Unit VII: General Exceptions
International and Regional Trade Law:  
The Law of the World Trade Organization

Unit VII: General Exceptions

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Note that several AB and panel reports which develop the law of Article XX GATT or are relevant for its interpretation -- such as Asbestos, Korea Beef, or Gambling -- are reproduced in other units of the teaching materials.

**Supplementary Reading**

We included in the supplementary reading suggestions, reading on the national security exception in Article XXI GATT.


1. Legal Text

GATT 1994 Article XX: General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(a) necessary to protect public morals;

(b) necessary to protect human, animal or plant life or health;

(c) relating to the importations or exportations of gold or silver;

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopoly operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

(e) relating to the products of prison labour;

(f) imposed for the protection of national treasures of artistic, historic or archaeological value;

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

(h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;*

(i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to nondiscrimination;

(j) essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have
ceased to exist. The CONTRACTING PARTIES shall review the need for this subparagraph not later than 30 June 1960.
2. Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes (Thai Cigarettes (1990))

This report has been harshly criticized as “pro-trade” biased. Is the panel’s perspective on the “least trade restrictive” measure plausible?

Is the panel’s rejection of the WHO’s opinion justified and legitimate? Would a panel or the Appellate Body give the same reasoning and conclusion had the case been brought under the dispute settlement system of the WTO?

Did the panel adequately take into consideration the fact that Thailand was a “developing” country when it considered an advertisement ban as a less trade restrictive measure?

Summary of Facts

From: WTO Committee on Trade and Environment (CTE) Summary (WT/CTE/W/203)

Parties

Complainant: United States.
Respondent: Thailand.
Third Parties: The European Communities.

(...)

Main Facts

Under Section 27 of the 1966 Tobacco Act, Thailand prohibited the importation of cigarettes and other tobacco preparations, but authorized the sale of domestic cigarettes; moreover, cigarettes were subject to an excise tax, a business tax and a municipal tax. The United States complained that the import restrictions were inconsistent with Article XI:1, and considered that they were not justified by Article XI:2(c)(i), nor by Article XX(b). The United States also requested the panel to find that the internal taxes were inconsistent with Article III:2.

Thailand argued, inter alia, that the import restrictions were justified under Article XX(b) because the government had adopted measures which could only be effective if cigarette imports were prohibited and because chemicals and other additives contained in US cigarettes might make them more harmful than Thai cigarettes. Since the health consequences of the opening of cigarette markets constituted one of the major justifications for Thailand's cigarette import régime, Thailand requested the panel to consult with experts from the World Health Organization (WHO). On the basis of a memorandum of understanding between the parties, the panel asked the WHO to present its conclusions on technical aspects of the case, such as the health effects of cigarette use and consumption.

The WHO indicated that there were sharp differences between cigarettes manufactured in developing countries such as Thailand and those available in developed countries, which used additives and flavourings.1 Moreover, locally grown tobacco leaf was harsher and smoked with

1 Ibid., para. 52.
less facility than the American blended tobacco used in international brands. These differences were of public health concern because they made smoking western cigarettes very easy for groups who might not otherwise smoke, such as women and adolescents, and created the false illusion among many smokers that these brands were safer than the native ones which consumers were quitting. However, the WHO could not provide any scientific evidence that cigarettes with additives were less or more harmful to health than cigarettes without.


Chairman: Mr. Rudolf Ramsauer, Members: Mr. Pekka Huhtaniemi, Mr. Adrian Macey

http://www.wto.org/english/tratop_e/dispu_e/gt47ds_e.htm

II. FACTUAL ASPECTS

A. Restrictions on imports

6. Under Section 27 of the Tobacco Act, 1966, the importation or exportation of tobacco seeds, tobacco plants, tobacco leaves, plug tobacco, shredded tobacco and tobacco is prohibited except by licence of the Director-General of the Excise Department or a competent officer authorized by him. Section 4 of the said Act defines tobacco as "cigarettes, cigars, other tobacco rolled for smoking, prepared shredded tobacco including chewing tobacco". Licences have only been granted to the Thai Tobacco Monopoly, which has imported cigarettes on only three occasions since 1966, namely in 1968-70, 1976 and 1980.

B. Internal Taxes

7. Cigarettes are subject to the payment of an excise tax, a business tax and a municipal tax.

B. Article XI:1

16. The United States argued that since 1966 Thailand had implemented an import licensing régime for cigarettes which was inconsistent with Article XI. The Thai Tobacco Monopoly had imported cigarettes on only three occasions and the Government refused to consider import licence applications from any other entity. (…)

C. Exceptions to Article XI:1

(…)
(ii) **Article XX(b)**

21. **Thailand** contended that the prohibition on imports of cigarettes was justified by the objective of public health policy which it was pursuing, namely to reduce the consumption of tobacco which was harmful to health. It was therefore covered by Article XX(b). The production and consumption of tobacco undermined the objectives set out in the Preamble of the General Agreement which were: to raise the standard of living, ensure full employment and a large and steadily growing volume of real income and effective demand, develop the full use of the resources of the world and expand the production and exchange of goods. Instead, smoking lowered the standard of living, increased sickness and thereby led to billions of dollars being spent every year on medical costs, which reduced real income and prevented an efficient use being made of resources, human and natural. The production of tobacco had not altogether been prohibited in Thailand because this might have led to production and consumption of narcotic drugs having effects even more harmful than tobacco, such as opium, marijuana and kratom (a plant with fragrant yellow flowers and intoxicating leaves). Historically, the manufacturing of cigarettes in Thailand had been aimed at providing a legal substitute for narcotic products which were themselves outlawed. Cigarette production in Thailand was a state-monopoly under the Tobacco Act, because the government felt the need to have total control over such a product which, even though legal, could be extremely harmful to health. A main objective of the Act was to ensure that cigarettes were produced in a quantity just sufficient to satisfy domestic demand, without increasing such demand. While a certain quantity of foreign cigarettes was smuggled into Thailand, this was unlikely to be done without the manufacturers' consent, since prior to the total ban on cigarette advertising which had been implemented on 10 February 1989, foreign cigarette manufacturers had advertised on Thai television, in mass circulation newspapers and on billboards. Indirect advertising had also taken place and the logos of cigarette manufacturers had appeared on clothing and many other non-tobacco products.

22. The **United States** noted the intent of the drafters of the General Agreement that measures which a contracting party seeks to justify under the provisions of Article XX(b) should reflect similar domestic safeguards. The drafting history of Article XX(b) indicated that the language in the preamble to Article XX stating that measures not be disguised restrictions on international trade had this meaning in the context of Article XX(b). The United States further noted that safeguards comparable to an import prohibition did not exist with respect to domestic cigarettes.

23. The **United States** noted that a recent panel had found that a contracting party could not justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is also available to it. It had also found that in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions. The United States considered that Thailand, like other contracting parties, could pursue the objective of seeking to prevent the increase in the number of smokers without imposing a ban on imports. The experience of other countries had shown that decreases in the level of smoking resulted from diminished demand achieved through education and the recognition of the effects of smoking rather than restraints on the availability of cigarettes. Moreover, the United States considered that Thailand, like other contracting parties, could pursue the objective of seeking to prevent the increase in the number of smokers without imposing a ban on imports. The experience of other countries

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1 Panel report on "United States - Section 337 of the Tariff Act of 1930", paragraph 5.26 (L/6439).
had shown that decreases in the level of smoking resulted from diminished demand achieved through education and the recognition of the effects of smoking rather than restraints on the availability of cigarettes. Moreover, the United States considered that Thailand could not argue that the ban on imports was necessary to protect human life or health since domestic production, sales and exports of cigarettes and tobacco remained at high levels. (…) 

24. Thailand replied that the exception contained in Article XX(b) reflected the recognition that public health protection is a basic responsibility of governments. With the support of non-governmental organizations, the Thai government had taken action to control smoking by, inter alia:

- adopting a comprehensive national programme for the control of tobacco use;
- establishing a body, the National Committee for Control of Tobacco Use (NCCTU), to implement the national programme;
- imposing a total ban on direct and indirect advertising of cigarettes in all media, legally enforced under the authority of the Consumer Protection Act;
- informing the general public about the dangers of smoking;
- requiring the printing of seven rotatory health warnings on the packages of cigarettes, in accordance with the Consumer Protection Act;
- prohibiting smoking in all public transport, health establishments and other public places;
- improving data collection on smoking and health;
- promoting research on smoking and health.

25. Most recently, on 6 March 1990, the Thai Cabinet had decided to attack the problem of smoking on both the supply and demand sides by instructing the relevant authorities to:

- reduce the production of cigarettes on a continuous basis;
- reduce the area where tobacco is grown;
- set aside funds to be used by the NCCTU in its anti-smoking campaign;
- encourage academic institutions in their role of expressing or reflecting public opinion on cigarette smoking;
- prohibit exports of cigarettes.

26. According to Thailand, the smoking rate among the Thai population over 10 years of age declined from 30.1 per cent in 1976 to 27.8 per cent in 1981, 26.4 per cent in 1986 and 25 per cent in 1988. In addition per capita consumption of tobacco declined at a rate of 2.2 per cent a year between 1974-76 and 1984-86. Aggregate consumption had increased at an average annual rate of 1.1 per cent in 1984-86 but this was largely accountable to increase in population and a higher standard of living which had encouraged smokers, particularly in rural areas, to switch
from self-rolled cigarettes and traditional tobacco products to manufactured cigarettes. At the same time, while total cigarette production in Thailand was still growing, the annual growth rate had fallen from 2.8 per cent to 2.72 per cent in recent years.

27. Thailand argued that while competition had desirable effects in international trade in goods, this did not apply to cigarettes. Governments in many countries, including the United States and Thailand, tried to discourage or control tobacco and cigarette consumption. Competition would lead to the use of better marketing techniques (including advertising), a wider availability of cigarettes, a possible reduction of their prices, and perhaps improvements in their quality. This might have the undesirable effect of leading to an increase in total consumption, especially among women and the young, which would run contrary to public health objectives. Some American cigarettes were specifically targeted at women of whom only 3.5 per cent smoked in Thailand compared to 30 per cent in Western countries. A recent report of the Council on Scientific Affairs of the American Medical Association stated that at a time when cigarette smoking is falling in developed nations, it is increasing in Africa, Latin America and Asia as tobacco companies seek new markets. According to this report, the United States leads the world in tobacco exports, and its cigarette exports to Asia had increased by 75 per cent in 1988 alone. Since the health consequences of the opening of cigarette markets constituted one of the major justifications for Thailand's cigarette import régime, Thailand deemed it necessary that the panel consult with experts from the World Health Organization (WHO) on recent experience in countries which had been made to open their markets for cigarettes. This showed that once a market was opened, the United States cigarette industry would exert great efforts to force governments to accept terms and conditions which undermined public health and governments were left with no effective tool to carry out public health policies. Advertising bans were circumvented and modern marketing techniques were used to boost sales. Hence, Thailand was of the view that an import ban was the only measure which could protect public health. Any other measure which allowed imports in any amounts would not be effective.

28. Thailand also argued that cigarettes manufactured in the United States may be more harmful than Thai cigarettes because of unknown chemicals placed by the United States cigarette companies in their cigarettes, partly to compensate for lower tar and nicotine levels. United States cigarette companies also used other additives which increased the health risks of smoking. One such additive was cocoa, which according to one study increased the risk of cancer. Others included deer tongue, ethyl butyrate, linalyl acetate, isooamyl acetate, 2,3,5 trimethyl and pyrazine. According to the United States Surgeon-General's 1984 report, "a characterization of the chemical composition and adverse biological potential of these additives is urgently required, but is currently impossible because cigarette companies are not required to reveal what additives they employ in the manufacture of tobacco" (USDHHS, 1984). According to Thailand, some United States cigarettes contained nicotine which was extracted from tobacco leaf, resprayed back into the leaf as part of a process called "reconstituting" the tobacco. Re-adding nicotine in chemical form to tobacco leaf may make United States cigarettes different from Thai cigarettes in the strict sense of the word and make them more addictive, since it could make inhalation easier and absorption of nicotine by the bloodstream and the brain more efficient.

29. The United States replied that the health hazards of smoking had been the subject of extensive documentation in a number of countries. The existence of such hazards was not the real issue in this dispute. The United States did not believe that Thailand had established that its import ban served the purpose of protecting public health or that such a measure was necessary to accomplish that purpose. The Thai Tobacco Monopoly produced at least 15 brands of cigarettes appealing to all types of consumers. It had consciously attempted to imitate "American blend" cigarettes, clearly in response to perceived consumer demand. These "American-style" brands were
among the Monopoly's best sellers. Its distribution system was both extensive and well-established at the wholesale and retail levels. Few barriers were imposed to entry into the retail cigarette business. Currently, Thailand had over 40,000 licensed cigarette retailers. The marketing techniques of the Thai Tobacco Monopoly were as effective as those of American manufacturers. A decision had been adopted by the Thai Cabinet to reduce cigarette production until 6 March 1990, i.e. after the United States had requested the establishment of the panel. In the past, the Thai Tobacco Monopoly had ignored earlier Cabinet decisions. For example, it had not implemented the six labelling requirements mentioned by Thailand and was negotiating with the government to weaken two of them. Moreover, three major expansion plans had been initiated by the Thai Tobacco Monopoly between July 1987 and January 1990, despite government policy, and new orders had been placed for machinery which would enable the Monopoly to increase its production by 10 billion cigarettes in 1991. While the Ministry of Agriculture had been instructed in January 1988 to formulate a plan for reducing tobacco acreage, this was not relevant to the object of the dispute which was cigarettes. Furthermore, Thailand had not presented any information on a concrete plan to decrease acreage and Thai statistics showed, if anything, that tobacco acreage increased, rather than decreased, in the 1988/1989 season.

30. According to the United States, the reasons identified by Thailand for the increasing consumption of cigarettes, namely a switch from traditional tobacco products to manufactured cigarettes were of declining importance as the economic situation of Thailand changed. Increased availability would lead to increased consumption if there was demand that was not currently satisfied. Thus, as had happened in other Asian markets which had recently liberalized import policies, opening the Thai market would lead to a shift in consumption from the Thai Tobacco Monopoly cigarettes to imported products, rather than to an increase in total demand. If the real issue was over advertising and concern over the creation of new customers and new demand, that problem should be addressed directly and not through a GATT-inconsistent import prohibition. The United States could not accept the view that the import ban on cigarettes was justified because of the lack of an alternative tool to carry out public health policy effectively. Any measures that could be taken in pursuance of such objectives should be taken on a national treatment basis.

31. The United States denied that its cigarettes raised special health concerns. Indeed, the Thai government had recognized that United States and other foreign cigarettes were less harmful than Thai cigarettes because of their significantly lower tar and nicotine content. Cigarettes exported from the United States were the same product as the ones sold in the United States. Their ingredients had been disclosed to the Department of Health and Human Services since 1985, in pursuance of the Federal Cigarette Labelling Act. That Department had raised no issue with any of the items on the list of ingredients that had been reported each year. None of the other countries, such as the United Kingdom, France and the Federal Republic of Germany, which also required disclosure of ingredients, had raised problems with ingredients in United States cigarettes. Thailand, however, had no regulations or restrictions on ingredients or flavourings used in cigarettes. The United States noted that the Thai Government admitted that the Thai Tobacco Monopoly used additives in its cigarettes. With respect to the ingredients that the Thai Government cited as raising health concerns, the United States noted that the US cigarette industry, unlike the Thai Tobacco Monopoly, did not use deer tongue, also known as coumarin. The Thai Tobacco Monopoly also purchased cocoa which it used as flavouring and which was on the list of approved ingredients of every country that maintained one. It was also a substance frequently consumed as food or beverage. 2,3,5 trimethyl was a flavoured aroma ingredient commonly used in food products and approved by the US Food and Drug Administration. Reconstituted tobacco had less nicotine than full leaf tobacco and the Thai Tobacco Monopoly intended to use this technique in the future. According to independent studies, tar and nicotine levels in Thai cigarettes were higher than in foreign cigarettes illegally imported into Thailand.
While it was true that United States cigarette exports to Asia had increased in recent years, this increase, which was due to the dismantling of monopolies in several countries, had been from a zero base which explained the high percentage increase in exports.

32. Thailand replied that it had never recognized that foreign cigarettes were less harmful than Thai cigarettes. Even though their tar and nicotine contents might be lower, they were more addictive than Thai cigarettes because smokers tended to consume a higher number of low tar and nicotine cigarettes, in order to obtain the amount of nicotine to which they were used. Artificial flavourings and other ingredients were added to low tar/nicotine cigarettes to compensate for the milder taste of such cigarettes. Thailand, like the United States, had regulations on ingredients and flavourings. The Thai Tobacco Monopoly was required by a Cabinet resolution of February 1990 to disclose the ingredients of its cigarettes to the Ministry of Public Health. This Ministry had requested the Ministry of Finance, which supervised the Thai Tobacco Monopoly to instruct it to reduce or eliminate three of the ingredients which were considered particularly dangerous to health. Some of these, such as cocoa could be harmless when eaten or drunk, but could be carcinogenic when burned. While it was true that the list of additives to American cigarettes had been submitted to the Department of Health and Human Services since 1985, only a consolidated list of additives which was used by six manufacturers was submitted by these manufacturers, without identifying the brand (or brands) of cigarettes containing particular additives and without indicating the amount of each additive used. Thus, the nature of the information given to the Department of Health and Human Services limited the ability to conduct a thorough analysis of the potential health risks of additives. Canada had passed legislation requiring all cigarette manufacturers to disclose the additives they used, and as a result one leading United States manufacturer had withdrawn several of its brands from the Canadian market. Moreover, Thailand did not agree that cigarettes exported from the United States were the same product as those sold on the domestic market. Recent studies had shown that some foreign cigarettes sold in Asia contained a higher tar level than the same brands sold in Australia, Europe or the United States.

33. Thailand recognized that consumption of cigarettes had continued to rise in Thailand, in spite of the efforts by the government with the support of non-governmental organizations, because such campaigns took a long time to produce effects, as had been seen in the United States where consumption had continued to rise until 1981, even though the first anti-smoking campaign had been initiated in 1965. Thailand denied that the objective of its policy was to protect domestic production of cigarettes. A new factory had been built in the last 12 years and a number of plans to expand existing capacity had been rejected by the government. Any machinery installed in existing factories was only replacing equipment whose life-span had expired. While it was true that the Thai Tobacco Monopoly had delayed implementing the health warnings required by the Cabinet, and had tried to weaken two of them, it could not ignore cabinet resolutions and would have to enforce the warnings. Health considerations overrode any other policy objectives of the government. Thus, the Ministry of Finance had estimated that the importation of cigarettes would yield an extra revenue of baht 800 million (about US$30 million) per year which was a substantial sum for a developing country. However, the government had decided to forego this sum in deference to public health considerations.

34. Since May 1989 Thailand had resisted bilateral pressures, under Section 301 of the US Trade Act, to open its market for cigarettes, and faced the imminent threat of retaliation against Thai exports to the United States, valued at US$166 million. Even though exports were the linchpin of Thailand's economic success, such considerations had given way to health concerns. In the course of these bilateral pressures, the United States had made it clear that its objectives were not limited to market opening and national treatment on internal taxation but covered other areas, such as a
unilateral reduction of Thailand's import duty on cigarettes to zero, a low specific rate of excise tax on cigarettes (which when converted to an ad valorem basis, would work to the advantage of higher-value American cigarettes) and the right for manufacturers of foreign cigarettes to advertise and conduct point-of-sale promotion even though such a right was denied to manufacturers of domestically-produced cigarettes. Thailand therefore sought from the Panel a recommendation as to whether Thailand was required by GATT provisions to grant such concessions to the United States. Such a recommendation was necessary to protect the credibility of the multilateral dispute settlement mechanism. Thailand also sought from the Panel confirmation of its understanding that, in the event of its market for cigarettes being opened, its obligations with regard to the pricing, distribution, advertising, promotion and labelling of cigarettes were limited to providing national treatment for foreign cigarettes.

35. In the view of the United States, there was a marginal benefit to be gained from smoking low tar and nicotine cigarettes, rather than high tar and nicotine cigarettes. With respect to tobacco additives, it considered that there was no evidence that these additives had any adverse effects and referred the panel to the findings of the American Health Foundation which were annexed to the WHO submission. Moreover, Thailand's import prohibition had always affected all cigarettes and not simply those containing additives, many of which such as menthol were also used by the Thai Tobacco Monopoly. United States cigarette manufacturers complied with the labelling and disclosure requirements of United States law. Apart from cigarettes sold in countries where local content requirements resulted in United States companies manufacturing locally for domestic consumption through licensees, and in consequent variations in tar and nicotine levels, all other cigarettes exported from the United States were identical to the product sold on the domestic market. Unless Thailand amended the Tobacco Act of 1966 to eliminate the monopoly on the manufacture of cigarettes, foreign firms would have to supply the Thai market through imports. In the case of Canada, only 1 per cent of the market had been held by United States cigarette manufacturers prior to the introduction of a reporting requirement for additives. That did not change after the implementation of the requirement as much of US manufacturing and sales were effected through Canadian licensees. Some firms had expressed concern about the protection of their trade secrets and had considered that the size of the market did not justify continuing their export effort, especially as each Canadian province had enacted individual requirements thus atomizing the market. The United States denied that it was seeking anything other than the application of national treatment in measures taken by Thailand to control the consumption of cigarettes and objected to the Panel making recommendations on issues not raised by it, as these issues were outside the terms of reference of the Panel.

(...)
disease in developed nations. As far as Thailand was concerned, smoking-related cancer was not as high as in many other developing countries and was relatively low in comparison to more affluent countries. However, an increase in cigarette smoking would lead to an increase in mortality due to lung cancer and hypertension, which was already rising because of the increase in cigarette consumption which had occurred 10 to 20 years ago.

52. According to the representatives of the WHO, cigarette smoking was declining in industrialized nations at a rate of 1.1 per cent a year, but rising in developing countries by 2.1 per cent a year. Smoking prevalence was high among males in developing countries, but low among women and children. There were sharp differences between the cigarettes manufactured in developing countries such as Thailand and those available in developed countries. In Thailand like in other developing countries, the market was dominated by a state-owned monopoly which promoted smoking minimally, in the absence of competition. Locally grown tobacco leaf was harsher and smoked with less facility than the American blended tobacco used in international brands. Locally-produced cigarettes were unlike those manufactured in western countries in that sophisticated manufacturing techniques such as the use of additives and flavourings, or the downward adjustment of tar and nicotine were not generally available, or were primitive in comparison to the techniques used by the multinational tobacco companies. These differences were of public health concern because they made smoking western cigarettes very easy for groups who might not otherwise smoke, such as women and adolescents, and create the false illusion among many smokers that these brands were safer than the native ones which consumers were quitting. In Thailand, half of the tobacco crop was consumed in the form of hand-rolled cigars or cigarettes which yielded large amounts of nicotine and tar and were popular among the elderly. However, their use was fading as old people died. There was no indication that young women turned to manufactured cigarettes instead of the self-made ones which their elders had smoked. Approximately half of all tobacco was used in the manufacturing of cigarettes by the government-owned monopoly which had produced 30.4 billion cigarettes in 1987. An additional 1.5 billion cigarettes had been smuggled into the country the same year, and foreign cigarette companies had advertised these allegedly imported cigarettes on television and billboards despite the administrative ban on advertising which had been in effect prior to the legislative ban. Current adult smoking rates were 67 per cent for males and 6 per cent for females. The male rate had declined by 6 per cent since 1981. Adult per capita consumption had also declined from 1,100 cigarettes per person in the late 1970s to 900 in 1985. The per capita rate was far lower than in the United States where it stood at 3,200 per person per year. A major factor in the recent decline in per capita consumption of cigarettes in Thailand had been the adoption of recommended WHO smoking control policies by the small but growing Thai tobacco control programme which had recently secured passage of a law prohibiting all forms of tobacco advertising, including a ban on events sponsorship and forceful warning labels on packages. A number of events and numerous educational programmes had been held in Thailand on "World N Tobacco Day" by the Thai Anti-Smoking Group which had been critical of the Thai Government's support of tobacco and had acted independently of the Government. If the multinational tobacco companies entered the market, the poorly-financed public health programmes would be unable to compete with the marketing budgets of these companies, as had been the case in other Asian countries whose markets had been opened. As a result, cigarette consumption and, in turn, death and disease attributable to smoking would increase.

