# *Brazil – Measures Affecting Imports of Retreaded Tyres*

**(WT/DS332)**

## ANSWERS OF THE UNITED STATES TO THE PANEL'S QUESTIONS TO THE THIRD PARTIES

**July 21, 2006**

**Q1. To the US: In paragraph 10 of your third party submission, you argue that the Understanding on the Interpretation of Article XXIV of GATT 1994 "makes clear that satisfaction of the notification requirement contained in Article XXIV:7(a) is a prerequisite to demonstrating that a regional arrangement is a customs union or free trade area consistent with Article XXIV". Could you please clarify:**

**(a) on what legal basis you claim that the legal consequence of a failure to notify an interim arrangement under Article XXIV:7(a) is to prevent a customs union member to demonstrate in a panel proceeding that the customs union in question is compatible with Article XXIV:5?**

1. The United States would like to note at the outset that it agrees with Chinese Taipei that, if the Panel concludes that the import ban and fines are not consistent with the provisions of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") identified by the EC, and further concludes that these measures are not permissible under Article XX(b), the Panel may exercise judicial economy with respect to Brazil's argument regarding GATT 1994 Article XXIV.

2. With regard to the Panel's question, paragraph 1 of the *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994* ("Understanding") provides that "[c]ustoms unions, free-trade areas, and interim agreements leading to the formation of a customs union or free-trade area, to be consistent with Article XXIV, must satisfy, *inter alia*, the provisions of paragraphs 5, 6, 7 and 8 of that Article." Therefore, in order to be consistent with Article XXIV, a customs union must satisfy the provisions of paragraph 7 of that article, which contains the notification obligation. Failure to notify in accordance with paragraph 7 does not merely render a customs union inconsistent with that paragraph; rather, under paragraph 1 of the Understanding, such a customs union is not "consistent with Article XXIV" as a whole. Thus, the special provisions applicable to customs unions under Article XXIV, including paragraph 5, are not available to it.

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

**(b) what is, in your view, the relevance of the fact that WTO Members agreed, as expressed in the terms of reference adopted for the examination of MERCOSUR, to examine MERCOSUR under Article XXIV of GATT 1994 (as well as the Enabling Clause), and that the examination of MERCOSUR has in fact been conducted under that provision?**

4. While the MERCOSUR countries have consented to, and MERCOSUR is currently the subject of, a form of review in the Committee on Regional Trade Agreements, this process does not constitute notification consistent with paragraph 7 of Article XXIV. In the compromise

reached between Members to initiate the review, Members, including Brazil, did not agree that such review was pursuant to the terms of paragraph 7.

5. Paragraph 7 of Article XXIV and the Understanding contain several requirements for Members notifying under that provision not specified in the terms of reference in the MERCOSUR review. For example, paragraph 7 includes the obligation to provide information to Members so that they may make reports and recommendations "as they may deem appropriate", and the obligation not to maintain or put into force a customs union agreement if the parties "are not prepared to modify it in accordance with" such recommendations. GATT 1994 Article XXIV:7. Likewise, the Understanding contains several additional provisions governing reviews of notifications made pursuant to paragraph 7, none of which are specified in the MERCOSUR terms of reference.

6. Thus, it would be inappropriate to view the MERCOSUR review as sufficient to satisfy the notification requirement contained in paragraph 7 of Article XXIV.

**(c) what is the relevance of the fact that MERCOSUR parties did notify the agreement, although under a separate provision?**

7. The fact that MERCOSUR parties notified the agreement pursuant to the Enabling Clause is irrelevant for purposes of determining whether MERCOSUR is a customs union consistent with Article XXIV. Nothing in the text of Article XXIV or the Understanding supports the conclusion that notification under the Enabling Clause satisfies the requirement to notify under paragraph 7 of Article XXIV.

**(d) can the fact that MERCOSUR is subject to examination before the CRTA be considered as satisfying the notification requirement?**

8. No. As noted above, in the compromise reached between Members, Members did not agree that such review was pursuant to the terms of paragraph 7, and that review is being conducted under terms of reference that are not the same as the text of Article XXIV and the Understanding.

**5. *To Korea:* Korea states in paragraph 38 of its written submission that "[T]he Article XX exceptions of the GATT 1994 can justify those measures that are inconsistent with the other provisions of the GATT 1994 and make them excusable, not consistent." What is the legal basis for the position that a GATT inconsistent measure that is 'excused' under Article XX cannot qualify as "laws or regulations which are not inconsistent with the provisions of [GATT 1994]".**

9. Without taking a position on whether the measure at issue satisfies the criteria in GATT 1994 Article XX, the United States offers the following observations. The chapeau to Article XX provides that "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of" the type of measures listed there. Thus, if a measure satisfies the criteria of Article XX, it may be adopted and enforced. In other words, there is no inconsistency with the GATT 1994. The question under the covered agreements is whether a measure is consistent or inconsistent. Nowhere does the GATT 1994 or the covered agreements refer to a measure as being "excused." There is no textual basis for establishing a third category of "excused" measures.

10. If Korea's position were accurate, then a number of consequences would flow which would appear to be difficult to reconcile with the plain text of Article XX, and the fact that Members may adopt and enforce measures meeting Article XX's criteria. For example, under Article 19.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*, a panel or the Appellate Body would be required to find that the measure, even though it satisfies the requirements of Article XX, is "inconsistent" with a covered agreement and therefore recommend that it be brought into conformity with the covered agreement. If a Member may maintain the measure, then how could it be required to bring it into conformity?