrangement" described in paragraphs 1, 2, and 3 of the Enabling Clause. Regional arrangements as defined in these provisions have different characteristics and are subject to different obligations than customs unions and free-trade areas described in Article XXIV.[25]

III. CONCLUSION

17. The United States appreciates the opportunity to provide its views in this appeal and hopes that its comments will be useful to the Appellate Body.

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[23] While the Mercosur countries have consented to, and are currently the subject of, a form of review in the Committee on Regional Trade Agreements, this process does not constitute notification consistent with paragraph 7 of Article XXIV. In the compromise reached between Members to initiate the review, Members, including Brazil, did not agree to conduct the review pursuant to the terms of paragraph 7.

[24] L/4903, adopted 28 November 1979, BISD 26S/203. *See* L/6985 (March 5, 1992) (notifying Mercosur agreements "in pursuance of paragraph 4(a) of the Ministerial Decision of 28 November 1979 regarding 'Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries', known as the Enabling Clause").

[25] Compare GATT 1994 Article XXIV to Enabling Clause, para. 2.