53. The representatives of the WHO stated that the use of additives in American cigarettes had increased greatly during the 1970s with the introduction of low-yield cigarettes. They were used to restore the lost flavour of the cigarette brought about by the reduction in tar and nicotine. The US Surgeon-General reports had concluded that the lowering of tar and nicotine had only a marginal benefit in contrast to quitting. Smokers of low-yield cigarettes had been found to increase their
consumption or to inhale more deeply. The health effects of cigarette additives were being analysed by the US Department of Health and Human Services which considered this task to be "enormously complex and expensive". Serious concerns about the presence in cigarettes of certain additives had been raised by the American Health Foundation which acted as a consultant to the Department of Health and Human Services on this issue. However, there was no scientific evidence that one type of cigarette was more harmful to health than another.

54. According to the WHO representatives, another major difference between manufacturers of American cigarettes and of Thai cigarettes was that the former designed special brands aimed at the female market. These cigarettes contained a much lower tar and nicotine level, thus making it easier for women to inhale the smoke. Some were also made to appeal to women by the addition of perfume or were made long and slender to suggest that smoking would result in thinness.

55. The WHO representatives stated that the experience in Latin America and Asia showed that the opening of closed cigarette markets dominated by a state tobacco monopoly resulted in an increase in smoking. Multinational tobacco companies had routinely circumvented national restrictions on advertising through indirect advertising and a variety of other techniques. However, one country outside Latin America and Asia had recently taken action to ban the utilization in advertising of brand imagery linked to tobacco products. Particularly concerned by the threats posed by advertising, the member states of WHO had adopted in May 1990, resolution WHO 43.16 which urged all member states:

"to consider including in their tobacco control strategies plans for legislation or other effective measures at the appropriate government level providing for:

...  

(c) progressive restrictions and concerted actions to eliminate eventually all direct and indirect advertising, promotion and sponsorship concerning tobacco;"

56. The representatives of the WHO stated that their organization had convened in 1982 an Expert Committee on "Smoking Control Strategies in Developing Countries" which had made a number of recommendations designed to reduce smoking. In particular, this Committee, many of whose recommendations had already been adopted in Thailand, had recommended to developing countries that all advertising and promotion of tobacco products be prohibited, including through the sponsorship of sporting events, that where tobacco is a commercial crop, its rôle be reduced in the economy through alternative use of land and labour for which the assistance of organizations within the UN system, such as FAO and the World Bank, would be sought. The same Committee had recommended to developed countries, inter alia, that any action possible be taken to curb activities aimed at promoting and selling tobacco products and that any exported tobacco products conform to standards obtaining in the exporting country in terms of health warnings, emissions and product information.

57. The representatives of WHO also stated that policies which raised the price of cigarettes, for instance through taxation, could result in a reduction in smoking. Studies showed that price elasticities were higher for younger smokers than for dependent ones. A recent study carried out in a developing country indicated that the price elasticity of smoking was higher in developing countries than in developed ones, thus making measures which raise the price of cigarettes, such as excise taxes, effective public health policy tools in such countries.
58. Responding to the submission of the WHO, the United States did not take issue with its statements regarding the effect of cigarette use or consumption on human health because this was within the WHO's area of recognized expertise. However, the United States took issue with some of the conclusions drawn by the WHO on the effect of lifting the import ban on cigarettes in Thailand as well as with the factual basis for these conclusions. The United States did not consider that the WHO was specially competent to address the "health consequences of the opening of the market for cigarettes" as requested by Thailand, but urged the Panel to limit the issues presented to the WHO to those aspects referred to in the Memorandum of Understanding between the parties (see paragraph 3 above).

59. On the question of additives contained in American cigarettes, the United States noted that the American Health Foundation had stated that for the great majority of agents in the list of tobacco additives contained in the 1988 report of the Independent Scientific Committee on Smoking and Health, they had no knowledge of adverse health effects. Nevertheless, some of the agents aroused concern.

60. The United States disagreed with the assertion that Thai cigarettes were unlike western cigarettes. In the view of the United States, the Thai Tobacco Monopoly had used additives and flavourings for some time and had imitated United States cigarettes with the help of imports of United States tobacco. While the equipment presently used by the Thai Tobacco Monopoly was not very modern, some of the machinery being purchased would permit the reconstitution of tobacco and the use of other modern cigarette manufacturing techniques. Neither did the United States agree with the view that prior to the imposition of the total ban on cigarette advertising, foreign companies had been advertising smuggled cigarettes. Some of the actions complained of could have been instances of trademark infringements or marketing of legitimate goods. Moreover, the Thai Tobacco Monopoly had been advertising its cigarettes during the period when the administrative ban had been in force. The United States noted that Thailand cited the figure of 3.5 per cent for the smoking rate among women whereas the WHO reported the figure of 6 per cent. While such statistics did not appear reliable, what seemed certain was that the level of production of cigarettes in Thailand was rising at a large and steady pace.

61. As to the effect of the lifting of restrictions on imports in other Asian countries, the United States considered that in these countries such restrictions as may have been implemented had not been effective in decreasing the level of consumption. In one of these countries consumption had declined after the cigarette market had been opened and had been accompanied by a shift in consumption from domestic to foreign cigarettes. In another country, the growth rate of consumption had slowed down after the market had been opened while in the third, consumption had not changed in the 18 months which had passed since the market had been opened. Comparisons between one of these countries and in particular Thailand were not appropriate because of developmental and cultural differences. It was therefore not accurate to draw the conclusion on the basis of the experience of these countries, that smoking among Thai women would increase as a result of opening of the Thai market.

62. The United States also stated that the 1989 Report of the United States Surgeon General had concluded that there was no scientifically rigorous study available to the public that provided a definitive answer to the basic question of whether advertising and promotion increase the level of tobacco consumption and that the extent of the influence of advertising and promotion on the level of smoking was unknown and possibly unknowable. ("Surgeon General, Reducing the Health Consequences of Smoking" 512-12(1989).) Even if it were accepted that advertising had an effect on the level of consumption of cigarettes, restrictions on advertising and fiscal measures to affect the price of cigarettes were available to control the level of consumption. Such measures could be
applied on the basis of national treatment and thus provide a GATT consistent measure of addressing the problem. The United States could not share the view that the Thai government and the anti-smoking lobby would not be able to resist the efforts of the foreign cigarette interests to permit the marketing practices that they opposed.

VI. FINDINGS

(...)

B. Restrictions on the Importation of Cigarettes

(i) Article XI:1

67. The Panel, noting that Thailand had not granted licences for the importation of cigarettes during the past 10 years, found that Thailand had acted inconsistently with Article XI:1, the relevant part of which reads:

"No prohibitions or restrictions ... made effective through ... import licences ... shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party ...".

(...)

(iii) Article XX(b)

72. The Panel proceeded to examine whether Thai import measures affecting cigarettes, while contrary to Article XI:1, were justified by Article XX(b), which states in part:

"... nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

... (b) necessary to protect human ... life or health".

73. The Panel then defined the issues which arose under this provision. In agreement with the parties to the dispute and the expert from the WHO, the Panel accepted that smoking constituted a serious risk to human health and that consequently measures designed to reduce the consumption of cigarettes fell within the scope of Article XX(b). The Panel noted that this provision clearly allowed contracting parties to give priority to human health over trade liberalization; however, for a measure to be covered by Article XX(b) it had to be "necessary".

74. The Panel noted that a previous panel had discussed the meaning of the term "necessary" in the context of Article XX(d), which provides an exemption for measures which are "necessary to secure compliance with laws or regulations which are not inconsistent" with the provisions of the General Agreement. The panel had stated that

"a contracting party cannot justify a measure inconsistent with other GATT provisions as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably
available to it, that which entails the least degree of inconsistency with other GATT provisions."(emphasis supplied)²

²Report of the panel on "United States - Section 337 of the Tariff Act of 1930" (L/6439, paragraph 5.26, adopted on 7 November 1989).

The Panel could see no reason why under Article XX the meaning of the term "necessary" under paragraph (d) should not be the same as in paragraph (b). In both paragraphs the same term was used and the same objective intended: to allow contracting parties to impose trade restrictive measures inconsistent with the General Agreement to pursue overriding public policy goals to the extent that such inconsistencies were unavoidable. The fact that paragraph (d) applies to inconsistencies resulting from the enforcement of GATT-consistent laws and regulations while paragraph (b) applies to those resulting from health-related policies therefore did not justify a different interpretation of the term "necessary".

75. The Panel concluded from the above that the import restrictions imposed by Thailand could be considered to be "necessary" in terms of Article XX(b) only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives. The Panel noted that contracting parties may, in accordance with Article III:4 of the General Agreement, impose laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of imported products provided they do not thereby accord treatment to imported products less favourable than that accorded to "like" products of national origin. The United States argued that Thailand could achieve its public health objectives through internal measures consistent with Article III:4 and that the inconsistency with Article XI:1 could therefore not be considered to be "necessary" within the meaning of Article XX(b). The Panel proceeded to examine this issue in detail.

76. The Panel noted that the principal health objectives advanced by Thailand to justify its import restrictions were to protect the public from harmful ingredients in imported cigarettes, and to reduce the consumption of cigarettes in Thailand. The measures could thus be seen as intended to ensure the quality and reduce the quantity of cigarettes sold in Thailand.

77. The Panel then examined whether the Thai concerns about the quality of cigarettes consumed in Thailand could be met with measures consistent, or less inconsistent, with the General Agreement. It noted that other countries had introduced strict, non-discriminatory labelling and ingredient disclosure regulations which allowed governments to control, and the public to be informed of, the content of cigarettes. A non-discriminatory regulation implemented on a national treatment basis in accordance with Article III:4 requiring complete disclosure of ingredients, coupled with a ban on unhealthy substances, would be an alternative consistent with the General Agreement. The Panel considered that Thailand could reasonably be expected to take such measures to address the quality-related policy objectives it now pursues through an import ban on all cigarettes whatever their ingredients.

78. The Panel then considered whether Thai concerns about the quantity of cigarettes consumed in Thailand could be met by measures reasonably available to it and consistent, or less inconsistent, with the General Agreement. The Panel first examined how Thailand might reduce the demand for cigarettes in a manner consistent with the General Agreement. The Panel noted the view expressed by the WHO that the demand for cigarettes, in particular the initial demand for cigarettes by the young, was influenced by cigarette advertisements and that bans on advertisement could therefore
curb such demand. At the Forty-third World Health Assembly a resolution was approved stating that the WHO is:

"Encouraged by ... recent information demonstrating the effectiveness of tobacco control strategies, and in particular ... comprehensive legislative bans and other restrictive measures to effectively control the direct and the indirect advertising, promotion and sponsorship of tobacco."1

1Forty-third World Health Assembly, Fourteenth plenary meeting, Agenda Item 10, 17 May 1990 (A43/VR/14; WHA43.16).

The resolution goes on to urge all member states of the WHO

"to consider including in their tobacco control strategies plans for legislation or other effective measures at the appropriate government level providing for:

(c) progressive restrictions and concerted actions to eliminate eventually all direct and indirect advertising, promotion and sponsorship concerning tobacco"1

A ban on the advertisement of cigarettes of both domestic and foreign origin would normally meet the requirements of Article III:4. It might be argued that such a general ban on all cigarette advertising would create unequal competitive opportunities between the existing Thai supplier of cigarettes and new, foreign suppliers and was therefore contrary to Article III:4.2 Even if this argument were accepted, such an inconsistency would have to be regarded as unavoidable and therefore necessary within the meaning of Article XX(b) because additional advertising rights would risk stimulating demand for cigarettes. The Panel noted that Thailand had already implemented some non-discriminatory controls on demand, including information programmes, bans on direct and indirect advertising, warnings on cigarette packs, and bans on smoking in certain public places.

79. The Panel then examined how Thailand might restrict the supply of cigarettes in a manner consistent with the General Agreement. The Panel noted that contracting parties may maintain governmental monopolies, such as the Thai Tobacco Monopoly, on the importation and domestic sale of products.3 The Thai Government may use this monopoly to regulate the overall supply of cigarettes, their prices and their retail availability provided it thereby does not accord imported cigarettes less favourable treatment than domestic cigarettes or act inconsistently with any commitments assumed under its Schedule of Concessions.4 As to the pricing of cigarettes, the Panel noted that the Forty-third World Health Assembly, in its resolution cited above, stated that it was:

"Encouraged by ... recent information demonstrating the effectiveness of tobacco control strategies, and in particular ... policies to achieve progressive increases in the real price of tobacco."

It accordingly urged all member states

"to consider including in their tobacco control strategies plans for ... progressive financial measures aimed at discouraging the use of tobacco"5
For these reasons the Panel could not accept the argument of Thailand that competition between imported and domestic cigarettes would necessarily lead to an increase in the total sales of cigarettes and that Thailand therefore had no option but to prohibit cigarette imports.

1 Forty-third World Health Assembly, Fourteenth plenary meeting, Agenda Item 10, 17 May 1990 (A43/VR/14; WHA43.16).

2 On the requirement of equal competitive opportunities, see the Report of the panel on "United States - Section 337 of the Tariff Act of 1930" (L/6439, paragraph 5.26, adopted on 7 November 1989).

3 Cf. Articles III:4, XVII and XX(d).

4 Cf. Articles III:2 and 4 and II:4.

5 Forty-third World Health Assembly, Fourteenth plenary meeting, Agenda Item 10, 17 May 1990 (A43/VR/14; WHA43.16).

80. The Panel then examined further the resolutions of the WHO on smoking which the WHO made available. It noted that the health measures recommended by the WHO in these resolutions were non-discriminatory and concerned all, not just imported, cigarettes. The Panel also examined the Report of the WHO Expert Committee on Smoking Control Strategies in Developing Countries. The Panel observed that a common consequence of import restrictions was the promotion of domestic production and the fostering of interests in the maintenance of that production and that the WHO Expert Committee had made the following recommendation relevant in this respect:

"Where tobacco is already a commercial crop every effort should be made to reduce its role in the national economy, and to investigate alternative uses of land and labour. The existence of a tobacco industry of any kind should not be permitted to interfere with the implementation of educational and other measures to control smoking."1

81. In sum, the Panel considered that there were various measures consistent with the General Agreement which were reasonably available to Thailand to control the quality and quantity of cigarettes smoked and which, taken together, could achieve the health policy goals that the Thai government pursues by restricting the importation of cigarettes inconsistently with Article XI:1. The Panel found therefore that Thailand's practice of permitting the sale of domestic cigarettes while not permitting the importation of foreign cigarettes was an inconsistency with the General Agreement not "necessary" within the meaning of Article XX(b).

(...)

Note that this is the very first case under the new WTO dispute settlement system. Note carefully the difference in rulings between the panel and the Appellate Body report. In this case, the Appellate Body created the so-called “chapeau” test.

Summary of Facts

From: WTO Committee on Trade and Environment (CTE) Summary (WT/CTE/W/203)

Main Facts

Following a 1990 amendment to the Clean Air Act, the Environmental Protection Agency (EPA) promulgated the Gasoline Rule on the composition and emissions effects of gasoline, in order to reduce air pollution in the United States and to ensure that pollution from the combustion of gasoline did not exceed 1990 levels. These rules were established to address the ozone and pollution damage experienced by large US cities, as a result, principally, of car exhaust fumes.

From 1 January 1995, the Gasoline Rule permitted only gasoline of a specified cleanliness ("reformulated gasoline") to be sold to consumers in the most polluted areas of the country. In the rest of the country, only gasoline no dirtier than that sold in the base year of 1990 ("conventional gasoline") could be sold.2 The Gasoline Rule applied to all US refiners, blenders and importers of gasoline.

The EPA regulation provided two different sets of baseline emissions standards.3 First, it required any domestic refiner which was in operation for at least six months in 1990 to establish an "individual baseline", which represented the quality of gasoline produced by that refiner in 1990. Second, EPA established a "statutory baseline", intended to reflect average US 1990 gasoline quality. The statutory baseline was assigned to those refiners who were not in operation for at least six months in 1990, and to importers and blenders of gasoline. The statutory baseline imposed a stricter burden on foreign gasoline producers.

Venezuela and Brazil claimed that the Gasoline Rule was prejudicial to their exports to the United States and that it favored domestic producers. Accordingly, the Gasoline Rule was inconsistent with Articles III and XXIII:1(b) of the GATT 1994, with Article 2.2 of the Agreement on Technical Barriers to Trade (TBT Agreement), and was not covered by Article XX.4 The United States argued that the Gasoline Rule was consistent with Article III, and, in any event, was justified under the exceptions contained in Article XX, paragraphs (b), (g) and (d), and that the Rule was also consistent with the TBT Agreement.5 The United States appealed the panel report but limited its appeal to the panel's interpretation of Article XX of the GATT 1994.

2 Ibid., Panel Report, para. 2.2.
3 Ibid., paras. 2.6, 2.8.
4 Ibid., paras. 3.1-3.2.
5 Ibid., para. 3.4.
II. FACTUAL ASPECTS

A. The Clean Air Act

2.1 The Clean Air Act ("CAA"), originally enacted in 1963, aims at preventing and controlling air pollution in the United States. In a 1990 amendment to the CAA6, Congress directed the Environmental Protection Agency ("EPA") to promulgate new regulations on the composition and emissions effects of gasoline in order to improve air quality in the most polluted areas of the country by reducing vehicle emissions of toxic air pollutants and ozone-forming volatile organic compounds. These new regulations apply to US refiners, blenders and importers.

2.2 Section 211(k) of the CAA divides the market for sale of gasoline in the United States into two parts. The first part, which covers approximately 30 percent of gasoline marketed in the United States, consists of the nine large metropolitan areas that experienced the worst summertime ozone pollution during the period 1987-1989, plus any areas that do not meet national ozone requirements and are added at the request of the governor of the state. These areas are referred to as ozone "nonattainment areas", and in this part of the United States only "reformulated gasoline" may be sold to consumers. In the rest of the United States, "conventional gasoline" may be sold to consumers.

B. EPA's Gasoline Rule

1. Establishment of Baselines

2.5 The CAA directed EPA to determine the quality of 1990 gasoline, to which reformulated and conventional gasoline would be compared in the future; these determinations are known as "baselines". EPA set historic baselines for individual entities, and established a statutory baseline, intended to reflect average US 1990 gasoline quality, which would be used instead of the historic individual baselines for those entities who were determined to be lacking adequate and reliable data regarding the quality of the gasoline they produced in 1990.

2.6 EPA's final rule2 ("Gasoline Rule") requires any domestic refiner, which was in operation for at least 6 months in 1990, to establish an individual refinery baseline, which represents the quality of gasoline produced by that refiner in 1990. The rule establishes three methods for the purpose of determining a domestic refiner's individual historic baseline. Under Method 1, the refiner must use the quality data and volume records of its 1990 gasoline. However, as

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acknowledged by EPA at the time, it was not anticipated that many domestic refiners would have all the data necessary to establish an individual baseline based entirely on actual 1990 data. If Method 1 type data are not available, a domestic refiner must use its 1990 gasoline blendstock quality data and 1990 blendstock production records (Method 2). In the event that neither one of these two methods is available, a domestic refiner must turn to Method 3 type data which consist of its post-1990 gasoline blendstock and/or gasoline quality data modeled in light of refinery changes to show 1990 gasoline composition. Domestic refiners are not permitted to choose the statutory baseline.

2.7 An importer which is also a foreign refiner must determine its individual baseline using Methods 1, 2 and 3 if it imported at least 75 percent, by volume, of the gasoline produced at its foreign refinery in 1990 into the United States in 1990 (the so-called "75 % rule")³.

2.8 Certain entities are, however, automatically assigned to the statutory baseline. Firstly, refineries which began operation after 1990 or were in operation for less than 6 months in 1990 are required to use the statutory baseline. Secondly, importers and blenders are assigned the statutory baseline unless they can establish their individual baseline following Method 1. If actual 1990 data are not available, which is, as for domestic refiners, anticipated by EPA, importers and blenders are assigned to the statutory baseline. EPA considers that blenders which produce gasoline by combining gasoline blendstocks purchased from many sources cannot determine with accuracy the quality of their 1990 gasoline using Methods 2 and 3. Similarly, EPA considers that importers cannot use Methods 2 and 3, because these methods inherently apply only to refineries and because of the extreme difficulty in establishing the consistency of their gasoline quality over time.

2. Reformulated Gasoline

2.9 Regarding the implementation of the regulations for reformulated gasoline, EPA proposes a two-step approach. From 1 January 1995 to 1 January 1998, EPA enforces an interim programme called the "Simple Model". Under this programme, reformulated gasoline sold in the United States by domestic refiners will be subject to requirements established with reference to the individual baseline for certain gasoline qualities and requirements specified in the Gasoline Rule for other gasoline qualities. More specifically, the parameters sulphur, olefins and T-90 are measured against each US refiner's individual 1990 baseline and must be maintained at or below these 1990 levels (these are called "non-degradation requirements"). The requirements regarding four other gasoline qualities (Reid Vapour Pressure, oxygen, benzene and toxics performance) are specified by EPA in the Gasoline Rule⁴. Importers of foreign gasoline also have to comply with the requirements set out in the final rule regarding Reid Vapour Pressure, oxygen, benzene and toxics performance. However, importers cannot use individual 1990 baseline for sulphur, olefins and T-90, but have to comply with levels specified in the statutory baseline for these parameters. Under the Simple Model, requirements for sulphur, olefins and T-90 must be met on an annual average basis. EPA adopted the individual baseline approach for these parameters in the Simple Model because at the time it was formulating its regulation, it considered that the available data regarding sulphur, olefins and T-90 did not permit an assessment of the precise effects of these components on the emissions level of gasoline. Given this uncertainty, EPA did not want to

³40 CFR 80.91(b)(ii).

⁴40 CFR 80.41.
require refiners immediately to make refinery changes which might later prove to be unnecessary, given the greater flexibility provided by the Complex Model.

2.10 As of 1 January 1998, EPA will enforce the "Complex Model", which will apply the same emissions reduction requirements to all producers of reformulated gasoline. The individual baselines for sulphur, olefins and T-90 will no longer apply.

3. Conventional Gasoline (or "Anti-Dumping Rules")

2.11 The 1990 Amendment to the CAA requires that, as of 1 January 1995, each refiner's, blender's or importer's conventional gasoline sold in the United States be no more polluting than the gasoline sold by that refiner, blender or importer in 1990. EPA requires domestic refiners to measure non-degradation requirements for conventional gasoline against their individual baselines while importers of foreign gasoline are assigned to the statutory baseline. However, in this programme, the non-degradation requirements apply to all conventional gasoline requirements, and not only to sulphur, olefins and T-90. Requirements must be met on an average annual basis. The Gasoline Rule limits ("caps") the volume of conventional gasoline that is subject to an individual baseline to the volume of gasoline produced in 1990 by that entity; all conventional gasoline produced in excess of the specific volume cap is measured against the statutory baseline.

2.12 Domestic refiners and importers of conventional gasoline, unlike those of reformulated gasoline, will still be subject to different baselines after the entry into force of the Complex Model in 1998.

C. The May 1994 Proposal

2.13 In view of the comments made by interested parties during the rulemaking process of the final Gasoline Rule, EPA proposed, in May 1994, to amend the reformulated gasoline regulation in order to define criteria and procedures by which foreign refiners could establish individual refinery baselines in a manner similar to that required for domestic refiners. Pursuant to this proposal, foreign refiners would be allowed to establish an individual baseline using Methods 1, 2 or 3. If the individual baseline was approved by EPA, importers could use it for the purpose of certifying the portion of reformulated gasoline imported from that particular refinery into the United States. However, the use of individual foreign refinery baselines would be subject to various additional strict requirements, aiming at ensuring the accuracy and respect of the foreign refinery's individual baseline with respect to gasoline shipped to the United States and verifying the refinery of origin. Furthermore, it would not apply to conventional gasoline. After a public comment period, the US Congress enacted legislation in September 1994 denying funding to EPA for implementation of the May 1994 Proposal.

(...)

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542 U.S.C. § 7545 (CAA 211(k)(8)).

VI. FINDINGS

A. Introduction

6.1 The Panel noted that the dispute arose from the following facts. The Clean Air Act aims to control and reduce air pollution in the United States. The Act and certain of its regulations (the “Gasoline Rule”) set standards for gasoline quality intended to reduce air pollution, including ozone, caused by motor vehicle emissions. From 1 January 1995, the Gasoline Rule permits only gasoline of a specified cleanliness (“reformulated gasoline”) to be sold in areas of high air pollution. In other areas, only gasoline no dirtier than that sold in the base year of 1990 (“conventional gasoline”) can be sold.

6.2 The Gasoline Rule applies to refiners, blenders and importers of gasoline. It requires that certain chemical characteristics of the gasoline in which they deal respect, on an annual average basis, defined levels. In the Gasoline Rule some of these levels are fixed; others are expressed as “non-degradation” requirements. Under the non-degradation requirements, each domestic refiner must maintain, on an annual average basis, the relevant gasoline characteristics at levels no worse than its “individual baseline” — that is, the annual average levels achieved by that refiner in 1990. To establish an individual baseline, a refiner must show evidence of the quality of gasoline produced or shipped in 1990 (“Method 1”). If that evidence is not complete, then it must use data on the quality of blendstock produced in 1990 (“Method 2”). If these two methods do not result in sufficient evidence, the refiner must also use data on the quality of post-1990 gasoline blendstock or gasoline (“Method 3”).

6.3 Importers are also required to use an individual baseline, but only in the case (unlikely, according to the parties to the dispute) that they are able to establish it using Method 1 data. Unlike domestic refiners, they are not allowed to establish an individual baseline by using the secondary or tertiary data specified in Methods 2 and 3. If an importer cannot produce Method 1 data, then it must use a “statutory baseline” which the United States claims is derived from the average characteristics of all gasoline consumed in the United States in 1990. Some other domestic entities (such as refiners with only partial or no 1990 operations, and blenders with insufficient Method 1 data) are also assigned the statutory baseline. Exceptionally, importers that imported in 1990 at least 75 percent of the production of an affiliated foreign refinery are treated as domestic refiners for the purpose of establishing baselines. Since this dispute concerns only the Gasoline Rule’s non-degradation requirements, and not reformulated and conventional gasoline as such, the Panel will refer generally to “gasoline” in the course of its findings.

6.4 Venezuela and Brazil claim that the Gasoline Rule violates the national treatment provisions of Article III:1 and 4 of the General Agreement and the most-favoured-nation provision of Article 1. Venezuela claims in the alternative that the Gasoline Rule has nullified and impaired benefits under the non-violation provisions of Article XXIII:1(b). Venezuela and Brazil also claim that the Gasoline Rule violates Article 2 of the Agreement on Technical Barriers to Trade (the “TBT Agreement”). The United States rejects these claims and argues that the Gasoline Rule can be justified under the exceptions contained in Article XX, paragraphs (b), (d) and (g), which argument is rejected by Venezuela and Brazil. It also argues that the Gasoline Rule does not come within the scope of Article 2 of the TBT Agreement.
B. Article III

1. Article III:4

6.5 The Panel proceeded to examine the claim that the Gasoline Rule violates Article III:4 of the General Agreement, which states:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

The Panel noted that under this provision the complainants are required to show the existence of: (a) a law, regulation or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution or use of an imported product; and (b) treatment accorded in respect of the law, regulation or requirement that is less favourable to the imported product than to the like product of national origin. The Panel agreed with the parties that the Gasoline Rule was a law, regulation or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution or use of an imported product. It proceeded therefore to consider whether the Gasoline Rule accorded less favourable treatment to imported products than to like products of national origin.

6.6 The Panel noted the arguments of Venezuela and Brazil that imported gasoline was “like” domestic gasoline, but received treatment less favourable because imported gasoline was subjected to more demanding quality requirements than gasoline of US origin. The United States replied that gasoline from similarly-situated parties was treated in the same manner under the Gasoline Rule. Gasoline from importers was treated no less favourably than that from other domestic non-refiners such as blenders, or refiners who had only limited or no operations in 1990.

6.7 The Panel observed that Article III:4 deals with treatment to be accorded to like products. However, the text does not specify exhaustively those aspects that determine whether the products are “like”. In resolving this interpretative issue the Panel referred, in conformity with Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, to the Vienna Convention on the Law of Treaties, which states in Article 31 that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. 25

6.8 The Panel proceeded to examine this issue in the light of the ordinary meaning of the term “like”. It noted that the word can mean “similar”, or “identical”. The Panel then examined the practice of the CONTRACTING PARTIES under the General Agreement. This practice was relevant since Article 31 of the Vienna Convention directs that “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” is also to be considered in the interpretation of a treaty. The Panel noted that various criteria for the determination of like products under Article III had previously been applied by panels. These were summarized in the 1970 Working Party Report on Border Tax Adjustments, which had observed:

With regard to the interpretation of the term ‘like or similar products’, which occurs some sixteen times throughout the General Agreement, it was recalled that considerable discussion had taken place . . . but that no further improvement of the term had been achieved. The Working Party concluded that problems arising from the interpretation of the terms should be examined on a case-by-case basis. This would allow a fair assessment in each case of the different elements that constitute a ‘similar’ product. Some criteria were suggested for determining, on a case-by-case basis, whether a product is ‘similar’: the product's end-uses in a given market; consumers' tastes and habits, which change from country to country; the product's properties, nature and quality.26

These criteria had been applied by the panel in the 1987 Japan Alcohol case in the examination under Article III:2 of internal taxation measures. That panel had proceeded on a case-by-case basis, determining whether various alcoholic beverages were “like” on the basis of “their similar properties, end-uses and usually uniform classification in tariff nomenclatures.”27 The Panel considered that those criteria were also applicable to the examination of like products under Article III:4.

6.9 In light of the foregoing, the Panel proceeded to examine whether imported and domestic gasoline were like products under Article III:4. The Panel observed first that the United States did not argue that imported gasoline and domestic gasoline were not like per se. It had argued rather that with respect to the treatment of the imported and domestic products, the situation of the parties dealing in the gasoline must be taken into consideration. The Panel, recalling its previous discussion of the factors to be taken into account in the determination of like product, noted that chemically-identical imported and domestic gasoline by definition have exactly the same physical characteristics, end-uses, tariff classification, and are perfectly substitutable. The Panel found therefore that chemically-identical imported and domestic gasoline are like products under Article III:4.

6.10 The Panel next examined whether the treatment accorded under the Gasoline Rule to imported gasoline was less favourable than that accorded to like gasoline of national origin. The Panel observed that domestic gasoline benefitted in general from the fact that the seller who is a refiner used an individual baseline, while imported gasoline did not. This resulted in less favourable treatment to the imported product, as illustrated by the case of a batch of imported gasoline which was chemically-identical to a batch of domestic gasoline that met its refiner's individual baseline, but not the statutory baseline levels. In this case, sale of the imported batch of gasoline on the first day of an annual period would require the importer over the rest of the period to sell on the whole cleaner gasoline in order to remain in conformity with the Gasoline Rule. On the other hand, sale of the chemically-identical batch of domestic gasoline on the first day of an annual period would not require a domestic refiner to sell on the whole cleaner gasoline over the period in order to remain in conformity with the Gasoline Rule. The Panel also noted that this less favourable treatment of imported gasoline induced the gasoline importer, in the case of a batch of imported gasoline not meeting the statutory baseline, to import that batch at a lower price. This reflected the fact that the importer would have to make cost and price allowances because of its need to import other gasoline with which the batch could be averaged so as to meet the statutory baseline. Moreover, the Panel recalled an earlier panel report which stated that “the


27 "Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages", BISD 34S/83, 115, para. 5.6 (adopted on 10 November 1987).
words ‘treatment no less favourable’ in paragraph 4 call for effective equality of opportunities for imported products in respect of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products.”

The Panel found therefore that since, under the baseline establishment methods, imported gasoline was effectively prevented from benefitting from as favourable sales conditions as were afforded domestic gasoline by an individual baseline tied to the producer of a product, imported gasoline was treated less favourably than domestic gasoline.

6.11 The Panel then examined the US argument that the requirements of Article III:4 are met because imported gasoline is treated similarly to gasoline from similarly situated domestic parties — domestic refiners with limited 1990 operations and blenders. According to the United States, the difference in treatment between imported and domestic gasoline was justified because importers, like domestic refiners with limited 1990 operations and blenders, could not reliably establish their 1990 gasoline quality, lacked consistent sources and quality of gasoline, or had the flexibility to meet a statutory baseline since they were not constrained by refinery equipment and crude supplies. The Panel observed that the distinction in the Gasoline Rule between refiners on the one hand, and importers and blenders on the other, which affected the treatment of imported gasoline with respect to domestic gasoline, was related to certain differences in the characteristics of refiners, blenders and importers, and the nature of the data held by them. However, Article III:4 of the General Agreement deals with the treatment to be accorded to like products; its wording does not allow less favourable treatment dependent on the characteristics of the producer and the nature of the data held by it. The Panel noted that in the Malt Beverages case, a tax regulation according less favourable treatment to beer on the basis of the size of the producer was rejected. Although this finding was made under Article III:2 concerning fiscal measures, the Panel considered that the same principle applied to regulations under Article III:4. Accordingly, the Panel rejected the US argument that the requirements of Article III:4 are met because imported gasoline is treated similarly to gasoline from similarly situated domestic parties.

6.12 Apart from being contrary to the ordinary meaning of the terms of Article III:4, any interpretation of Article III:4 in this manner would mean that the treatment of imported and domestic goods concerned could no longer be assured on the objective basis of their likeness as products. Rather, imported goods would be exposed to a highly subjective and variable treatment according to extraneous factors. This would thereby create great instability and uncertainty in the conditions of competition as between domestic and imported goods in a manner fundamentally inconsistent with the object and purpose of Article III.

6.13 The Panel considered that the foregoing was sufficient to dispose of the US argument. It noted, however, that even if the US approach were to be followed, under any approach based on “similarly situated parties” the comparison could just as readily focus on whether imported gasoline from an identifiable foreign refiner was treated more or less favourably than gasoline from an identifiable US refiner. There were, in the Panel’s view, many key respects in which these refineries could be deemed to be the relevant similarly situated parties, and the Panel could find no inherently objective criteria by means of which to distinguish which of the many factors were relevant in making a determination that any particular parties were “similarly situated.” Thus, although these refineries were similarly situated, the Gasoline Rule treated the products of these refineries differently by allowing only gasoline produced by the domestic entity to benefit from the advantages of an individual baseline. This consequential uncertainty and indeterminacy


of the basis of treatment underlined, in the view of the Panel, the rationale of remaining within the terms of the clear language, object and purpose of Article III:4 as outlined above in paragraph 6.12.

6.14 The Panel then noted the argument of the United States that the treatment accorded to gasoline imported under a statutory baseline was on the whole no less favourable than that accorded to domestic gasoline under individual refiner baselines. The United States claimed that the Gasoline Rule did not discriminate against imported gasoline, since the statutory baseline (by the nature of its calculation) and the average of the sum of the individual baselines both corresponded to average gasoline quality in 1990, and that domestic and imported gasoline was treated equally overall. The Panel noted that, in these circumstances, the argument that on average the treatment provided was equivalent amounted to arguing that less favourable treatment in one instance could be offset provided that there was correspondingly more favourable treatment in another. This amounted to claiming that less favourable treatment of particular imported products in some instances would be balanced by more favourable treatment of particular products in others. A previous panel had found that

the "no less favourable" treatment requirement of Article III:4 has to be understood as applicable to each individual case of imported products. The Panel rejected any notion of balancing more favourable treatment of some imported products against less favourable treatment of other imported products. If this notion were accepted, it would entitle a contracting party to derogate from the no less favourable treatment obligation in one case, or indeed in respect of one contracting party, on the ground that it accords more favourable treatment in some other case, or to another contracting party. Such an interpretation would lead to great uncertainty about the conditions of competition between imported and domestic products and thus defeat the purposes of Article III.30

The Panel concurred with this reasoning that under Article III:4 less favourable treatment of particular imported products in some instances could not be balanced by more favourable treatment of other imported products in other instances. The Panel therefore rejected the US argument.

6.15 The Panel observed that, considered even from the point of view of imported gasoline as a whole, treatment was generally less favourable. Importers of gasoline had to adapt to an assigned average standard not linked to the particular gasoline imported, while refiners of domestic gasoline had only to meet a standard linked to their own product in 1990. Statistics on baselines bore out this difference in treatment. According to the United States, as of August 1995, approximately 100 US refiners, representing 98.5 percent of gasoline produced in 1990, had received EPA approval of their individual baselines. Only three of the refiners met the statutory baseline for all parameters. Thus, while 97 percent of US refiners did not and were not required to meet the statutory baseline, the statutory baseline was required of importers of gasoline, except in the rare case (according to the parties) that they could establish a baseline using Method 1.

6.16 The Panel found that imported and domestic gasoline were like products, and that since, under the baseline establishment methods, imported gasoline was effectively prevented from

benefitting from as favourable sales conditions as were afforded domestic gasoline by an individual baseline tied to the producer of a product, imported gasoline was treated less favourably than domestic gasoline.

2. Article III:1

6.17 The Panel then noted the arguments advanced by Venezuela and Brazil that the Gasoline Rule was applied “so as to afford protection to domestic production” contrary to Article III:1. The United States disagreed and argued in the alternative that Article III:1 was only hortatory and could not form the basis of a violation. The Panel examined first whether, after making a finding of inconsistency with Article III:4, it should make a finding under Article III:1. The Panel noted that the panel in the Malt Beverages case had examined a claim made under paragraphs 1, 2 and 4 of Article III. That panel had concluded that “because Article III:1 is a more general provision than either Article III:2 or III:4, it would not be appropriate for the Panel to consider [the complainant’s] Article III:1 allegations to the extent that the Panel were to find [the respondent’s] measures to be inconsistent with the more specific provisions of Articles III:2 and III:4.”31 The present Panel agreed with this reasoning, and therefore did not find it necessary to examine the consistency of the Gasoline Rule with Article III:1.

C. Article I:1

6.18 The Panel proceeded to examine the claim of Venezuela and Brazil that the Gasoline Rule violated the most-favoured-nation provision of Article I:1 by permitting an importer to use secondary evidence to establish an individual baseline, provided that in 1990 it imported at least 75 percent of the production from an affiliated foreign refinery. Venezuela and Brazil claimed that the rule targeted a small number of countries, and that the different treatment was based on criteria (ownership and proportion of product purchased) that had no link to the product, as required under Article I:1. The United States claimed the rule was based on objective criteria and, in any case, it was not applicable because no importer had qualified for the benefit before the deadline.

6.19 The Panel observed that it had not been the usual practice of a panel established under the General Agreement to rule on measures that, at the time the panel’s terms of reference were fixed, were not and would not become effective. In the 1978 Animal Feed Protein case, the Panel ruled on a discontinued measure, but one that had terminated after agreement on the panel’s terms of reference.32 In the 1980 Chile Apples case, the panel ruled on a measure terminated before agreement on the panel’s terms of reference; however, the terms of reference in that case specifically included the terminated measure and, it being a seasonal measure, there remained the prospect of its reintroduction.33 In the present case, the Panel’s terms of reference were established after the 75 percent rule had ceased to have any effect, and the rule had not been specifically mentioned in the terms of reference. The Panel further noted that there was no indication by the parties that the 75 percent rule was a measure that, although currently not in force, was likely to be renewed. Finally, the Panel considered that its findings on treatment under


the baseline establishment methods under Articles III:4 and XX (b), (d) and (g) would in any case have made unnecessary the examination of the 75 percent rule under Article I:1. The Panel did not therefore proceed to examine this aspect of the Gasoline Rule under Article I:1 of the General Agreement.

D. Article XX(b)

6.20 The Panel proceeded to examine whether the aspect of the baseline establishment methods found inconsistent with Article III:4 could, as argued by the United States, be justified under paragraph (b) of Article XX. The relevant parts of Article XX were as follows:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(b) necessary to protect human, animal or plant life or health;

The Panel noted that as the party invoking an exception the United States bore the burden of proof in demonstrating that the inconsistent measures came within its scope. The Panel observed that the United States therefore had to establish the following elements:

(1) that the policy in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or plant life or health;

(2) that the inconsistent measures for which the exception was being invoked were necessary to fulfil the policy objective; and

(3) that the measures were applied in conformity with the requirements of the introductory clause of Article XX.

In order to justify the application of Article XX(b), all the above elements had to be satisfied.

1. Policy goal of protecting human, animal or plant life or health

6.21 The Panel noted the United States argument that air pollution, in particular ground-level ozone and toxic substances, presented health risks to humans, animals and plants. The United States argued that, since about one-half of such pollution was caused by vehicle emissions, and the Gasoline Rule reduced these, the Gasoline Rule was within the range of policy goals described in Article XX(b). Venezuela and Brazil did not disagree with this view. The Panel agreed with the parties that a policy to reduce air pollution resulting from the consumption of gasoline was a policy within the range of those concerning the protection of human, animal and plant life or health mentioned in Article XX(b).

2. Necessity of the inconsistent measures

6.22 The Panel recalled its finding in paragraph 6.16 that imported gasoline was treated less favourably than domestic gasoline, since, under the baseline establishment methods, imported gasoline was prevented from benefitting from as favourable sales conditions as were afforded
domestic gasoline by an individual baseline tied to the producer of a product. The Panel then proceeded to examine whether the aspect of the Gasoline Rule found inconsistent with the General Agreement was necessary to achieve the stated policy objectives under Article XX(b). The Panel noted that it was not the necessity of the policy goal that was to be examined, but whether or not it was necessary that imported gasoline be effectively prevented from benefitting from as favourable sales conditions as were afforded by an individual baseline tied to the producer of a product. It was the task of the Panel to address whether these inconsistent measures were necessary to achieve the policy goal under Article XX(b). It was therefore not the task of the Panel to examine the necessity of the environmental objectives of the Gasoline Rule, or of parts of the Rule that the Panel did not specifically find to be inconsistent with the General Agreement.

6.23 The Panel then turned to the arguments of the parties relating to that aspect of the Gasoline Rule found inconsistent with the General Agreement. The United States argued that not all entities dealing in gasoline could be assigned an individual baseline and, of those who could be assigned such a baseline, not all could use the same types of secondary or tertiary evidence (Methods 2 and 3) to establish it. Certain entities including importers, blenders and refiners which did not have continuous 1990 operations, were simply not in a position to furnish this secondary or tertiary evidence. Venezuela and Brazil argued on the other hand that foreign refiners should be accorded their own individual baselines under the Gasoline Rule using the same types of evidence, as easily available to them as to domestic refiners. Alternatively, they argued that importers should be able to use individual 1990 baselines established for the foreign refiners with whom they dealt. They noted that an EPA regulatory proposal had even been made along those lines in May 1994. The United States countered that such a proposal would not be feasible because of: (1) the impossibility of determining the refinery of origin for each imported shipment; (2) the incentive to “game” the system thereby handed to exporters and importers; and (3) the difficulty for the United States to exercise an enforcement jurisdiction with respect to a foreign refinery, since the Gasoline Rule required criminal and civil sanctions in order to be effective. The United States argued further against the use of foreign refiner baselines by citing “equity concerns” of importers that their use would favour those firms that dealt with Venezuelan product, and the existence of particular competitive conditions in the international market, including the flexibility maintained by foreign refiners.

6.24 The Panel proceeded to examine whether the United States had in fact demonstrated that the inconsistent measures found to violate Article III:4 were necessary to achieve the stated policy objectives of the United States. The Panel noted that the term “necessary” had been interpreted in the context of Article XX(d) by the panel in the Section 337 case which had stated that:

a contracting party cannot justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.34

The same reasoning had been adopted by the 1990 Thai Cigarette panel in examining a measure under Article XX(b). That panel saw no reason not to adopt the same interpretation of “necessity” under Article XX(b) as under Article XX(d), stating that

the import restrictions imposed by Thailand could be considered to be "necessary" in terms of Article XX(b) only if there were no alternative measures consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives.\(^{35}\)

The Panel also noted that while several past panels examining issues under Article XX had identified alternative measures that were reasonably available and fully consistent with the General Agreement, they had also in other instances identified alternative measures that would be “less inconsistent” with the General Agreement. For example, the panel in the 337 case found that, while a general exclusion order applying to imported products was not “necessary”, a limited in rem order could be justified even though it too was inconsistent with Article III:4.\(^{36}\) Recalling its remarks in paragraph 6.22 above, the Panel considered that its task was thus to determine whether the United States had demonstrated whether it was necessary to maintain precisely those inconsistent measures whereby imported gasoline was effectively prevented from benefitting from as favourable sales conditions as were afforded to domestic gasoline by an individual baseline tied to the producer of a product. If there were consistent or less inconsistent measures reasonably available to the United States, the requirement to demonstrate necessity would not have been met.

6.25 The Panel then examined whether there were measures consistent or less inconsistent with the General Agreement that were reasonably available to the United States to further its policy objectives of protecting human, animal and plant life or health. The Panel did not consider that the manner in which imported gasoline was effectively prevented from benefitting from as favourable sales conditions as were afforded to domestic gasoline by an individual baseline tied to the producer of a product was necessary to achieve the stated goals of the Gasoline Rule. In the view of the Panel, baseline establishment methods could be applied to entities dealing in imported gasoline in a way that granted treatment to imported gasoline that was consistent or less inconsistent with the General Agreement. If a single statutory baseline applying to all entities — refiners, blenders and importers — was not the chosen regulatory method, then importers could for example be permitted to use a gasoline baseline applicable to imports derived, when possible, from evidence of the individual 1990 baselines of foreign refiners with whom the importer currently dealt. Although such a scheme could result in formally different regulation for imported and domestic products, the Panel noted that previous panels had accepted that this could be consistent with Article III:4.\(^{37}\) The requirement under Article III:4 to treat an imported product no less favourably than the like domestic product is met by granting formally different treatment to the imported product, if that treatment results in maintaining conditions of competition for the imported product no less favourable than those of the like domestic product. Further, these conditions of competition referred to those conditions that were established by government measures and would not therefore include factors such as the “flexibility of individual producers” in this case. The Panel noted finally that a regulatory scheme using foreign

\(^{35}\) "Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes", BISD 37S/200, para. 75 (adopted on 7 November 1990).

\(^{36}\) "United States - Section 337 of the Tariff Act of 1930", BISD 36S/345, para. 5.32 (adopted on 7 November 1989).

\(^{37}\) "United States - Section 337 of the Tariff Act of 1930", BISD 36S/345, para. 5.11 (adopted on 7 November 1989).
refiner baselines, to the extent that it did not distinguish between imported gasoline on the basis of its country of origin, would not necessarily contravene Article I or other provisions of the General Agreement, and that the United States, notwithstanding suggestions that certain importers might have equitable concerns, had not established the contrary.

6.26 The Panel noted the claims of the United States that allowing importers or foreign refiners to use individual baselines in such a way was not feasible for the reasons listed in paragraph 6.23. The Panel was not convinced that the United States had satisfied its burden of proving that those reasons precluded the effective use of individual baselines in a manner which would allow imported products to obtain treatment that was consistent, or less inconsistent, with obligations under Article III:4. First, while the Panel agreed that it would be necessary under such a system to ascertain the origin of gasoline, the Panel could not conclude that the United States had shown that this could not be achieved by other measures reasonably available to it and consistent or less inconsistent with the General Agreement. Indeed, the Panel noted that a determination of origin would often be feasible. The Panel examined, for instance, the case of a direct shipment to the United States. It considered that there was no reason to believe that, given the usual measures available in international trade for determination of origin and tracking of goods (including documentary evidence and third party verification) there was any particular difficulty sufficient to warrant the demands of the baseline establishment methods applied by the United States.

6.27 Second, the Panel did not agree that the United States had met its burden of showing that the “gaming” concern was an adequate justification for maintaining the inconsistency with Article III:4 resulting from the baseline establishment methods. It was uncertain if, or to what extent, gaming would actually occur, especially given the small market share of imported gasoline (approximately 3 percent). Moreover, the Panel noted that the Gasoline Rule did not guarantee in its regulation of US entities that gasoline characteristics subject to non-degradation requirements (i.e. those regulated by baselines), would remain at the 1990 average levels. For example, there was no volume cap on the production of reformulated gasoline by individual refineries, which meant that if producers of relatively dirtier gasoline expanded their relative share of production of reformulated gasoline, the national average level of pollutants subject to the non-degradation requirements would be greater than in 1990. Similarly, within the 1990 volume limitations, if the output of producers of relatively cleaner gasoline fell below 1990 levels, while output of others did not, national average levels of pollutants would be worse. Moreover, specific provisions of the Gasoline Rule permitted some refiners to produce dirtier gasoline than they produced in 1990 (e.g., certain producers of JP-4 jet fuel) and permitted others to request specific derogation from the Rule. The Panel stressed that it was not finding that such events would occur, only that they could under the Rule. Given that the Gasoline Rule did not therefore guarantee that gasoline characteristics subject to non-degradation requirements would remain at 1990 levels, the Panel considered that it was not consistent for the United States to insist that there could be no possible deviation from achieving those levels in respect of imports, when it had not deemed it necessary to be as exacting on its own domestic production. Moreover, slightly stricter overall requirements applied to both domestic and imported gasoline could offset any possibility of an adverse environmental effect from these causes, and allow the United States to achieve its desired level of clean air without discriminating against imported gasoline. Such requirements could be implemented by the United States at any time. The Panel concluded that the United States had not met its burden of showing that concern over gaming was an adequate justification for maintaining the inconsistency with Article III:4 resulting from the baseline establishment methods.
Third, the Panel did not accept that the United States had demonstrated that there was no other measure consistent, or less inconsistent, with Article III:4 reasonably available to enforce compliance with foreign refiner baselines, or importer baselines based thereon. The imposition of penalties on importers was in the Panel’s view an effective enforcement mechanism used by the United States in other settings. In the view of the Panel, the United States had reasonably available to it data for, and measures of, verification and assessment which were consistent or less inconsistent with Article III:4. For instance, although foreign data may be formally less subject to complete control by US authorities, this did not amount to establishing that foreign data could not in any circumstances be sufficiently reliable to serve US purposes. This, however, was the practical effect of the application of the Gasoline Rule. In the Panel's view, the United States had not demonstrated that data available from foreign refiners was inherently less susceptible to established techniques of checking, verification, assessment and enforcement than data for other trade in goods subject to US regulation. The nature of the data in this case was similar to data relied upon by the United States in other contexts, including, for example, under the application of antidumping laws. In an antidumping case, only when the information was not supplied or deemed unverifiable did the United States turn to other information. If a similar practice were to be applied in the case of the Gasoline Rule, then importers could, for instance, be permitted to use the individual baselines of foreign refiners for imported gasoline from those refiners, with the statutory baseline being applied only when the source of imported gasoline could not be determined or a baseline could not be established because of an absence of data. In the Panel's view, because allowing for such a possibility was reasonably available to the United States and would entail a lesser degree of inconsistency with the General Agreement, the United States had failed to demonstrate the necessity of the Gasoline Rule's inconsistency with Article III:4 on this matter.

In view of the Panel’s finding that the aspect of the baseline establishment methods found inconsistent with Article III:4 was not “necessary” under Article XX(b), the Panel did not proceed to examine whether it met also the conditions in the introductory clause to Article XX.

E. Article XX(d)

The Panel proceeded to examine whether the aspect of the baseline establishment methods found inconsistent with Article III:4 could, as argued by the United States, be justified under paragraph (d) of Article XX. The relevant parts of Article XX were as follows:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

The Panel recalled that the party invoking an exception under Article XX bore the burden of proving that the inconsistent measures came within its scope. The Panel observed that the United States therefore had to demonstrate the following elements:
(1) that the measures for which the exception were being invoked - that is, the particular trade measures inconsistent with the General Agreement - secure compliance with laws or regulations themselves not inconsistent with the General Agreement;

(2) that the inconsistent measures for which the exception was being invoked were necessary to secure compliance with those laws or regulations; and

(3) that the measures were applied in conformity with the requirements of the introductory clause of Article XX.

In order to justify the application of Article XX(d), all the above elements had to be satisfied.

1. Securing compliance with consistent laws or regulations

6.32 The Panel proceeded to examine whether the aspect of the baseline establishment methods found inconsistent with the General Agreement secured compliance with a law or regulation not inconsistent with the General Agreement. The United States argued that the non-degradation requirements were laws and regulations not inconsistent with the General Agreement, and that the baseline establishment methods secured compliance with these. Venezuela argued that the United States had not clearly established which laws or regulations were not inconsistent with the General Agreement, and with which compliance was secured. Brazil considered that the US measures at most enforced a policy objective, not an actual obligation as required under Article XX(d).

6.33 The Panel observed that, assuming that a system of baselines by itself were consistent with Article III:4, the US scheme might constitute, for the purposes of Article XX(d), a law or regulation “not inconsistent” with the General Agreement. However, the Panel found that maintenance of discrimination between imported and domestic gasoline contrary to Article III:4 under the baseline establishment methods did not “secure compliance” with the baseline system. These methods were not an enforcement mechanism. They were simply rules for determining the individual baselines. As such, they were not the type of measures with which Article XX(d) was concerned.38

2. Other conditions

6.34 The Panel observed that, in view of its finding that the less favourable treatment of imported gasoline under the baseline establishment methods accorded to importers did not “secure compliance” with the underlying baseline establishment rules, it did not need to consider also whether these methods were “necessary” to secure compliance and met the conditions in the introductory clause to Article XX.

F. Article XX(g)

6.35 The Panel proceeded to examine whether the part of the Gasoline Rule found inconsistent with Article III:4 could, as argued by the United States, be justified under paragraph (g) of Article XX. The relevant parts of Article XX were as follows:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

\[(g)\] relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

The Panel noted that as the party invoking an exception the United States bore the burden of proof in demonstrating that the inconsistent measures came within its scope. The Panel observed that the United States therefore had to demonstrate the following elements:

1. that the *policy* in respect of the measures for which the provision was invoked fell within the range of policies related to the conservation of exhaustible natural resources;

2. that the measures for which the exception was being invoked - that is the particular trade measures inconsistent with the General Agreement - were *related to* the conservation of exhaustible natural resources;

3. that the measures for which the exception was being invoked were made effective *in conjunction* with restrictions on domestic production or consumption; and

4. that the measures were applied in conformity with the requirements of the *introductory clause* of Article XX.

In order to justify the application of Article XX(g), all the above elements had to be satisfied.

1. **Policy goal of conserving an exhaustible natural resource**

6.36 The Panel noted the US argument that clean air was an exhaustible resource within the meaning of Article XX(g), since it could be exhausted by pollutants such as those emitted through the consumption of gasoline. Lakes, streams, parks, crops and forests were also natural resources that could be exhausted by air pollution. Measures to control air pollution were therefore measures to conserve exhaustible natural resources. Venezuela disagreed, considering that air was not an exhaustible natural resource within the meaning of Article XX(g); rather, its “condition” changed depending on its cleanliness. Article XX(g) was originally intended to cover exports of exhaustible goods such as petroleum and coal; to expand it to cover “conditions” of renewable resources was not justified.

6.37 The Panel then examined whether clean air could be considered an exhaustible natural resource. In the view of the Panel, clean air was a resource (it had value) and it was natural. It could be depleted. The fact that the depleted resource was defined with respect to its qualities was not, for the Panel, decisive. Likewise, the fact that a resource was renewable could not be an objection. A past panel had accepted that renewable stocks of salmon could constitute an exhaustible natural resource. Accordingly, the Panel found that a policy to reduce the depletion of clean air was a policy to conserve a natural resource within the meaning of Article XX(g).
2. Measures “related to” the conservation of an exhaustible natural resource; and made effective “in conjunction” with restrictions on domestic production or consumption

6.38 The Panel proceeded to examine whether the baseline establishment methods found inconsistent with Article III:4 were “related to” the conservation of clean air. Venezuela argued that past panels had interpreted “related to” to mean “primarily aimed at” the conservation of the resource. According to Venezuela, loopholes in the establishment of the baseline undermined its own conservation objectives, and the measure could not therefore be seen as “primarily aimed” at conservation.

6.39 The Panel noted that the words “related to” did not in isolation provide precise guidance as to the required link between the measures and the conservation objective. However, the Panel agreed with the interpretation of this term in the report of the 1987 Herring and Salmon case, where the panel stated that

as the preamble of Article XX indicates, the purpose of including Article XX:(g) in the General Agreement was not to widen the scope for measures serving trade policy purposes but merely to ensure that the commitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of exhaustive natural resources. The Panel concluded for these reasons that, while a trade measure did not have to be necessary or essential to the conservation of an exhaustible natural resource, it had to be primarily aimed at the conservation of an exhaustible natural resource to be considered as "relating to" conservation within the meaning of Article XX:(g).40 (emphasis added)

For the same reasons, the Herring and Salmon panel decided that

the terms "in conjunction with" in Article XX:(g) had to be interpreted in a way that ensures that the scope of possible actions under that provision corresponds to the purpose for which it was included in the General Agreement. A trade measure could therefore in the view of the Panel only be considered to be made effective “in conjunction with” production restrictions if it was primarily aimed at rendering effective these restrictions.41 (emphasis added)

6.40 The Panel then proceeded to examine whether the baseline establishment methods could be said to be "primarily aimed at" achieving the conservation objectives of the Gasoline Rule. The Panel recalled the purpose of Article XX:(g), which had been expressed by the panel in the 1987 Herring and Salmon case as follows:

[T]he purpose of including Article XX:(g) in the General Agreement was not to widen the scope of measures serving trade policy purposes but merely to ensure that the


41 Ibidem.
commitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of exhaustible natural resources.

The Panel then considered whether the precise aspects of the Gasoline Rule that it had found to violate Article III -- the less favourable baseline establishments methods that adversely affected the conditions of competition for imported gasoline -- were primarily aimed at the conservation of natural resources. The Panel saw no direct connection between less favourable treatment of imported gasoline that was chemically identical to domestic gasoline, and the US objective of improving air quality in the United States. Indeed, in the view of the Panel, being consistent with the obligation to provide no less favourable treatment would not prevent the attainment of the desired level of conservation of natural resources under the Gasoline Rule. Accordingly, it could not be said that the baseline establishment methods that afforded less favourable treatment to imported gasoline were primarily aimed at the conservation of natural resources. In the Panel's view, the above-noted lack of connection was underscored by the fact that affording treatment of imported gasoline consistent with its Article III:4 obligations would not in any way hinder the United States in its pursuit of its conservation policies under the Gasoline Rule. Indeed, the United States remained free to regulate in order to obtain whatever air quality it wished. The Panel therefore concluded that the less favourable baseline establishments methods at issue in this case were not primarily aimed at the conservation of natural resources.

6.41 With respect to whether the baseline establishment methods could be said to be primarily aimed at "rendering effective restrictions on domestic production or consumption", the Panel noted that it had not determined that the measures at issue were “restrictions”, and whether they were “on” domestic production or consumption. However, in light of its finding in paragraph.

G.  Article XXIII:1(b)

6.42 The Panel then noted the claim by Venezuela under Article XXIII:1(b) that benefits accruing to it under the General Agreement had been nullified and impaired by the application of the Gasoline Rule, whether or not it conflicted with provisions of the General Agreement. In view of the finding by the Panel that the Gasoline Rule violated Article III:4 of the General Agreement, and could not be justified under Article XX (b), (d) and (g), the Panel concluded that it was not necessary to examine this additional claim.

H.  Applicability of the Agreement on Technical Barriers to Trade

6.43 In view of its findings under the General Agreement, the Panel concluded that it was not necessary to decide on issues raised under the TBT Agreement.

VII.  CONCLUDING REMARKS

7.1 In concluding, the Panel wished to underline that it was not its task to examine generally the desirability or necessity of the environmental objectives of the Clean Air Act or the Gasoline Rule. Its examination was confined to those aspects of the Gasoline Rule that had been raised by the complainants under specific provisions of the General Agreement. Under the General Agreement, WTO Members were free to set their own environmental objectives, but they were bound to implement these objectives through measures consistent with its provisions, notably those on the relative treatment of domestic and imported products.
VIII. CONCLUSIONS

8.1 In the light of the findings above, the Panel concluded that the baseline establishment methods contained in Part 80 of Title 40 of the Code of Federal Regulations are not consistent with Article III:4 of the General Agreement, and cannot be justified under paragraphs (b), (d) and (g) of Article XX of the General Agreement.

8.2 The Panel recommends that the Dispute Settlement Body request the United States to bring this part of the Gasoline Rule into conformity with its obligations under the General Agreement.

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Feliciano, Presiding Member; Beeby, Member, Matsushita, Member

I. Introductory

The United States appeals from certain conclusions on issues of law and certain legal interpretations contained in the Panel Report, United States - Standards for Reformulated and Conventional Gasoline, WT/DS2/R, 29 January 1996 (the "Panel Report"). That Panel had been established to consider a dispute between the United States, on the one hand, and Venezuela, later joined by Brazil, on the other. The dispute related to the implementation by the United States of its domestic legislation known as the Clean Air Act of 1990 (the "CAA") and, more specifically, to the regulation enacted by the United States' Environmental Protection Agency (the "EPA") pursuant to that Act, to control toxic and other pollution caused by the combustion of gasoline manufactured in or imported into the United States. This regulation is formally entitled "Regulation of Fuels and Fuel Additives - Standards for Reformulated and Conventional Gasoline", Part 80 of Title 40 of the Code of Federal Regulations, and is commonly referred to as the Gasoline Rule.

(...)

C. The Panel Report: Its Findings and Conclusions

The Panel's overall conclusions and its recommendation are set out in the following terms:

8.1 In the light of the findings above, the Panel concluded that the baseline establishment methods contained in Part 80 of Title 40 of the Code of Federal Regulations are not consistent with Article III:4 of the General Agreement, and cannot be justified under paragraphs (b), (d) and (g) of Article XX of the General Agreement.

8.2 The Panel recommends that the Dispute Settlement Body request the United States to bring this part of the Gasoline Rule into conformity with its obligations under the General Agreement.

On route to its overall conclusions, the Panel made the following principal findings:

(...)

(ii) that imported and domestic gasoline were "like products" and that since, under the baseline establishment rules of the Gasoline Rule, imported gasoline was effectively prevented from benefitting from as favourable sales conditions as were afforded domestic gasoline by an individual baseline tied to the producer of a product, imported gasoline was treated "less favourably" than domestic gasoline. The baseline establishment rules of the Gasoline Rule were accordingly inconsistent with Article III:4 of the General Agreement.

8Panel Report at p. 47.
9Panel Report, para. 6.16.
(iii) that, in view of finding (ii), it was not necessary to examine the consistency of the Gasoline Rule with Article III:1;10

(iv) that the "aspect of the baseline establishment methods" found inconsistent with Article III:4 was not justified under Article XX(b) of the General Agreement as "necessary to protect human, animal or plant life or health”;11

(v) that the "maintenance of discrimination between imported and domestic gasoline" contrary to Article III:4 was not justified under Article XX(d) as "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of [the General] Agreement”;12

(vi) that clean air was an exhaustible natural resource within the meaning of Article XX(g) of the General Agreement;13

(vii) that the baseline establishment rules found to be inconsistent with Article III:4 could not be justified under Article XX(g) as a measure "relating to" the conservation of exhaustible natural resources;14

(viii) that it was unnecessary, in the light of finding (vii), to determine whether the measure at issue was "made effective in conjunction with restrictions on domestic production or consumption";15

(ix) that it was unnecessary, in the light of finding (vii), to determine whether the measure at issue met the conditions in the introductory clause of Article XX (sometimes referred to as the chapeau of Article XX);

(…)

II. Issues Raised In This Appeal

A. The Claims of Error by the United States

It is important to focus upon the subject matter of this appeal. We seek to do this first by identifying the issues which have been raised by the Appellant, the United States. In what follows we highlight those same issues by listing certain other issues dealt with in the Panel proceedings but which have not been brought before the Appellate Body in this appeal, and which we accordingly exclude from consideration in this Appellate Report.

In its Notice of Appeal, dated 21 February 1996, and its Appellant's Submission, dated 4 March 1996, the United States claims that the Panel erred in law, firstly, in holding that the baseline establishment rules of the Gasoline Rule are not justified under Article XX(g) of the General Agreement and, secondly, in its interpretation of Article XX as a whole.

10Panel Report, para. 6.17.
11Panel Report, para. 6.29.
12Panel Report, para. 6.33.
15Panel Report, para. 6.41.
More specifically, the United States assigns as error the ruling of the Panel that the baseline establishment rules do not constitute a "measure" "relating to" the conservation of clean air within the meaning of Article XX(g) of the General Agreement. Consequently, it is also the view of the United States that the Panel erred in failing to proceed further in its interpretation and application of Article XX(g), and in not finding that the baseline establishment rules satisfy the other requirements of Article XX(g) and the introductory provisions of Article XX.

The sharply limited scope of this appeal is underscored by noting the number of findings which the Panel had made but which have not been appealed from by the United States. Very briefly, the United States does not appeal from the findings or rulings made by the Panel on, or in respect of, the consistency of the baseline establishment rules with Article I:1, Article III:1, Article III:4, and Article XXIII:1(b) of the General Agreement and the applicability of Article XX(b) and Article XX(d) of the General Agreement and of the TBT Agreement. Understandably, the United States has also not appealed from the Panel's ruling that clean air is an exhaustible natural resource within the meaning of Article XX(g) of the General Agreement.

B. The Claims of the Appellees and the Arguments of the Third Participants

The Appellees, Venezuela and Brazil, submit that the Appellate Body should dismiss the United States' appeal and uphold the Panel's findings and conclusions concerning Article XX(g). In particular, Venezuela and Brazil support the Panel's finding that the measure at issue before the Panel was not one "relating to" the conservation of exhaustible natural resources. Venezuela also states that a measure can only be "relating to" or "primarily aimed at" conservation if the measure was both: (i) primarily intended to achieve a conservation goal; and (ii) had a positive conservation effect.

Venezuela argues that, as the United States has not met its burden with respect to the "relating to" requirement of Article XX(g) in this appeal, the Appellate Body may uphold the Panel Report on this issue alone, and it is not necessary to address the additional requirements of Article XX(g), nor the requirements in the Article XX chapeau.

If the Appellate Body overturns the Panel's findings on the "relating to" component of Article XX(g) and does proceed to examine the other requirements of Article XX(g), Venezuela and Brazil submit that the United States has also failed to demonstrate that those requirements have been satisfied. They argue that the measure in issue is not "made effective in conjunction with restrictions on domestic production or consumption" as the restrictions are not imposed as direct limits on the production or consumption of clean air, but rather upon the consumption of certain kinds of gasoline. They further submit that clean air does not qualify as an "exhaustible natural resource" within the meaning of Article XX(g).

With regard to the requirements in the chapeau to Article XX, Venezuela and Brazil submit that the measure is applied in a manner which constitutes "arbitrary or unjustifiable discrimination between countries where the same conditions prevail." Venezuela argues that the measure constitutes a "disguised restriction on international trade" as well.

The Appellees also raise the conditional argument that, if the Appellate Body were to overturn the Panel's findings on Article XX(g), and not find in favour of Venezuela and Brazil as to the other requirements of Article XX, it would then need to examine their claims under the TBT Agreement.
The third participants, the European Communities and Norway, endorse the Panel's interpretation of "relating to" and the Panel's findings under Article XX(g). They find it difficult to accept the United States' arguments that the measure at issue was "made effective in conjunction with restrictions on domestic production or consumption," as the measure in issue did not impose restrictions on clean air. With regard to the Article XX chapeau criteria, the European Communities and Norway both submit that the measure is applied in a manner constituting "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" and a "disguised restriction on international trade."

(...)

III. The Issue of Justification Under Article XX(g) of the General Agreement

Article XX(g) needs to be set out in full:

Article XX

General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

...  

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

...

A. "Measures"

The initial issue we are asked to look at relates to the proper meaning of the term "measures" as used both in the chapeau of Article XX and in Article XX(g). The question is whether "measures" refers to the entire Gasoline Rule or, alternatively, only to the particular provisions of the Gasoline Rule which deal with the establishment of baselines for domestic refiners, blenders and importers.

Cast in the foregoing terms, the issue does not appear to be a live one. True enough the Panel Report used differing terms, or terms of shifting reference, in designating the "measures" in different parts of the Report. The Panel Report, however, held only the baseline establishment rules of the Gasoline Rule to be inconsistent with Article III:4, to the extent that such rules provided "less favourable treatment" for imported than for domestic gasoline. These are the same provisions which the Panel evaluated, and found wanting, under the justifying provisions of Article XX(g). The Panel Report did not purport to find the Gasoline Rule itself as a whole, or any part thereof other than the baseline establishment rules, to be inconsistent with Article III:4; accordingly, there was no need at all to examine whether the whole of the Gasoline Rule or any of its other
rules, was saved or justified by Article XX(g). The Panel here was following the practice of earlier panels in applying Article XX to provisions found to be inconsistent with Article III:4: the "measures" to be analyzed under Article XX are the same provisions infringing Article III:4. These earlier panels had not interpreted "measures" more broadly under Article XX to include provisions not themselves found inconsistent with Article III:4. In the present appeal, no one has suggested in their final submissions that the Appellate Body should examine under Article XX any portion of the Gasoline Rule other than the baseline establishment rules held to be in conflict with Article III:4. No one has urged an interpretation of "measures" which would encompass the Gasoline Rule in its totality.29

At the oral hearing and in its Post-Hearing Memorandum, the United States complained about the designation of the baseline establishment rules in the Panel Report and by the Appellees Venezuela and Brazil, in such terms as "the difference in treatment", "the less favourable treatment" or "the discrimination." It is, of course, true that the baseline establishment rules had been found by the Panel to be inconsistent with Article III:4 of the General Agreement. The frequent designation of those provisions by the Panel in terms of its legal conclusion in respect of Article III:4, in the Appellate Body's view, did not serve the cause of clarity in analysis when it came to evaluating the same baseline establishment rules under Article XX(g).

B. "relating to the conservation of exhaustible natural resources"

The Panel Report took the view that clean air was a "natural resource" that could be "depleted." Accordingly, as already noted earlier, the Panel concluded that a policy to reduce the depletion of clean air was a policy to conserve an exhaustible natural resource within the meaning of Article XX(g). Shortly thereafter, however, the Panel Report also concluded that "the less favourable baseline establishments methods" were not primarily aimed at the conservation of exhaustible natural resources and thus fell outside the justifying scope of Article XX(g).

The Panel, addressing the task of interpreting the words "relating to", quoted with approval the following passage from the panel report in the 1987 Herring and Salmon case:30

as the preamble of Article XX indicates, the purpose of including Article XX:(g) in the General Agreement was not to widen the scope for measures serving trade policy purposes but merely to ensure that the commitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of exhaustive natural resources. The Panel concluded for these reasons that, while a trade measure did not have to be necessary or essential to the conservation of an

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29Although, in earlier submissions to the Appellate Body, the United States suggested that "the Gasoline Rule" should be examined in the context of Article XX(g), in its Post-Hearing Memorandum, dated 1 April 1996, the United States confirmed its understanding that the "measures" in issue are the baseline establishment rules contained in the Gasoline Rule.

Brazil stated, in its final submission to the Appellate Body, dated 1 April 1996, that "the measure with which this appeal is concerned is the baseline methodology of the Gasoline Rule, not the entire rule itself." This would suggest a position similar to that adopted by the United States. Thereafter, Brazil continued to state that "Brazil and Venezuela did not challenge all portions of the Rule; they challenged only the discriminatory methods of establishing baselines."

Venezuela stated, in its summary statement, dated 29 March 1996, that "the measure to be examined is the discriminatory measure, that is, the aspect of the Gasoline Rule that denies imported gasoline the right to use the same regulatory system of baselines applicable to U.S. gasoline, namely, the system of individual baselines."

exhaustible natural resource, it had to be primarily aimed at the conservation of an exhaustible natural resource to be considered as "relating to" conservation within the meaning of Article XX:(g). (emphasis added by the Panel)

The Panel Report then went on to apply the 1987 Herring and Salmon reasoning and conclusion to the baseline establishment rules of the Gasoline Rule in the following manner.\(^{31}\)

The Panel then considered whether the precise aspects of the Gasoline Rule that it had found to violate Article III -- the less favourable baseline establishments methods that adversely affected the conditions of competition for imported gasoline -- were primarily aimed at the conservation of natural resources. The Panel saw no direct connection between less favourable treatment of imported gasoline that was chemically identical to domestic gasoline, and the US objective of improving air quality in the United States. Indeed, in the view of the Panel, being consistent with the obligation to provide no less favourable treatment would not prevent the attainment of the desired level of conservation of natural resources under the Gasoline Rule. Accordingly, it could not be said that the baseline establishment methods that afforded less favourable treatment to imported gasoline were primarily aimed at the conservation of natural resources. In the Panel's view, the above-noted lack of connection was underscored by the fact that affording treatment of imported gasoline consistent with its Article III:4 obligations would not in any way hinder the United States in its pursuit of its conservation policies under the Gasoline Rule. Indeed, the United States remained free to regulate in order to obtain whatever air quality it wished. The Panel therefore concluded that the less favourable baseline establishments methods at issue in this case were not primarily aimed at the conservation of natural resources.

It is not easy to follow the reasoning in the above paragraph of the Panel Report. In our view, there is a certain amount of opaqueness in that reasoning. The Panel starts with positing that there was "no direct connection" between the baseline establishment rules which it characterized as "less favourable treatment" of imported gasoline that was chemically identical to the domestic gasoline and "the US objective of improving air quality in the United States." Shortly thereafter, the Panel went on to conclude that "accordingly, it could not be said that the baseline establishment rules that afforded less favourable treatment to imported gasoline were primarily aimed at the conservation of natural resources" (emphasis added). The Panel did not try to clarify whether the phrase "direct connection" was being used as a synonym for "primarily aimed at" or whether a new and additional element (on top of "primarily aimed at") was being demanded.

One problem with the reasoning in that paragraph is that the Panel asked itself whether the "less favourable treatment" of imported gasoline was "primarily aimed at" the conservation of natural resources, rather than whether the "measure", i.e. the baseline establishment rules, were "primarily aimed at" conservation of clean air. In our view, the Panel here was in error in referring to its legal conclusion on Article III:4 instead of the measure in issue. The result of this analysis is to turn Article XX on its head. Obviously, there had to be a finding that the measure provided "less favourable treatment" under Article III:4 before the Panel examined the "General Exceptions" contained in Article XX. That, however, is a conclusion of law. The chapeau of

\(^{31}\)Panel Report, para. 6.40.
Article XX makes it clear that it is the "measures" which are to be examined under Article XX(g), and not the legal finding of "less favourable treatment."

Furthermore, the Panel Report appears to have utilized a conclusion it had reached earlier in holding that the baseline establishment rules did not fall within the justifying terms of Articles XX(b); i.e. that the baseline establishment rules were not "necessary" for the protection of human, animal or plant life. The Panel Report, it will be recalled, found that the baseline establishment rules had not been shown by the United States to be "necessary" under Article XX(b) since alternative measures either consistent or less inconsistent with the General Agreement were reasonably available to the United States for achieving its aim of protecting human, animal or plant life.32 In other words, the Panel Report appears to have applied the "necessary" test not only in examining the baseline establishment rules under Article XX(b), but also in the course of applying Article XX(g).

A principal difficulty, in the view of the Appellate Body, with the Panel Report's application of Article XX(g) to the baseline establishment rules is that the Panel there overlooked a fundamental rule of treaty interpretation. This rule has received its most authoritative and succinct expression in the Vienna Convention on the Law of Treaties (the "Vienna Convention")33 which provides in relevant part:

ARTICLE 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

The "general rule of interpretation" set out above has been relied upon by all of the participants and third participants, although not always in relation to the same issue. That general rule of interpretation has attained the status of a rule of customary or general international law.34 As such, it forms part of the "customary rules of interpretation of public international law" which the Appellate Body has been directed, by Article 3(2) of the DSU, to apply in seeking to clarify the provisions of the General Agreement and the other "covered agreements" of the Marrakesh Agreement Establishing the World Trade Organization35 (the "WTO Agreement"). That direction reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law.

Applying the basic principle of interpretation that the words of a treaty, like the General Agreement, are to be given their ordinary meaning, in their context and in the light of the treaty's object and purpose, the Appellate Body observes that the Panel Report failed to take adequate account of the words actually used by Article XX in its several paragraphs. In enumerating the various categories of governmental acts, laws or regulations which WTO Members may carry out

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32Panel Report, paras. 6.25-6.28.
35Done at Marrakesh, Morocco, 15 April 1994.

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or promulgate in pursuit of differing legitimate state policies or interests outside the realm of trade liberalization, Article XX uses different terms in respect of different categories:

"necessary" - in paragraphs (a), (b) and (d);  
"relating to" - in paragraphs (c), (e) and (g);  
"in pursuance of" - in paragraph (h); and  
"essential" - in paragraph (j);  
"for the protection of" - in paragraph (f);  
"involving" - in paragraph (i).

It does not seem reasonable to suppose that the WTO Members intended to require, in respect of each and every category, the same kind or degree of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized.

At the same time, Article XX(g) and its phrase, "relating to the conservation of exhaustible natural resources," need to be read in context and in such a manner as to give effect to the purposes and objects of the General Agreement. The context of Article XX(g) includes the provisions of the rest of the General Agreement, including in particular Articles I, III and XI; conversely, the context of Articles I and III and XI includes Article XX. Accordingly, the phrase "relating to the conservation of exhaustible natural resources" may not be read so expansively as seriously to subvert the purpose and object of Article III:4. Nor may Article III:4 be given so broad a reach as effectively to emasculate Article XX(g) and the policies and interests it embodies. The relationship between the affirmative commitments set out in, e.g., Articles I, III and XI, and the policies and interests embodied in the "General Exceptions" listed in Article XX, can be given meaning within the framework of the General Agreement and its object and purpose by a treaty interpreter only on a case-to-case basis, by careful scrutiny of the factual and legal context in a given dispute, without disregarding the words actually used by the WTO Members themselves to express their intent and purpose.

The 1987 Herring and Salmon report, and the Panel Report itself, gave some recognition to the foregoing considerations of principle. As earlier noted, the Panel Report quoted the following excerpt from the Herring and Salmon report:

as the preamble of Article XX indicates, the purpose of including Article XX(g) in the General Agreement was not to widen the scope for measures serving trade policy purposes but merely to ensure that the commitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of exhaustible natural resources.36 (emphasis added)

All the participants and the third participants in this appeal accept the propriety and applicability of the view of the Herring and Salmon report and the Panel Report that a measure must be "primarily aimed at" the conservation of exhaustible natural resources in order to fall within the scope of Article XX(g).17 Accordingly, we see no need to examine this point further, save, perhaps, to note that the phrase "primarily aimed at" is not itself treaty language and was not designed as a simple litmus test for inclusion or exclusion from Article XX(g).

Against this background, we turn to the specific question of whether the baseline establishment rules are appropriately regarded as "primarily aimed at" the conservation of natural

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17We note that the same interpretation has been applied in two recent unadopted panel reports: United States - Restrictions on Imports of Tuna, DS29/R (1994); United States - Taxes on Automobiles, DS31/R (1994).
resources for the purposes of Article XX(g). We consider that this question must be answered in the affirmative.

The baseline establishment rules, taken as a whole (that is, the provisions relating to establishment of baselines for domestic refiners, along with the provisions relating to baselines for blenders and importers of gasoline), need to be related to the "non-degradation" requirements set out elsewhere in the Gasoline Rule. Those provisions can scarcely be understood if scrutinized strictly by themselves, totally divorced from other sections of the Gasoline Rule which certainly constitute part of the context of these provisions. The baseline establishment rules whether individual or statutory, were designed to permit scrutiny and monitoring of the level of compliance of refiners, importers and blenders with the "non-degradation" requirements. Without baselines of some kind, such scrutiny would not be possible and the Gasoline Rule's objective of stabilizing and preventing further deterioration of the level of air pollution prevailing in 1990, would be substantially frustrated. The relationship between the baseline establishment rules and the "non-degradation" requirements of the Gasoline Rule is not negated by the inconsistency, found by the Panel, of the baseline establishment rules with the terms of Article III:4. We consider that, given that substantial relationship, the baseline establishment rules cannot be regarded as merely incidentally or inadvertently aimed at the conservation of clean air in the United States for the purposes of Article XX(g).

C. "if such measures are made effective in conjunction with restrictions on domestic production or consumption"

The Panel did not find it necessary to deal with the issue of whether the baseline establishment rules "are made effective in conjunction with restrictions on domestic production or consumption", since it had earlier concluded that those rules had not even satisfied the preceding requirement of "relating to" in the sense of being "primarily aimed at" the conservation of clean air. Having been unable to concur with that earlier conclusion of the Panel, we must now address this second requirement of Article XX(g), the United States having, in effect, appealed from the failure of the Panel to proceed further with its inquiry into the availability of Article XX(g) as a justification for the baseline establishment rules.

The claim of the United States is that the second clause of Article XX(g) requires that the burdens entailed by regulating the level of pollutants in the air emitted in the course of combustion of gasoline, must not be imposed solely on, or in respect of, imported gasoline.

On the other hand, Venezuela and Brazil refer to prior panel reports which include statements to the effect that to be deemed as "made effective in conjunction with restrictions on domestic production or consumption", a measure must be "primarily aimed at" making effective certain restrictions on domestic production or consumption.18 Venezuela and Brazil also argue that the United States has failed to show the existence of restrictions on domestic production or consumption of a natural resource under the Gasoline Rule since clean air was not an exhaustible natural resource within the meaning of Article XX(g). Venezuela contends, finally, that the United States has not discharged its burden of showing that the baseline establishment rules make the United States' regulatory scheme "effective." The claim of Venezuela is, in effect, that to be properly regarded as "primarily aimed at" the conservation of natural resources, the baseline

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establishment rules must not only "reflect a conservation purpose" but also be shown to have had "some positive conservation effect."39

The Appellate Body considers that the basic international law rule of treaty interpretation, discussed earlier, that the terms of a treaty are to be given their ordinary meaning, in context, so as to effectuate its object and purpose, is applicable here, too. Viewed in this light, the ordinary or natural meaning of "made effective" when used in connection with a measure - a governmental act or regulation - may be seen to refer to such measure being "operative", as "in force", or as having "come into effect."19 Similarly, the phrase "in conjunction with" may be read quite plainly as "together with" or "jointly with."20 Taken together, the second clause of Article XX(g) appears to us to refer to governmental measures like the baseline establishment rules being promulgated or brought into effect together with restrictions on domestic production or consumption of natural resources. Put in a slightly different manner, we believe that the clause "if such measures are made effective in conjunction with restrictions on domestic product or consumption" is appropriately read as a requirement that the measures concerned impose restrictions, not just in respect of imported gasoline but also with respect to domestic gasoline. The clause is a requirement of even-handedness in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources.

There is, of course, no textual basis for requiring identical treatment of domestic and imported products. Indeed, where there is identity of treatment - constituting real, not merely formal, equality of treatment - it is difficult to see how inconsistency with Article III:4 would have arisen in the first place. On the other hand, if no restrictions on domestically-produced like products are imposed at all, and all limitations are placed upon imported products alone, the measure cannot be accepted as primarily or even substantially designed for implementing conservationist goals.42 The measure would simply be naked discrimination for protecting locally-produced goods.

In the present appeal, the baseline establishment rules affect both domestic gasoline and imported gasoline, providing for - generally speaking - individual baselines for domestic refiners and blenders and statutory baselines for importers. Thus, restrictions on the consumption or depletion of clean air by regulating the domestic production of "dirty" gasoline are established jointly with corresponding restrictions with respect to imported gasoline. That imported gasoline has been determined to have been accorded "less favourable treatment" than the domestic gasoline in terms of Article III:4, is not material for purposes of analysis under Article XX(g). It might also be noted that the second clause of Article XX(g) speaks disjunctively of "domestic production or consumption."

We do not believe, finally, that the clause "if made effective in conjunction with restrictions on domestic production or consumption" was intended to establish an empirical "effects test" for the availability of the Article XX(g) exception. In the first place, the problem of determining causation,
well-known in both domestic and international law, is always a difficult one. In the second place, in the field of conservation of exhaustible natural resources, a substantial period of time, perhaps years, may have to elapse before the effects attributable to implementation of a given measure may be observable. The legal characterization of such a measure is not reasonably made contingent upon occurrence of subsequent events. We are not, however, suggesting that consideration of the predictable effects of a measure is never relevant. In a particular case, should it become clear that realistically, a specific measure cannot in any possible situation have any positive effect on conservation goals, it would very probably be because that measure was not designed as a conservation regulation to begin with. In other words, it would not have been "primarily aimed at" conservation of natural resources at all.


Having concluded, in the preceding section, that the baseline establishment rules of the Gasoline Rule fall within the terms of Article XX(g), we come to the question of whether those rules also meet the requirements of the chapeau of Article XX. In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions - paragraphs (a) to (j) - listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX.

The chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied. It is, accordingly, important to underscore that the purpose and object of the introductory clauses of Article XX is generally the prevention of "abuse of the exceptions of [what was later to become] Article [XX]." This insight drawn from the drafting history of Article XX is a valuable one. The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement. If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned.

The burden of demonstrating that a measure provisionally justified as being within one of the exceptions set out in the individual paragraphs of Article XX does not, in its application, constitute abuse of such exception under the chapeau, rests on the party invoking the exception. That is, of necessity, a heavier task than that involved in showing that an exception, such as Article XX(g), encompasses the measure at issue.

The enterprise of applying Article XX would clearly be an unprofitable one if it involved no more than applying the standard used in finding that the baseline establishment rules were inconsistent with Article III:4. That would also be true if the finding were one of inconsistency with some other substantive rule of the General Agreement. The provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred. To proceed down that path would be both to empty the chapeau of

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21This was noted in the Panel Report on United States - Imports of Certain Automotive Spring Assemblies, BISD 30S/107, para. 56; adopted on 26 May 1983.

its contents and to deprive the exceptions in paragraphs (a) to (j) of meaning. Such recourse would also confuse the question of whether inconsistency with a substantive rule existed, with the further and separate question arising under the chapeau of Article XX as to whether that inconsistency was nevertheless justified. One of the corollaries of the "general rule of interpretation" in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.23

The chapeau, it will be seen, prohibits such application of a measure at issue (otherwise falling within the scope of Article XX(g)) as would constitute

(a) "arbitrary discrimination" (between countries where the same conditions prevail);
(b) "unjustifiable discrimination" (with the same qualifier); or
(c) "disguised restriction" on international trade.

The text of the chapeau is not without ambiguity, including one relating to the field of application of the standards it contains: the arbitrary or unjustifiable discrimination standards and the disguised restriction on international trade standard. It may be asked whether these standards do not have different fields of application. Such a question was put to the United States in the course of the oral hearing. It was asked whether the words incorporated into the first two standards "between countries where the same conditions prevail" refer to conditions in importing and exporting countries, or only to conditions in exporting countries. The reply of the United States was to the effect that it interpreted that phrase as referring to both the exporting countries and importing countries and as between exporting countries. It also said that the language spoke for itself, but there was no reference to third parties; while some thought that this was only between exporting countries inter se, there is no support in the text for that view. No such question was put to the United States concerning the field of application of the third standard - disguised restriction on international trade. But the United States put forward arguments designed to show that in the case under appeal, it had met all the standards set forth in the chapeau. In doing so, it clearly proceeded on the assumption that, whatever else they might relate to in another case, they were relevant to a case of national treatment where the Panel had found a violation of Article III:4. At no point in the appeal was that assumption challenged by Venezuela or Brazil. Venezuela argued that the United States had failed to meet all the standards contained in the chapeau. So did Norway and the European Communities as third participants. In short, the field of application of these standards was not at issue.

The assumption on which all the participants proceeded is buttressed by the fact that the chapeau says that "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures ..." The exceptions listed in Article XX thus relate to all of the obligations under the General Agreement: the national treatment obligation and the most-favoured-nation obligation, of course, but others as well. Effect is more easily given to the words "nothing in this Agreement", and Article XX as a whole including its chapeau more easily integrated into the remainder of the General Agreement, if the chapeau is taken to mean that the standards it sets forth are applicable to all of the situations in which an allegation of a substantive obligation has been made and one of the exceptions contained in Article XX has in turn been claimed.

Against this background, we see no need to decide the matter of the field of application of the standards set forth in the chapeau nor to make a ruling at variance with the common understanding of the participants. 46

"Arbitrary discrimination", "unjustifiable discrimination" and "disguised restriction" on international trade may, accordingly, be read side-by-side; they impart meaning to one another. It is clear to us that "disguised restriction" includes disguised discrimination in international trade. It is equally clear that concealed or unannounced restriction or discrimination in international trade does not exhaust the meaning of "disguised restriction." We consider that "disguised restriction", whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX. Put in a somewhat different manner, the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to "arbitrary or unjustifiable discrimination", may also be taken into account in determining the presence of a "disguised restriction" on international trade. The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX.

There was more than one alternative course of action available to the United States in promulgating regulations implementing the CAA. These included the imposition of statutory baselines without differentiation as between domestic and imported gasoline. This approach, if properly implemented, could have avoided any discrimination at all. Among the other options open to the United States was to make available individual baselines to foreign refiners as well as domestic refiners. The United States has put forward a series of reasons why either of these courses was not, in its view, realistically open to it and why, instead, it had to devise and apply the baseline establishment rules contained in the Gasoline Rule.

In explaining why individual baselines for foreign refiners had not been put in place, the United States laid heavy stress upon the difficulties which the EPA would have had to face. These difficulties related to anticipated administrative problems that individual baselines for foreign refiners would have generated. This argument was made succinctly by the United States in the following terms:

Verification on foreign soil of foreign baselines, and subsequent enforcement actions, present substantial difficulties relating to problems arising whenever a country exercises

46We note in this connection that two previous panels had occasion to apply the chapeau. In United States - Imports of Certain Automotive Spring Assemblies, BISD 30S/107; adopted on 26 May 1983, the panel had before it a ban on imports, and an exclusion order of the United States' International Trade Commission, of certain automotive spring assemblies which the Commission had found, under Section 337 of the Tariff Act of 1930, to have infringed valid United States patents. The panel there held that the exclusion order had not been applied in a manner which would constitute a means of "arbitrary or unjustifiable discrimination against countries where the same conditions prevail," because that order was directed against imports of infringing assemblies "from all foreign sources, and not just from Canada." At the same time, the same order was also examined and found not to be "a disguised restriction on international trade." Id., paras. 54-56. See also United States - Prohibition of Imports of Tuna and Tuna Products, BISD 29S/91, para. 4.8; adopted 22 February 1982.

It may be observed that the term "countries" in the chapeau is textually unqualified; it does not say "foreign countries", as did Article 4 of the 1927 League of Nations International Convention for the Abolition of Import and Export Prohibitions and Restrictions, 97 L.N.T.S. 393. Neither does the chapeau say "third countries" as did, e.g., bilateral trade agreements negotiated by the United States under the 1934 Reciprocal Trade Agreements Act; e.g. the Trade Agreement between the United States of America and Canada, 15 November 1935, 168 L.N.T.S. 356 (1936). These earlier treaties are here noted, not as pertaining to the travaux préparatoires of the General Agreement, but simply to show how in comparable treaties, a particular intent was expressed with words not found in printer's ink in the General Agreement.
enforcement jurisdiction over foreign persons. In addition, even if individual baselines were established for several foreign refiners, the importer would be tempted to claim the refinery of origin that presented the most benefits in terms of baseline restrictions, and tracking the refinery or origin would be very difficult because gasoline is a fungible commodity. The United States should not have to prove that it cannot verify information and enforce its regulations in every instance in order to show that the same enforcement conditions do not prevail in the United States and other countries ... The impracticability of verification and enforcement of foreign refiner baselines in this instance shows that the "discrimination" is based on serious, not arbitrary or unjustifiable, concerns stemming from different conditions between enforcement of its laws in the United States and abroad.47

Thus, according to the United States, imported gasoline was relegated to the more exacting statutory baseline requirement because of these difficulties of verification and enforcement. The United States stated that verification and enforcement of the Gasoline Rule's requirements for imported gasoline are "much easier when the statutory baseline is used" and that there would be a "dramatic difference" in the burden of administering requirements for imported gasoline if individual baselines were allowed.24

While the anticipated difficulties concerning verification and subsequent enforcement are doubtless real to some degree, the Panel viewed them as insufficient to justify the denial to foreign refiners of individual baselines permitted to domestic refiners. The Panel said:

While the Panel agreed that it would be necessary under such a system to ascertain the origin of gasoline, the Panel could not conclude that the United States had shown that this could not be achieved by other measures reasonably available to it and consistent or less inconsistent with the General Agreement. Indeed, the Panel noted that a determination of origin would often be feasible. The Panel examined, for instance, the case of a direct shipment to the United States. It considered that there was no reason to believe that, given the usual measures available in international trade for determination of origin and tracking of goods (including documentary evidence and third party verification) there was any particular difficulty sufficient to warrant the demands of the baseline establishment methods applied by the United States.49

(...) In the view of the Panel, the United States had reasonably available to it data for, and measures of, verification and assessment which were consistent or less inconsistent with Article III:4. For instance, although foreign data may be formally less subject to complete control by US authorities, this did not amount to establishing that foreign data could not in any circumstances be sufficiently reliable to serve U.S. purposes. This, however, was the practical effect of the application of the Gasoline Rule. In the Panel's view, the United States had not demonstrated that data available from foreign refiners was inherently less susceptible to established techniques of checking, verification, assessment and

47Para. 55 of the Appellant's Submission, dated 4 March 1996. The United States was in effect making the same point when, at pages 11 and 12 of its Post-Hearing Memorandum, it argued that the conditions were not the same as between the United States, on the one hand, and Venezuela and Brazil on the other.

24Supplementary responses by the United States to certain questions of the Appellate Body, dated 1 April 1996.

enforcement than data for other trade in goods subject to US regulation. The nature of the data in this case was similar to data relied upon by the United States in other contexts, including, for example, under the application of antidumping laws. In an antidumping case, only when the information was not supplied or deemed unverifiable did the United States turn to other information. If a similar practice were to be applied in the case of the Gasoline Rule, then importers could, for instance, be permitted to use the individual baselines of foreign refiners for imported gasoline from those refiners, with the statutory baseline being applied only when the source of imported gasoline could not be determined or a baseline could not be established because of an absence of data.\textsuperscript{50}

We agree with the finding above made in the Panel Report. There are, as the Panel Report found, established techniques for checking, verification, assessment and enforcement of data relating to imported goods, techniques which in many contexts are accepted as adequate to permit international trade - trade between territorial sovereigns - to go on and grow. The United States must have been aware that for these established techniques and procedures to work, cooperative arrangements with both foreign refiners and the foreign governments concerned would have been necessary and appropriate. At the oral hearing, in the course of responding to an enquiry as to whether the EPA could have adapted, for purposes of establishing individual refinery baselines for foreign refiners, procedures for verification of information found in U.S. antidumping laws, the United States said that "in the absence of refinery cooperation and the possible absence of foreign government cooperation as well", it was unlikely that the EPA auditors would be able to conduct the on-site audit reviews necessary to establish even the overall quality of refineries' 1990 gasoline.\textsuperscript{25} From this statement, there arises a strong implication, it appears to the Appellate Body, that the United States had not pursued the possibility of entering into cooperative arrangements with the governments of Venezuela and Brazil or, if it had, not to the point where it encountered governments that were unwilling to cooperate. The record of this case sets out the detailed justifications put forward by the United States. But it does not reveal what, if any, efforts had been taken by the United States to enter into appropriate procedures in cooperation with the governments of Venezuela and Brazil so as to mitigate the administrative problems pleaded by the United States.\textsuperscript{26} The fact that the United States Congress might have intervened, as it did later intervene, in the process by denying funding, is beside the point: the United States, of course, carries responsibility for actions of both the executive and legislative departments of government.

In its submissions, the United States also explained why the statutory baseline requirement was not imposed on domestic refiners as well. Here, the United States stressed the problems that domestic refineries would have faced had they been required to comply with the statutory baseline. The Panel Report summarized the United States' argument in the following terms:

\footnote{Panel Report, para. 6.28.}

\footnote{Supplementary responses to the United States to certain questions of the Appellate Body, dated 1 April 1996.}

\footnote{While it is not for the Appellate Body to speculate where the limits of effective international cooperation are to be found, reference may be made to a number of precedents that the United States (and other countries) have considered it prudent to use to help overcome problems confronting enforcement agencies by virtue of the fact that the relevant law and the authority of the enforcement of the agency does not hold sway beyond national borders. During the course of the oral hearing, attention was drawn to the fact that in addition to the antidumping law referred to by the Panel in the passage cited above, there were other US regulatory laws of this kind, e.g., in the field of anti-trust law, securities exchange law and tax law. There are cooperative agreements entered into by the US and other governments to help enforce regulatory laws of the kind mentioned and to obtain data from abroad. There are such agreements, inter alia, in the anti-trust and tax areas. There are also, within the framework of the WTO, the Agreement on the Implementation of Article VI of GATT 1994, (the "Antidumping Agreement"), the Agreement on Subsidies and Countervailing Measures (the "SCM Agreement") and the Agreement on Pre-Shipment Inspection, all of which constitute recognition of the frequency and significance of international cooperation of this sort.}
The United States concluded that, contrary to Venezuela's and Brazil's claim, Article XX did not require adoption of the statutory baseline as a national standard even if the difficulties associated with the establishment of individual baselines for importers were insurmountable. Application of the statutory baseline to domestic producers of reformulated and conventional gasoline in 1995 would have been physically and financially impossible because of the magnitude of the changes required in almost all US refineries; it thus would have caused a substantial delay in the programme. Weighing the feasibility of policy options in economic or technical terms in order to meet an environmental objective was a legitimate consideration, and did not, in itself, constitute protectionism, as alleged by Venezuela and Brazil. Article XX did not require a government to choose the most expensive possible way to regulate its environment. 53 (emphasis added)

Clearly, the United States did not feel it feasible to require its domestic refiners to incur the physical and financial costs and burdens entailed by immediate compliance with a statutory baseline. The United States wished to give domestic refiners time to restructure their operations and adjust to the requirements in the Gasoline Rule. This may very well have constituted sound domestic policy from the viewpoint of the EPA and U.S. refiners. At the same time we are bound to note that, while the United States counted the costs for its domestic refiners of statutory baselines, there is nothing in the record to indicate that it did other than disregard that kind of consideration when it came to foreign refiners.

We have above located two omissions on the part of the United States: to explore adequately means, including in particular cooperation with the governments of Venezuela and Brazil, of mitigating the administrative problems relied on as justification by the United States for rejecting individual baselines for foreign refiners; and to count the costs for foreign refiners that would result from the imposition of statutory baselines. In our view, these two omissions go well beyond what was necessary for the Panel to determine that a violation of Article III:4 had occurred in the first place. The resulting discrimination must have been foreseen, and was not merely inadvertent or unavoidable. In the light of the foregoing, our conclusion is that the baseline establishment rules in the Gasoline Rule, in their application, constitute "unjustifiable discrimination" and a "disguised restriction on international trade." We hold, in sum, that the baseline establishment rules, although within the terms of Article XX(g), are not entitled to the justifying protection afforded by Article XX as a whole.

V. FINDINGS AND CONCLUSIONS

For the reasons set out in the preceding sections of this report, the Appellate Body has reached the following conclusions:

(a) the Panel erred in law in its conclusion that the baseline establishment rules contained in Part 80 of Title 40 of the Code of Federal Regulations did not fall within the terms of Article XX(g) of the General Agreement;

(b) the Panel accordingly also erred in law in failing to decide whether the baseline establishment rules contained in Part 80 of Title 40 of the Code of Federal

53Panel Report, para. 3.52.
Regulations fell within the ambit of the chapeau of Article XX of the *General Agreement*;

(c) the baseline establishment rules contained in Part 80 of Title 40 of the Code of Federal Regulations fail to meet the requirements of the chapeau of Article XX of the *General Agreement*, and accordingly are not justified under Article XX of the *General Agreement*.

The foregoing legal conclusions modify the conclusions of the Panel as set out in paragraph 8.1 of its Report. The Appellate Body's conclusions leave intact the conclusions of the Panel that were not the subject of appeal.

The Appellate Body *recommends* that the Dispute Settlement Body request the United States to bring the baseline establishment rules contained in Part 80 of Title 40 of the Code of Federal Regulations into conformity with its obligations under the *General Agreement*.

It is of some importance that the Appellate Body point out what this does *not* mean. It does not mean, or imply, that the ability of any WTO Member to take measures to control air pollution or, more generally, to protect the environment, is at issue. That would be to ignore the fact that Article XX of the *General Agreement* contains provisions designed to permit important state interests - including the protection of human health, as well as the conservation of exhaustible natural resources - to find expression. The provisions of Article XX were not changed as a result of the Uruguay Round of Multilateral Trade Negotiations. Indeed, in the preamble to the *WTO Agreement* and in the *Decision on Trade and Environment*, there is specific acknowledgment to be found about the importance of coordinating policies on trade and the environment. WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the *General Agreement* and the other covered agreements.

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27Adopted by Ministers at the Meeting of the Trade Negotiations Committee in Marrakesh on 14 April 1994.

4-1. Case Note on the Panel Report by Julia Qin
ASIL Insight, September 5, 2007, Volume 11, Issue 23

Update: The Mercosur Exemption Reversed – Conflict between WTO and Mercosur Rulings and Its Implications for Environmental Values (December 31, 2008)

The recent decision of the World Trade Organization's Panel in the Brazil - Tyres[1] case has the potential to become a milestone in WTO jurisprudence on trade and the environment. At issue was Brazil's ban on imports of retreaded tyres. The European Communities (EC) challenged the ban as a violation of WTO rules, whereas Brazil defended the measure as necessary to protect health and the environment. The Panel held that, although the ban was necessary to protect health and the environment, it was applied in a WTO-inconsistent manner because Brazil failed to enforce a similar ban on used tyre imports. Thus, the Panel decision effectively directed Brazil to impose further trade restrictions so as to advance its environmental objective. Previous WTO decisions have not gone this far in safeguarding environmental values.

Brazil has indicated that it will accept the Panel's ruling and implement the additional ban on used tyres. The European Communities, however, has decided to appeal. It remains to be seen, therefore, whether the WTO Appellate Body will uphold the Panel's "green" decision.

Background

Retreaded tyres are produced by reconditioning used tyres; they have a shorter lifespan than new tyres and are sold at a cheaper price. Brazil imposed the ban on retread imports in 2000, claiming such imports led to a faster accumulation of waste tyres, which create health and environmental hazards by providing breeding grounds for mosquito-borne diseases such as dengue fever, yellow fever, and malaria, and by causing tyre fires that are difficult to control. Furthermore, Brazil claimed, it is not only costly to collect waste tyres scattered in its vast territory, but also technologically impossible to dispose of waste tyres without negative environmental consequences.

There is an exemption for retreaded tyres produced in members of MERCOSUR - the free trade arrangement among Brazil, Argentina, Uruguay, and Paraguay. Brazil established this exception after it lost to Uruguay in a MERCOSUR arbitration, which ruled that its ban violated MERCOSUR obligations.

Brazil originally also imposed a ban on used tyre imports, but that ban has been suspended through domestic court injunctions obtained by Brazilian retread producers. It is cheaper for the Brazilian producers to import used tyres than to collect them domestically.
The EC is a net exporter of retreaded tyres, for which there is only a limited demand in European markets. Its retread exports declined substantially after Brazil imposed the ban. The EC claimed that the ban was not designed to protect the environment, but rather to protect Brazil's domestic retread industry from foreign competition.

**Major Legal Issues**

An import ban violates the General Agreement on Tariffs and Trade (GATT) Article XI:1, which prohibits quantitative restrictions on imports or exports. The question, however, is whether the ban can be justified by one of the GATT exceptions. In this case, Brazil invoked GATT Article XX(b) that excepts measures "necessary to protect human, animal or plant life or health."

**Is the ban "necessary" to protect human health and the environment?**

- The link between retreaded tyres and health/environmental risks

A threshold issue was to determine whether retreaded tyres could cause health and environmental concerns. (The Panel accepted the use of the term "environment" in this case as shorthand for "animal or plant life or health" within the meaning of Article XX(b).) According to the EC, retreaded tyres are not waste tyres and do not in themselves cause health concerns. Since all products eventually turn into waste, and since many low-quality products have short lives, the EC argued, if Brazil's ban were allowed, there would be no reason why other members could not restrict imports of any product having a shorter life than competing domestic products. The Panel dismissed the EC's argument by noting that there had been other WTO cases in which the risk being addressed through a measure did not involve the exact product at issue. For example, the Panel pointed out, the health risk addressed in *U.S.-Gasoline*[2] related to air pollution caused by the consumption of gasoline rather than to gasoline itself. "While retreaded tyres are distinct from waste tyres," the Panel stated, "waste tyres are nothing other than tyres that have reached the end of their lifecycle as tyres."[3]

The Panel then examined whether the accumulation of waste tyres creates health and environmental risks. It accepted the evidence presented by Brazil that numerous waste tyres scattered in its territory provide perfect breeding grounds for mosquito-borne diseases, and can cause tyre fires that harm humans, animals and plants alike. As for the EC's argument that the risks posed by waste tyres are due to Brazil's poor management of waste tyres, the Panel stated that, even if proper management of waste tyres may significantly reduce such risks, "that does not negate the reality that waste tyres get abandoned and accumulated and that risks associated with accumulated waste tyres exist in Brazil."[4]

- The "necessity" test

In deciding whether the ban was "necessary" to achieve Brazil's stated objective, the Panel followed the established approach in Article XX cases. It engaged in weighing and balancing several factors: the relative importance of the policy objective pursued by the
measure; the contribution of the measure to the realization of the policy objective; and the restrictive impact of the measure on international commerce. While recognizing that an import ban is as trade-restrictive as a measure can be, the Panel believed that "the objective of protecting human health and life against life-threatening diseases, such as dengue fever and malaria, is both vital and important in the highest degree."

In evaluating the ban's contribution to this objective, the Panel decided it was unnecessary to examine the actual impact of the ban on the reduction of waste tyres; instead, it would suffice to know whether the ban is capable of contributing to such objective. Since all retreaded tyres have a shorter lifespan than new tyres, the Panel logically concluded that the ban can contribute to the reduction of waste tyre accumulation in Brazil.

Under Article XX jurisprudence, a measure is "necessary" only if there is no less trade-restrictive alternative reasonably available. The Panel examined a number of alternatives identified by the EC, which ranged from preventive measures, such as promotion of public transportation, to various disposal methods, such as landfill, stockpiling, energy recovery and recycling. It found that while these measures could each contribute to the reduction of waste tyres or address some aspects of the health/environmental risks involved, none of them, either individually or collectively, would safely eliminate the risks arising from waste tyres, as intended by the import ban. Hence, the Panel concluded, they were not reasonably available alternatives to the ban.

**Is the ban applied consistently with the requirement of the chapeau?**

A measure justifiable under Article XX(b) must also meet the requirement of the chapeau of Article XX that it is "not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."

1. Arbitrary or unjustifiable discrimination

The EC argued that the manner in which Brazil applied the ban constituted arbitrary and unjustifiable discrimination because (i) the ban did not apply to MERCOSUR countries, and (ii) Brazilian producers were allowed to import used tyres, even though such imports produce the same environmental externalities as imports of retreaded tyres. The Panel agreed that the ban was implemented in a manner that resulted in discrimination between MERCOSUR and non-MERCOSUR countries and between Brazil and other WTO members. The question then is whether such discrimination is "arbitrary or unjustifiable" within the meaning of the chapeau.

- The MERCOSUR exemption

The Panel found the discrimination arising from the MERCOSUR exemption was neither "arbitrary" nor "unjustifiable." According to the Panel, this discrimination was not arbitrary because Brazil adopted the exemption to comply with the ruling of a MERCOSUR tribunal rather than as a result of its own capricious or unpredictable decision. The Panel then examined the volumes of retreaded tyres imported from
MERCOSUR countries and found that such imports had not been significant enough to undermine Brazil's ability to fulfill its objective. Based on this "effect" test, the Panel concluded that, as of the time of its ruling, the discrimination arising from the MERCOSUR exemption was not unjustifiable.

It should be noted that, while allowing the MERCOSUR exemption, the Panel did not exclude the regional trade arrangement categorically from the application of Article XX. On the contrary, it indicated that "the fact that we give due consideration to the existence of Brazil's commitments under MERCOSUR ... does not imply that the exemption must necessarily be justified."[6] Indeed, the Panel's ruling suggests that should the imports from MERCOSUR countries increase significantly in the future, the exemption may become "unjustifiable."

- Imports of used tyres

As for the discrimination arising from used tyre imports, the Panel found it not "arbitrary" but "unjustifiable." The discrimination was not arbitrary because the imports were made through injunctions granted by Brazilian courts, which the Panel believed were not capricious or unpredictable. However, the Panel also found the granting of injunctions directly contradicted the rationale of the ban on retreads since "it effectively allows the very used tyres that are prevented from entering into Brazil after retreading to be imported before retreading."[7] In this regard, the Panel again employed an effect test. It found that used tyre imports had been taking place in such a large amount that the achievement of Brazil's declared objective was being "significantly undermined."[8] Consequently, it found the discrimination arising from used tyre imports "unjustifiable."

Since Brazil did not claim the conditions prevailing in Brazil were different from those in other WTO members, the Panel held that the ban was being applied in a manner that "constitutes a means of unjustifiable discrimination between countries where the same conditions prevail."[9]

2. Disguised restriction on international trade

Based on the same rationale as that underlying its finding on unjustifiable discrimination, the Panel found that the ban was applied in a manner that constituted a disguised restriction on international trade, "since imports of used tyres are taking place to the benefit of the Brazilian retreading industry in such quantities as to seriously undermine the achievement of the stated objective of avoiding the further accumulation of waste tyres in Brazil."[10]

Implications

If Brazil restores its ban on used tyre imports, as it is expected to do under the Panel's ruling, Brazilian retread producers will have to rely on domestically-generated used tyres for production. Consequently, more used tyres can be collected domestically, contributing to a reduction of waste tyre accumulation in Brazil.
Tyre retreading is an environmentally-friendly measure; free trade in retreaded tyres may well lead to a more efficient allocation of resources for retreading and for disposing of tyre waste on a global basis. However, insofar as the importing country is concerned, such trade can also worsen its environment, as Brazil has demonstrated in this case. Trade in waste or recycled products, therefore, may present a different set of issues from trade in new products.

This case is the first in GATT/WTO history that involves a recycled waste product. Significantly, the Panel decision is consistent with the principles of the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*,[11] the most comprehensive international agreement to date concerning waste trade. The Basel principles include minimization of waste generation (the reduction principle) and local disposal of wastes to the extent possible (the proximity principle). Furthermore, the Convention recognizes the sovereign right of a State to ban imports of hazardous and other wastes, and prohibits the export of such wastes to developing countries without their prior consent. Thus, the Basel norms endorse restrictions on trade in waste products and advocate the right of a sovereign nation to discriminate against foreign-generated waste.

The Panel did not invoke the Basel Convention explicitly, evidently because the Convention does not cover tyre waste directly. But the Panel adopted the Basel norms implicitly in its interpretation of the "necessity" test under Article XX(b). For instance, when noting the EC's argument that the reduction principle of the Basel Convention applies to hazardous waste only, the Panel commented: "[p]olicies to address "waste" by non-generation of additional waste are a generally recognized means of addressing waste management issues."[12] In assessing the health/environmental risks posed by waste tyres and in evaluating alternative methods of tyre disposal, the Panel made numerous references to the *Basel Technical Guidelines on the Identification and Management of Used Tyres*,[13] which were adopted by the Parties to the Convention in recognition of "the serious health and environmental problems" used tyres may cause.

Conceptually, the most difficult barrier in integrating the Basel norms into WTO law lies in the apparent conflict between the WTO principle of nondiscrimination and the Basel principle of differential treatment of wastes generated in different countries. In the context of GATT Article XX, the nondiscrimination requirement of the chapeau presents the challenge. Previous WTO cases do not provide much guidance in this regard, as they concern either generally polluting products (such as gasoline and asbestos) or endangered species (such as sea-turtles), in which nondiscrimination between the importing and exporting countries is inherently consistent with the objective of protecting health and the environment. In light of the specific facts of this case, the Panel was able to interpret the chapeau as requiring consistent application of the policy objective within the importing country's domestic system. This interpretation resolved the potential conflict of norms in a way that is consistent with the purpose of the policy exceptions of Article XX.
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Footnotes


[8] Id., paras. 7.306.


II. FACTUAL ASPECTS

A. PRODUCTS AT ISSUE

2.1 This dispute concerns retreaded tyres which are produced by reconditioning used tyres by stripping the worn tread from a used tyre's skeleton (casing) and replacing it with new material in the form of a new tread and, sometimes, new material covering also parts or all of the sidewalls.

2.2 Retreaded tyres can be produced through a number of different methods all encompassed by the generic term "retreading." These methods are: (i) top-capping, which consists in replacing only the tread; (ii) re-capping, which entails replacing the tread and part of the sidewall; and (iii) remoulding or "bead to bead" method, which consists of replacing the tread and the sidewall including all or part of the lower area of the tyre.28

2.3 There are different types of retreaded tyres which correspond to the different types of casings used to produce them, namely: passenger car retreaded tyres, commercial vehicle retreaded tyres, aircraft retreaded tyres and other. Under international standards, passenger car tyres may be retreaded only once.29 By contrast, commercial vehicle and aircraft tyres may be retreaded more than once.

B. MEASURES AT ISSUE30

2.5 On 17 November 2005, the European Communities requested the establishment of a panel in relation to the following measures of Brazil:31

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30 The text of Brazilian laws and regulations is based on translations provided by Brazil in its exhibits as clarified in light of Brazil's answer to panel question No. 1. In its answer to this question, Brazil indicated, inter alia, that the Portuguese term "reformadas" should be translated as "reconditioned or retreaded tyres", the term "recauchutagem" as "recapping", "remoldagem" as "remolding", and "recapagem" as "top-capping".
31 WT/DS332/4.
(a) The imposition of an import ban on retreaded tyres, notably by virtue of Portaria 14 of 17 November 2004 of the Secretariat of Foreign Trade of the Brazilian Ministry of Development, Industry and International Commerce (SECEX) that prohibits the issuance of import licenses for retreaded tyres.

(b) The adoption of a set of measures banning the importation of used tyres, which are sometimes applied against imports of retreaded tyres. In a footnote to this paragraph, the European Communities identifies the following measures banning the importation of used tyres: Portaria No. 8 of the Department of Foreign Trade Operations (DECEX) of 13 May 1991; Portaria DECEX 18 of 19 July 1992; Portaria 138-N of the Brazilian Institute of the Environment and of Renewable Resources (IBAMA) of 22 December 1992; Portaria 370 of the Ministry of Industry, Commerce and Tourism (MICT) of 28 November 1994; Interministerial Portaria 3 of 12 September 1995 of the Ministry of Industry, Commerce and Tourism and of the Ministry of the Economy; Resolution 23 of the National Council of the Environment (CONAMA) of 12 December 1996, and CONAMA Resolution 235 of 7 January 1998.

(…) 

(e) The exemption of retreaded tyres imported from other MERCOSUR countries from the import ban by means of Portaria SECEX 14 of 17 November 2004 and from the above-mentioned financial penalties by virtue of Presidential Decree No. 4592 of 11 February 2003, in response to the ruling of a MERCOSUR panel established at the request of Uruguay.

2.6 The European Communities also noted that for each of the measures referred to above, its request also covers any amendments, replacements, extensions, implementing measures or other related measures.

(…) 

4. Exemption of MERCOSUR countries from the import ban and the fines

2.13 After the adoption of Portaria SECEX 8/2000, the first measure explicitly banning the importation of "retreaded tyres", Uruguay requested, on 27 August 2001, the initiation of arbitral proceedings under MERCOSUR against this Brazilian measure. On 9 January 2002, the MERCOSUR arbitral tribunal decided that the import ban on retreaded tyres imposed by Portaria SECEX 8/2000 was incompatible with MERCOSUR Decision 22/2000, which requires MERCOSUR partners not to introduce new restrictions to commerce among themselves.

2.14 Following this arbitral award, Brazil eliminated the ban for remoulded tyres imported from MERCOSUR countries by means of Portaria SECEX 2 of 8 March 2002. Article 1 of Portaria SECEX 2/2002 provides:

"Art. 1. The import license for remoulded tyres is hereby authorized, classified under NCM codes 4012.1100, 4012.1200, 4012.1300 and 4012.1900, when proceeding from MERCOSUR member States under the Economic Complementation Agreement no. 18."32

2.15 This exception was maintained in Portaria SECEX 17 of 1 December 2003, and it is currently contained in Article 40 of Portaria SECEX 14/2004, transcribed above.

32 Exhibit BRA-78. See also Exhibit EC-41.
VII. FINDINGS

A. THE BAN ON THE IMPORTATION OF RETREADED TYRES

7.1 The European Communities claims that Brazil imposes a prohibition on the importation of retreaded tyres into Brazil inconsistent with Article XI of GATT 1994.33 The European Communities also submits that its challenge extends to any prohibition on the importation of used goods to the extent that such prohibitions are applied to retreaded tyres.34

7.2 Brazil presents no arguments in relation to the violation of Article XI itself and states that it does not contest that the import prohibition is prima facie inconsistent with Article XI:1.35 Brazil, however, claims that its import prohibition is justified under Article XX(b).

7.3 The Panel will thus consider the European Communities' claim under Article XI:1 first and then, as necessary, the parties' arguments on Brazil's defence under Article XX(b) of GATT 1994.

1. Does Brazil impose an import prohibition on retreaded tyres inconsistent with Article XI:1 of GATT 1994?

7.4 In its panel request, the European Communities identifies Portaria SECEX 14/2004 as the legal basis of an import ban on retreaded tyres.36 The European Communities has also indicated in its first written submission that it is challenging Portaria SECEX 14/2004 as the "current legal basis of the ban on importation of retreaded tyres into Brazil". In this connection, the Panel notes that the European Communities also identifies, in its panel request, an additional set of measures that it claims also constitute an import prohibition on retreaded tyres.

7.5 The Panel will first examine the European Communities' claim in relation to Portaria SECEX 14/200437, and then turn to the additional set of measures identified by the European Communities in its panel request.

(…)

33 European Communities' first written submission, paras. 88-91. In its panel request, the European Communities identified Portaria SECEX 14/2004 in relation to its claim under Article XI:1:

"The imposition of an import ban on retreaded tyres, notably by virtue of Portaria No. 14 of 17 November 2004 of the Secretariat of Foreign Trade of the Brazilian Ministry of Development, Industry and International Commerce that prohibits the issuance of import licenses for retreaded tyres".

34 European Communities' first written submission, para. 59 and footnotes 34 and 48.

35 Brazil's answer to Panel question No. 33. Brazil itself refers to Portaria SECEX 14/2004 as "the import ban" throughout its written submissions. See, for example, the legal argument section of Brazil's first written submission.

36 As noted above in the descriptive part of this report, the products at issue in this case are retreaded tyres classified under HS subheadings 4012.11, 4012.12, 4012.13, and 4012.19 and thus cover all types of retreaded tyres listed under these subheadings, namely tyres used on motor cars, buses and lorries, aircrafts and all other types of retreaded tyres. UNECE Regulations No. 108 and 109, which cover respectively passenger cars and commercial vehicles and their trailers, provide that "retreading" means the generic term for reconditioning a used tyre by replacing the worn tread with new material and may also include renovation of the outermost sidewall surface (Exhibit EC-6, para. 2.37). According to the Regulations, "retreading" covers three process methods, namely (1) top-capping (replacement of the tread), (2) re-capping (replacement of the tread and with the new material extending over part of the sidewall) and (3) bead to bead (or referred to as remoulding by Brazil) (replacement of the tread and renovation of the sidewall including all or part of the lower area of the tyre). (See the parties' responses to panel question No.1).

37 European Communities' panel request, European Communities' first written submission, paras. 49, 56, 59, 88, and European Communities' answer to panel question No. 27.
In sum, although Portaria SECEX 14/2004 does not provide for an outright ban on importation, by prohibiting the issuance of import licences for retreaded tyres, which would be necessary for their importation, it has the effect of prohibiting the importation of retreaded tyres. The Panel thus finds that Portaria SECEX 14/2004 is inconsistent with Article XI:1 of GATT 1994.

(...)

2. Is Brazil's import prohibition justified under Article XX of GATT 1994?

Brazil argues that the import prohibition is justified pursuant to Article XX(b) of GATT 1994. The European Communities considers that the measure is not justified under that provision.

The European Communities and Brazil agree that a responding party invoking an affirmative defence bears the burden of demonstrating that its measure satisfies the requirements of the invoked defence. If Brazil adduces sufficient evidence to raise a presumption that its defence is justified, then the burden shifts to the European Communities to rebut the presumption.

The Panel notes that as outlined by the Appellate Body in the US – Gasoline case, a two-tiered test must be presented under Article XX: it must be demonstrated that the measure (i) falls under at least one of the ten exceptions listed under Article XX, and (ii) satisfies the requirements of the preamble. These are cumulative requirements and as confirmed by the Appellate Body in the US – Shrimp case, this sequence of steps "reflects, not inadvertence or random choice, but rather the fundamental structure and logic of Article XX". Moreover, in the US – Gasoline case, the Appellate Body found that the burden of showing that a measure complies with the requirements of the introductory clause of Article XX falls on the defending party, even after that party has established that the measure qualifies under one of the paragraphs of Article XX.

Therefore, Brazil, as the party invoking an exception under Article XX, is required to show first, that the measure falls within the scope of paragraph (b) of Article XX, and second, that the measure is applied in a manner that is consistent with the chapeau of Article XX.

(a) Is Brazil's import prohibition justified under paragraph (b) of Article XX?

Brazil argues that the measure is justified under Article XX(b) because it is necessary to protect "human health and the environment" against risks arising from the accumulation of waste tyres.

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38 Brazil's first written submission, para. 83.  
39 European Communities' first written submission, para. 116.  
40 Brazil's first written submission, para. 89; European Communities' first written submission, para. 95.  
43 We recall our earlier findings that two measures, Portaria SECEX 14/2004 and DECEX 8/1991, are inconsistent with Article XI, in that they prohibit the importation into Brazil of retreaded tyres. We understand Brazil's defence under Article XX to relate to both of these measures. Therefore, references to the "measure at issue" in this section of the findings should be understood to refer to the import prohibition on retreaded tyres, as it is contained in both of these instruments.  
44 European Communities' first written submission, para. 95; Brazil's first written submission, para. 89.  
45 Brazil defines "the environment", in this context, as comprising animal or plant life or health.  
46 Brazil's first written submission, paras. 6, 94; Brazil's second written submission, paras. 1, 3, 4, 10. We note in this regard that Brazil claims that its import ban is necessary to protect human health and the environment against risks arising from both accumulation and disposal of waste tyres. However, in identifying a risk within the meaning of Article XX(b) (i.e. "to protect human, animal or plant life or health"), Brazil has substantiated only its arguments relating to the risks arising from the accumulation of waste.
7.40 Article XX(b) covers measures "necessary to protect human, animal or plant life or health". As outlined by the Panel in US – Gasoline, two elements must exist for a measure to be justified under paragraph (b):

(a) the policy in respect of the measures for which the provision is invoked falls within the range of policies designed to protect human, animal or plant life or health; and

(b) the inconsistent measure for which the exception is invoked is necessary to fulfil the policy objective.47

7.41 The European Communities and Brazil agree that Brazil, as the party invoking Article XX(b), must prove, first, that the policy pursued falls within the range of policies designed to protect human, animal or plant life or health and, secondly, that the inconsistent measures for which the exception is invoked are necessary to fulfil the policy objective. We will therefore consider both aspects in turn.

(i) "To protect human, animal or plant life or health"

7.42 As recalled above, a party invoking Article XX(b) as a defence needs to establish, inter alia, that "the policy in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or plant life or health."48 To address this question, the Panel in EC – Asbestos considered it necessary first to determine the existence of a health risk, i.e. whether the product at issue (i.e. chrysotile-asbestos in that case) posed a risk to, in that case, human life or health.49 Once such a risk is found to exist, the objective of the measure should be assessed to determine whether the policy underlying the measure is to reduce such a risk and thus falls within the range of policies covered by Article XX(b).

7.43 Therefore, to determine whether Brazil's policy in respect of its import prohibition for which Article XX(b) is invoked falls within the range of policies designed to protect human, animal or plant life or health, the Panel will examine first whether a risk exists to "human" and "animal or plant" life or health respectively and, if so, whether the objective of the import ban, as declared by Brazil, is to reduce such risk. Before turning to these issues, however, the Panel will address some preliminary issues.

(...)

Risks posed to human life or health by the accumulation of waste tyres

7.53 **Brazil** submits that the accumulation of waste tyres creates a risk of mosquito-borne diseases such as dengue and yellow fever in Brazil because waste tyres create perfect breeding grounds for disease carrying mosquitoes and that these diseases are also spread through interstate transportation of waste tyres for disposal operations.50 Brazil also argues that the accumulation of waste tyres creates a risk of tyre fires and toxic leaching and that this risk has substantial adverse effects on human health and the environment.51

7.54 The **European Communities** does not dispute the existence of health risks to humans in connection with mosquito-borne diseases.52 The European Communities argues, however, that Brazil has not demonstrated that there is a specific link between the spread of mosquito-borne diseases or the harmful effects of tyre fires and the accumulation of waste tyres. The European Communities is also of the view that not all waste tyres cause health risks, but only incorrectly managed waste tyres.53

7.55 The **Panel** notes that Brazil identifies mosquito-borne diseases and toxic emissions from tyre fires as health risks posed by the accumulation54 of waste tyres to humans. The Panel will address these risks in turn, starting with the alleged health risks associated with mosquito-borne diseases.

*Mosquito-borne diseases*

7.56 As noted above, Brazil identifies mosquito-borne diseases, notably dengue, yellow-fever and malaria, as a major risk to human health and life caused by the accumulation of waste tyres. We will thus now examine whether Brazil has demonstrated the existence of each of these mosquito-borne diseases in Brazil and, if it has, whether it has also demonstrated the link between the accumulation of waste tyres and such diseases.

7.57 First, as regards dengue, Brazil submits that the WHO has recognized dengue as "the most important emerging tropical viral disease" and "a major international public health concern."55 A WHO fact sheet states that dengue is found in tropical and sub-tropical regions around the world, including the Americas.56 We also note that Brazil's current dengue epidemic, which is country-wide, escalated from 1994 to 2002, and, in particular the complications resulting from the disease (e.g. dengue haemorrhagic fever (DHF)) in Brazil resulted in a 4.3 per cent

50 Brazil's first written submission, paras. 22-28; Brazil's first oral statement, paras. 13-20; Brazil's second written submission, paras. 15-33, 94; Brazil's second oral statement, para. 8.
51 Brazil's second written submission, paras. 33, 61.
52 European Communities' second oral statement, para. 16; European Communities' answer to panel question No. 34.
53 European Communities' response to panel question 34.
54 Although Brazil does not define the term "accumulation" of waste tyres, it refers to the following concepts throughout its submissions: "dumped or stockpiled"; "discarded or stockpiled"; "widespread dumping and stockpiling and landfilling"; "abandoned on the side of the road or stockpiled in a large tyre dump"; "stockpiled and illegally dumped"; "in stockpiles and in the countryside"; and "tyres discarded into the environment" (Brazil's first written submission, paras. 3, 17, 18, 20, 22; Brazil's first oral statement, paras. 11, 27; Brazil's second written submission, paras. 17, 33). The European Communities also refers, for example, to both "abandoned or negligently placed in monofilms" (European Communities' response to panel question No. 34).

Thus, in light of the parties' descriptions of various forms of "accumulated" waste tyres, we understand that "accumulation" of waste tyres in the context of the present case refers to the fact that waste tyres may accumulate. The term "accumulate" is commonly defined as "heap up; gradually get an increasing number or quantity of; form an increasing mass or quantity" and "accumulation" as "the action of accumulating something; the process of growing in amount or number; an accumulated mass; a quantity formed by successive additions" (*The Shorter Oxford English Dictionary*, L. Brown (ed.) (Oxford University Press, 2002), Vol. I, p. 16).

55 Brazil's first written submission, para. 23; Exhibits BRA-13-14. See also, exhibits BRA-15, 16, 17, 19, 20, 92, 109, 112, 113, 118, 119, 120, 121 and 145.
fatality rate, which is eight times the rate in South-East Asia, and accounted for 70 per cent of all cases reported in the Americas between 1998 and 2002.57 The European Communities does not contest these facts. Thus, based on the evidence before us, we find that Brazil has demonstrated the existence of health risks relating to dengue in Brazil.

7.58 Brazil also submits that other mosquito-borne diseases such as yellow fever and malaria are endemic in Brazil.58 We note that the WHO fact sheet does indicate that Brazil is one of the countries in South America with the greatest risk of yellow fever, which is transmitted by mosquitoes and has a higher fatality rate than dengue.59 The fact sheet also states that yellow fever causes a wide spectrum of diseases ranging from mild symptoms to severe illness and death and that 15 per cent of yellow fever patients enter into a "toxic phase" and half of the patients in the "toxic phase" die within 10-14 days. Thus, we find that the evidence submitted by Brazil supports its argument that yellow fever is an endemic disease transmitted by mosquitoes in Brazil.

7.59 The evidence before us also shows that malaria is one of the diseases transmitted by mosquitoes and that Brazil is included in the WHO list of the countries where malaria occurs.60 In fact, the 2005 World Malaria Report by the WHO states that, in 2002, Brazil reported approximately 40 per cent of the total number of malaria cases in the Americas.61 According to the evidence, malaria can cause not only variable clinical features such as fever, chills, headache, muscular aching and weakness, vomiting, cough, diarrhoea and abdominal pain, but also other symptoms related to organ failure such as acute renal failure, generalized convulsions, circulatory collapse, followed by coma and death.62 Thus, we find that Brazil has also demonstrated that health risks relating to malaria exist in Brazil.

7.60 The European Communities does not contest that these diseases pose health risks that potentially fall within the scope of Article XX(b).64 However, the European Communities considers that health risks may arise from waste tyres only in case of incorrect management.65 We therefore now consider whether the accumulation of waste tyres plays a role in the dissemination of the mosquito-borne diseases identified above, as claimed by Brazil.

57 Brazil's first written submission, para. 24, referring to exhibits BRA-13, 16, 18; Brazil's first oral statement, paras. 13-16.
58 Brazil's first written submission, paras. 27, 28; Brazil's first oral statement, paras. 17-20; Brazil's second written submission, para. 21; Brazil's second oral statement, para. 8.
59 WHO Fact Sheet N°100, "Yellow Fever" (December 2001) (Exhibit BRA-22). Also, "Update on Yellow Fever in Americas" by Pan American Health Organization states that "yellow fever continues to be an important public health problem in the Americas," and that "the overwhelming spread of the Aedes aegypti mosquito threatens to re-urbanize the disease" (Exhibit BRA-23). See also exhibits BRA-17, 92, 109, 111, 145.
60 WHO, "International Travel and Health" (January 2005) (Exhibit BRA-21). Also, Exhibits BRA-24, 119, 145.
62 WHO, "International Travel and Health," pp. 132-133, 150 (January 2005) (Exhibit BRA-21). According to this paper, P. falciparum, one of the four different species of the protozoan parasite causing malaria (i.e. Plasmodium falciparum, P. vivax, P. ovale and P. malariae), causes the most severe form of illness as indicated in para. 0 above. It also states, "[i]n endemic areas it is estimated that about 1 per cent of patients with P. falciparum infection die of the disease... The forms of malaria caused by other Plasmodium species are less severe and rarely life-threatening." It also explains that Brazil is one of the countries with malicious areas where the risk is not limited to P. vivax only: this shows that all four forms of malaria, including the most severe form – P. falciparum – exist in Brazil.
63 In this regard, the Panel notes that Brazil has not provided in its submissions any argument on the existence in Brazil of health risks posed to humans by West Nile virus and refers to West Nile virus only in its response to a question from the Panel on the exact environmental risks posed by the disposal of tyres: Brazil has responded that stockpiling leads to propagation of mosquitoes that carry diseases, such as dengue, yellow fever, malaria, and West Nile virus and that these diseases impact both humans and animals (emphasis added) (Brazil's answer to panel question No. 34bis). In light of the fact that Brazil has not provided any arguments on West Nile virus and any health risks posed by it to humans in Brazil, the Panel does not consider that Brazil has demonstrated the existence of health risks posed by West Nile virus in Brazil.
64 European Communities' first written submission, para. 16; European Communities' second written submission, para. 16.
65 European Communities' answer to panel question No. 34.
7.61 Brazil submits that accumulated waste tyres provide a particularly fertile breeding ground for disease-carrying mosquitoes and thus contribute to the spread of the disease. According to Brazil, these disease-carrying mosquitoes breed in receptacles that collect rainwater, in particular used tyres. Furthermore, Brazil argues that a single tyre can spawn thousands of mosquitoes in just one summer. Various studies as well as the exhibits submitted by Brazil suggest that there is indeed a correlation between the spread of dengue and the accumulation of waste tyres in particular countries with tropical climates such as Brazil. For example, the Basel Convention Technical Guidelines on the Identification and Management of Used Tyres provide:

"Under certain specifically defined climatic conditions waste tyres dumps or stockpiles can become the breeding grounds for insects, such as mosquitoes, which are capable of transmitting diseases to humans. This is of particular concern in tropical or sub-tropical regions."

7.62 We also note the Australian Environmental Department's observation that "tyres trap water, and this in turn provides a breeding site for mosquitoes. In tropical areas, particularly, this can pose a significant threat to human health due to diseases carried by mosquitoes."

7.63 In this connection, we recall the European Communities' argument that health risks associated with waste tyres could arise only if waste tyres are incorrectly managed. The European Communities submits that waste tyres themselves are considered inert in Brazilian legislation and non-hazardous in the European Communities' legislation and that only abandoned tyres or tyres negligently placed in monofills may become breeding places for mosquitoes. In
response, Brazil submits that the European Communities' argument in this respect is without merit because stockpiles are frequently dangerous and the European Communities itself recognizes the risks and actively promotes the clearing of stockpiles. In the view of Brazil, stockpiling also provides breeding grounds for mosquitoes and as provided in the Basel Tyre Guidelines, even with proper control, stockpiling can be used only for temporary storage before an end-of-life tyre is forwarded to a recovery operation.

7.64 The Panel recalls in this regard the Appellate Body's observation in EC–Hormones that the risk being addressed encompasses "risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world, where people live and work and die." We believe that the observation, although made in the context of the SPS Agreement, is also applicable to the situation in the present case.

7.65 First, as noted above, the European Communities does not dispute that health risks associated with waste tyres could arise if waste tyres are "incorrectly managed" by being abandoned or being negligently placed in monofills. In this connection, the evidence submitted by Brazil suggests that in reality, waste tyres do get abandoned and accumulated. We also note that the European Communities itself agrees that health risks associated with waste tyres exist in Brazil to the extent that such health risks arise from tyres that "litter the countryside" in Brazil. Specifically, the 2004 TBR Report of the European Communities' states:

"Clearly, waste tyres that litter the countryside pose a significant environmental and public health problem in Brazil, notably in that they can collect rain water and thus potentially provide breeding grounds for mosquitoes (aedes aegypti) that can spread dengue and in some circumstances urban yellow fever. In 1999, before the current destruction programme started, the administration estimated that the backlog of waste tyres was around 100 million, although no accurate figures existed..." (emphasis added)

7.66 Furthermore, we note that one of the objectives of the "Paraná Rodando Limpo" – a programme created by the Brazilian state of Paraná – is to collect, inter alia, all existing unusable tyres currently found inappropriately discarded throughout the territory of Paraná. The Panel also notes the following explanation: "A variation of landfilling is monofilling, which means that scrap tires are not mixed with other waste materials, but stored at a dedicated, licensed location..." (Kurt Reschner, "Scrap Tyre Recycling: A Summary of Prevalent Scrap Tire Recycling Methods," p.3 (2006) (Exhibit BRA-5)).

73 Brazil's second written submission, paras. 33, 64-66.
74 Brazil's first written submission, para. 42, citing exhibit BRA 40.
76 See exhibits BRA-1, 5, 6, 8, 19, 36, 38, 39, 56, 58, 119, 125, 129, 132. For example, the Panel notes the following: "in most countries illegal dumping is a common way to get rid of a cumbersome waste at no financial cost" ("OECD Environmental Directorate," p. 124 (Exhibit BRA-58)); "Out of the way ravines and woods became the sites of illegal dumping, often without the property owner's knowledge. In time these illegal dumps could contain upwards of several thousand tires each.... it is estimated that US tire stockpiles contain between 700-800 million scrap tires..." (John Serumgard, "Internalization of Scrap Tire Management Costs: A Review of the North American Experience," p.6 (1998) (Exhibit BRA-125)); "the EU has millions of used tyres that have been illegally dumped or stockpiled. These historic stockpiles can, in some cases, pose a potential threat to human health (fire risk, haven for rodents or other pests such as mosquitoes...). The current estimate for these historic stockpiles throughout the enlarged EU stands at 5.5 million tons..." (European Tyre & Rubber Manufacturers’ Association, "End-of-Life Tyres: A Valuable Resource with a Wealth of Potential," p. 4 (Exhibit BRA-126); and "In New Jersey, there are estimated to be 15 million tires deposited in 24 locations -- called orphan tire dumps because the ownership is unclear -- most of them in sparsely populated pockets of South Jersey. Untold more are thrown along roadways or stored in yards..." (Kathleen Cannon, "Where Mosquitoes And Tires Breed," New York Times (8 July 2001) (Exhibit BRA-130)).
77 Brazil's second written submission, para. 15, quoting a statement in the European Communities’ TBR Report, which is attached as exhibit EC-2.
78 Report to the Trade Barriers Regulation Committee, p. 13 (2004) (Exhibit EC-2). Brazil itself has also stated, "When, in the 1990s, Brazil set out to combat dengue and other mosquito-borne diseases by, among other things, collecting the used tyres that were scattered over its vast territory..." (emphasis added) (Brazil's answer to panel question No. 88).
79 Description of the Programme "Parana Rodando Limpo," p.3 (Exhibit EC-49).
Brazilian government also states in the preamble of Resolution CONAMA 258/1999 that "the dumping or inappropriate disposal of scrap tyres is an environmental liability resulting in serious environmental and public health hazards."80

7.67 Therefore, it may be that health risks associated with waste tyres can be significantly reduced with proper management of waste tyres.81 However, that does not negate the reality that waste tyres get abandoned and accumulated and that risks associated with accumulated waste tyres exist in Brazil.

7.68 Moreover, the evidence before the Panel does not suggest that only illegally dumped or mismanaged waste tyres can cause mosquito-borne diseases. The risk of mosquito-borne diseases, albeit to different extents, seems to exist in relation to all types of accumulated waste tyres. Indeed, this situation does not appear to be limited to Brazil, as some of the evidence presented to the Panel makes clear. For example, we note, inter alia, the following:

"Scrap tyres disposed of in landfills pose increased environmental and public health risks ... and create a favourable environment for insects, which increases the risk of mosquito-borne diseases"82; and

"The EU has millions of used tyres that have been illegally dumped or stockpiled. These historic stockpiles can, in some cases, pose a potential threat to human health (fire risk, haven for rodents or other pests such as mosquitoes...)..."83

7.69 We thus find that Brazil has demonstrated that accumulated waste tyres provide a fertile breeding ground for mosquitoes and consequentially contribute to the transmission of dengue, yellow-fever and malaria.

7.70 Further, Brazil argues that transportation of used tyres to collection points also disperses mosquitoes that could not otherwise fly more than 100 meters on their own.84 Brazil submits that transportation of such waste tyres cannot be avoided in some cases even though Brazil promotes disposal of tyre waste in a place close to its origin.85 Various studies submitted by Brazil indeed show that these mosquito-borne diseases get transmitted through transportation of waste tyres for disposal operations.86

80 Resolutions CONAMA 258 of 26 August 1999 and. 301 of 21 March 2002 (Exhibit BRA-4; Exhibit EC-47).
81 See paras below for a detailed analysis of measures to improve the management of waste tyres.
84 Brazil's first written submission, para. 22; Brazil's first oral statement, paras. 17, 36; Brazil's second written submission, paras. 26-32; Brazil's second oral statement, para. 9.
85 For example, Brazil states, "as most waste tyre disposal sites and facilities are situated out of the Amazon region and its fragile ecosystem, the wastes generated in that part of the country frequently have to be transported to other regions to be disposed of, thus creating a serious risk of spreading mosquitoes and the diseases they carry" (Brazil's first written submission, para. 27).
86 Brazil submits various studies on the risks of waste tyre transportation including the following: (a) a health official in the UK illustrates that through the internal movement of these tyres, the movement of these mosquitoes through the interstate highway systems can be monitored (Exhibit BRA-119); (b) a 2002 Japanese study showing that tyres transported to disposal operations could be infested with mosquitoes (Exhibit BRA-120); (c) a study by the US Center for Disease Control and Prevention that ",the postulated relationship between dispersal and major transportation routes would be expected for a species transported largely by human activities such as the commercial movement of scrap tires for retreading, recycling, or other purposes..." (Exhibit BRA-121); and (d) the Environmental Health Committee of Québec's comment that "interregional transport of used tyres has been identified as the principal factor behind Aedes Albopictus propagation in the United States. Its distribution, for the moment, remains limited to tyre deposits" (Exhibit BRA-122).
7.71 Therefore, the Panel finds that Brazil has demonstrated that risks posed by mosquito-borne diseases such as dengue, yellow fever and malaria to human health and life exist in Brazil in relation to the accumulation as well as transportation of waste tyres.

Toxic emissions from tyre fires

7.72 Brazil also identifies tyre fires and their consequential negative impact on human health and life as another type of risk posed by accumulated waste tyres.87 Brazil argues that tyre fires produce highly toxic and mutagenic emissions such as a noxious plume88 with numerous hazardous compounds such as carbon monoxide, dioxins and furans that pose a significant potential health hazard; pyrolytic oil that contains naphthalene, anthracene, benzene, and various metals; and ash containing various heavy metals including lead, arsenic, and zinc.89 Brazil also refers to a number of tyre fire incidents in Brazil.90

7.73 Brazil explains that highly toxic and mutagenic emissions produced by tyre fires result in a number of health problems, including, inter alia, the loss of short-term memory, learning disabilities, immune system suppression, cardiovascular problems, and that a noxious plume comprising dioxins emitted by tyre fires produces significant short- and long-term health hazards, including inter alia, cancer, premature mortality, reduced lung function, suppression of the immune system, respiratory effects, heart and chest problems.91

7.74 The European Communities has not provided any direct counter-arguments in relation to these alleged health risks associated with tyre fires. Rather, the European Communities argues that the adverse consequences arising from tyre fires depend on variables such as location, cause, dimension and duration of the fires and that the risk for tyre fires is not the same between different countries.92 The Panel first notes that the evidence submitted by Brazil suggests that the smoke, pyrolytic oil and ash generated by a tyre fire contain numerous hazardous compounds that pose a significant potential health hazard to workers and responders to a tyre fire as well as residents in nearby areas.93

(...)

87 Brazil's first written submission, paras. 29-36; Brazil's second written submission, para. 33. Brazil cites exhibits BRA-10, 27, 28, 29. Also, see exhibits BRA-8, 10, 29, 44, 137.
88 According to Brazil, numerous compounds contained in a noxious plume produce significant short-and long-term health hazards, including premature mortality, reduced lung function, suppression of the immune system, respiratory effects, heart and chest problems, depression of the central nervous system, and skin, eye, and mucous membrane irritation.
89 Specifically, Brazil submits that heavy metals contained in pyrolytic oil and ash are highly toxic and produce a range of adverse health effects, including the loss of short term memory, learning disabilities, immune system suppression, cardiovascular problems, kidney damage, reproductive problems, muscle wasting, partial blindness, deformities in children, and skin cancer.
90 For the tyre fire incidents in Brazil, see paragraph.
91 Brazil's first written submission, paras. 29-33; Brazil's second written submission, para. 33; Brazil's answer to panel question 88.
92 European Communities' comment on Brazil's answer to panel question No. 88.
93 California Environmental Protection Agency (US), Integrated Waste Management Board, "Tire Pile Fires: Prevention, Response, Remediation," pp. 9-1, 9-2, 9-3 (2002) (Exhibit BRA-29). See also, for example, the US Environmental Protection Agency ("EPA") research paper, "Air Emissions from Scrap Tire Combustion", provides: "Air emissions from open fires have been shown to be more toxic (e.g. mutagenic) than those of a combustor, regardless of fuel... emissions from an open fire can represent significant acute (short-term) and chronic (long-term) health hazards to firefighters and nearby residents. Depending on the length and degree of exposure, these health effects could include irritation of the skin, eyes, and mucous membranes, respiratory effects, central nervous system depression, and cancer... Open tire fire emissions are estimated to be 16 times more mutagenic than residential wood combustion in a fireplace, and 13,000 times more mutagenic than coal-fired utility emissions with good combustion efficiency and add-on controls." (Exhibit BRA-26)
See also exhibits BRA-1, 8, 10, 27, 29, 44, 137.
7.80 Our analysis above with respect to the similar argument made by the European Communities concerning mosquito-borne diseases is also applicable here: the current reality in Brazil is that tyres do accumulate and these accumulations do in practice generate health risks arising from tyre fires as identified above.94 It may be that such risks can be significantly reduced with proper management. However, this does not negate the fact that waste tyres do accumulate and that, consequently, a risk of tyre fires exists in Brazil.

7.81 Furthermore, as in the case of mosquito-borne diseases, the evidence before the Panel indicates that a risk of tyre fires is not necessarily limited to badly designed or uncontrolled waste tyres: the risk, albeit to different extents, exists in relation to various types of accumulated waste tyres. For example, as cited by Brazil, the Basel Convention Technical Guidelines on the Identification and Management of Used Tyres provide that:

"Stockpiling facilities require investments in transport, handling and fire prevention. Stockpiling with proper control can be used only for temporary storage before an end-of-life tyre is forwarded to a recovery operation. ... Precautions must be taken against the deliberate or accidental igniting of tyre stockpiles. The major risk is that a fire could gather pace without it being possible to prevent it from spreading to all of the tyres being stored... Their scale will depend upon the quantity of the tyres being stored..."95

In the Panel's view, this tends to indicate that the risk for tyre fires is not necessarily limited to badly designed or uncontrolled monofills, given that precautions against the deliberate or accidental igniting of tyre stockpiles are also required in stockpiling facilities.

7.82 In light of the foregoing, the Panel is of the view that Brazil has demonstrated that the accumulation of waste tyres poses a risk of tyre fires and the associated health risks arising from such tyre fires.

7.83 In conclusion, the Panel finds that Brazil has demonstrated the existence of risks to human life and health within the meaning of Article XX(b) in connection with the accumulation of waste tyres.96

(…)

94 See paras. 0-0 above.
95 Exhibit BRA-40, p. 12. Among other relevant evidence are as follows: "Stockpiled tyres, illegally dumped tyres and other stores are a fire risk. ... Stockpiles of tyres and landfill sites containing predominantly tyres pose a fire risk ..." (British Environment Agency, Tyres in the Environment (1998) (Exhibit BRA-1)); "Impacts due to the uncontrolled disposal of tyres to land are similar to those for stockpiles. ... Tyre stockpile fires pose a major environmental threat. The fires produce thick toxic smoke... Due to the large size of stockpiles and the intensity of tyre fires they pose a significant hazard to persons. ... Tyres trap water, and this in turn provides a breeding site for mosquitoes. In tropical areas, particularly, this can pose a significant threat to human health due to diseases carried by mosquitoes..." (Commonwealth Department of Environment (Australia), A National Approach to Waste Tyres (2001) (Exhibit BRA-8)); and "All tire and rubber storage facilities should be considered high-risk storage facilities and as such a pre-incident fire management plan should be developed..." (California Environmental Protection Agency (US), Integrated Waste Management Board, Tire Pile Fires: Prevention, Response, Remediation (2002) (Exhibit BRA-29)). The Panel notes in this regard a statement in the OECD Environment Directorate (Exhibit BRA-9): "the improper disposal of used tyres often results in health and environmental hazards... they present a fire hazard when improperly stored." This tends to support the European Communities' view that only improperly stored waste tyres are susceptible to fire hazards. However, the evaluation of the overall evidence before the Panel, including those cited above, lead the Panel to conclude that health risks (i.e. mosquito-born diseases and tyre fires) exist in relation all forms of accumulated waste tyres.
96 The Panel notes that Brazil also claims that the accumulation of waste tyres creates toxic leaching (Brazil's second written submission, para. 33). For the arguments and supporting evidence pertinent to its claim relating to toxic leaching, however, Brazil refers to its arguments on stockpiling under the section on the alternative measures. (See Brazil's first written submission, para. 42; Brazil's second written submission, para. 61). Brazil also presents its argument on toxic leaching in relation to landfilling (Brazil's first written submission, paras. 39, 41) Thus, we will address Brazil's argument on toxic leaching in relation to landfilling and stockpiling.
To protect human, animal or plant life or health

7.94 **Brazil** submits that the sole policy objective behind Brazil's measures is the protection of human health and the environment.97 Brazil argues that as in the case of French ban on asbestos-containing products in EC – Asbestos, Brazil's import ban is designed to prevent the generation of additional waste tyres in Brazil and consequently to reduce the incidence of, *inter alia*, dengue, yellow fever and other risks associated with waste tyres.98 Accordingly, Brazil submits that its ban on retreaded tyre imports is a restriction intended to protect human health and the environment from these well-recognized risks, which falls squarely within the range of policies designed to protect human, animal or plant life or health.

7.95 The **European Communities** does not contest that measures designed to prevent the incidence of such diseases as dengue and yellow fever among humans potentially falls within the scope of Article XX(b)99 and that the protection of life and health, and of human life and health in particular, is important.100 The European Communities also states that it recognizes the right of a WTO Member to establish, within the limits of its WTO obligations, the level of protection of human health and safety that it aims to achieve for its citizens. The European Communities, however, submits that measures intended to protect the environment as such are not covered by Article XX(b) and thus the frequent references made by Brazil to the implications of waste tyres for the environment are irrelevant for the purposes of a justification of its measure under Article XX(b).101 The European Communities also claims that the real aim of Brazil's import ban is not the protection of life and health but the protection of Brazil's domestic industry.102

7.96 Having determined that a risk to human, animal or plant life within the meaning of Article XX(b) exists, the Panel must determine whether the policy objective of the measure to address this risk, as declared by Brazil, falls under the range of policies covered by Article XX(b). In this regard, we recall the Appellate Body's clarification in US – Shrimp that "the legitimacy of the declared policy objective of the measure, and the relationship of that objective with the measure itself and its general design and structure", are examined under a specific paragraph (paragraph (g) in that case) of Article XX.103

7.97 As a preliminary matter, we note that we are not, in our view, required to examine the desirability of the declared policy goal as such.104 In other words, we are not required to assess the policy choice declared by Brazil to protect human, animal or plant life or health against certain risks, nor the level of protection that Brazil wishes to achieve. We also recall in this respect that in the EC – Asbestos case, the Appellate Body asserted clearly that it was each WTO Member's "(…) right to determine the level of protection of health that [it] consider[s] appropriate in a given situation".105

7.98 We note that a number of policies aimed at reducing risks to human health or life have been found, in previous panel and Appellate Body reports, to fall within the range of policies designed to protect human, animal or plant life or health.106 We note in particular the finding of

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97 Brazil's first written submission, para. 19. As to Brazil's reference to the term "environment", see paragraphs above.
98 Brazil's first written submission, paras. 95-96.
99 European Communities' first written submission, para. 16.
100 European Communities' second written submission, para. 12.
101 European Communities' second written submission, para. 11.
102 European Communities' answer to panel question No. 34, referring to its first written submission, paras. 130-133, 164-166 and second written submission, para. 178; and European Communities' second oral statement, paras. 9-13.
104 Panel Report on US – Gasoline, para. 7.1, see also para. 6.22.
106 Under GATT 1947, in the Thailand – Cigarettes case, the panel acknowledged, in accordance with the parties to the dispute and
the Panel in *EC – Asbestos*, that "in principle, a policy that seeks to reduce exposure to a risk should fall within the range of policies designed to protect human life or health, insofar as a risk exists".107 Measures specifically designed to avoid the generation of further risk, thereby contributing to the reduction of exposure to the risk, fall, in our view, within that category.

7.99 In this instance, Brazil submits that the policy objective behind the import ban is the protection of human life and health and the environment and that it is designed to prevent the generation of additional amounts of waste tyres in Brazil and, by so doing, to reduce the incidence of cancer, dengue, yellow fever, respiratory diseases, reproductive problems, environmental contamination, and other risks associated with waste tyres.108

7.100 In our view, Brazil's declared policy of reducing exposure to the risks to human, animal or plant life or health arising from the accumulation of waste tyres falls within the range of policies covered by Article XX(b). In this respect, we find further confirmation for our view in the evidence presented to us showing that policies to address "waste" by non-generation of additional waste are a generally recognized means of addressing waste management issues.109

7.101 We note the European Communities' argument that the real objective of Brazil's import ban on retreaded tyres is to protect Brazil's domestic retreading industry, not to protect human, animal or plant life and health. However, the Panel does not consider that this factor needs to be addressed in determining under paragraph (b) of Article XX whether the declared policy objective of a measure falls within the range of policies under that paragraph. In the Panel's view, what is relevant at this stage of the analysis is the existence of a risk and whether the policy

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107 See the parties' answers to panel question No. 37. In this regard, the Panel notes the European Communities' answer that the reduction principle has only been recognized in Article 4(2)(a) Basel Convention with respect to hazardous waste and households waste subject to taking into account social, technological and economic aspects. However, the Panel is presented with the following evidence, which, in its view, is sufficient to support the conclusion that policies to address "waste" by non-generation of additional waste are a generally recognized means of addressing waste management issues: "The most efficient way of dealing with waste is to find ways to prevent or reduce its production in the first place. ... there are ways to reduce the number of tyres we use and therefore the quantity of waste generated." (British Environment Agency, Tyres in the Environment, at §4.1, Exhibit BRA-1); "Waste avoidance is reducing the number of tyres that are disposed by reducing the number of tyres generated..." (Commonwealth Department of Environment (Australia), "A National Approach to Waste Tyres," p. xv (2001) (Exhibit BRA-8)); "Tire pile fires can be prevented simply by not creating waste or scrap tire piles in the first place." (California Environmental Protection Agency (US), Integrated Waste Management Board, *Tire Pile Fires: Prevention, Response, Remediation* (2002), Exhibit BRA-29); "... assigns prevention of waste the first priority, followed by reuse and recovery and finally by safe disposal of waste; ... the Council reiterated its conviction that waste prevention should be the first priority of any rational waste policy in relation to minimising waste production and the hazardous properties of waste" (EU Directive 2000/76/EC of the European Parliament and of the Council, of 4 December 2000, on the incineration of waste, Recital (8), Exhibit BRA-34); "Whereas both the quantity and hazardous nature of waste intended for landfill should be reduced where appropriate" (EU Council Directive 1999/31/EU of the European Communities, of 26 April 1999, on the landfill of waste, Recital (8), Exhibit BRA-42); "In order to implement the precautionary and preventive principles and in light with the Community strategy for waste management, the generation of waste must be avoided as much as possible" (EU Directive 2000/53/European Communities of the European Parliament and of the Council, of 18 September 2000, on end-of-life Vehicles, Recital (4), Exhibit BRA-43); "... prevention of the generation of waste shall remain the first priority, followed by the recovery of waste and finally by the safe disposal of waste" (EU Community Strategy for Waste Management, COM(96)399 final, 30 July 1996, para. 20, Exhibit BRA-106); and "... Achieving a significant overall reduction in the volumes of waste generated through waste prevention initiatives, better resource efficiency and a shift towards more sustainable production and consumption patterns; a significant reduction in the quantity of waste going to disposal..." (EU Decision n° 1600/2002/CE of the European Parliament and of the Council, of 22 July 2002, laying down the Sixth Community Environment Action Programme, Art. (8), Exhibit BRA-107). Also, Exhibits BRA-3, 8, 9, 108.


109 See the parties' answers to panel question No. 37. In this regard, the Panel notes the European Communities' answer that the reduction principle has only been recognized in Article 4(2)(a) Basel Convention with respect to hazardous waste and households waste subject to taking into account social, technological and economic aspects. However, the Panel is presented with the following evidence, which, in its view, is sufficient to support the conclusion that policies to address "waste" by non-generation of additional waste are a generally recognized means of addressing waste management issues: "The most efficient way of dealing with waste is to find ways to prevent or reduce its production in the first place. ... there are ways to reduce the number of tyres we use and therefore the quantity of waste generated." (British Environment Agency, Tyres in the Environment, at §4.1, Exhibit BRA-1); "Waste avoidance is reducing the number of tyres that are disposed by reducing the number of tyres generated..." (Commonwealth Department of Environment (Australia), "A National Approach to Waste Tyres," p. xv (2001) (Exhibit BRA-8)); "Tire pile fires can be prevented simply by not creating waste or scrap tire piles in the first place." (California Environmental Protection Agency (US), Integrated Waste Management Board, *Tire Pile Fires: Prevention, Response, Remediation* (2002), Exhibit BRA-29); "... assigns prevention of waste the first priority, followed by reuse and recovery and finally by safe disposal of waste; ... the Council reiterated its conviction that waste prevention should be the first priority of any rational waste policy in relation to minimising waste production and the hazardous properties of waste" (EU Directive 2000/76/EC of the European Parliament and of the Council, of 4 December 2000, on the incineration of waste, Recital (8), Exhibit BRA-34); "Whereas both the quantity and hazardous nature of waste intended for landfill should be reduced where appropriate" (EU Council Directive 1999/31/EU of the European Communities, of 26 April 1999, on the landfill of waste, Recital (8), Exhibit BRA-42); "In order to implement the precautionary and preventive principles and in light with the Community strategy for waste management, the generation of waste must be avoided as much as possible" (EU Directive 2000/53/European Communities of the European Parliament and of the Council, of 18 September 2000, on end-of-life Vehicles, Recital (4), Exhibit BRA-43); "... prevention of the generation of waste shall remain the first priority, followed by the recovery of waste and finally by the safe disposal of waste" (EU Community Strategy for Waste Management, COM(96)399 final, 30 July 1996, para. 20, Exhibit BRA-106); and "... Achieving a significant overall reduction in the volumes of waste generated through waste prevention initiatives, better resource efficiency and a shift towards more sustainable production and consumption patterns; a significant reduction in the quantity of waste going to disposal..." (EU Decision n° 1600/2002/CE of the European Parliament and of the Council, of 22 July 2002, laying down the Sixth Community Environment Action Programme, Art. (8), Exhibit BRA-107). Also, Exhibits BRA-3, 8, 9, 108.

110 European Communities' second oral statement, paras. 10-13.
objective to reduce such a risk, as declared by the Member taking the measure, falls within the scope of policies to protect human, animal or plant life or health.

7.102 Therefore, the Panel finds that Brazil's policy of reducing exposure to the risks to human, animal or plant life or health arising from the accumulation of waste tyres falls within the range of policies covered by Article XX(b).

(ii) Is the measure "necessary" within the meaning of paragraph (b) Article XX?

7.103 The Panel notes that Article XX(b) allows, subject to the conditions of the chapeau, measures "necessary to protect human, animal or plant life or health" (emphasis added). Having determined that the protection of human, animal or plant life or health against risks arising from the accumulation of waste tyres constitutes a policy that falls within the scope of paragraph (b) of Article XX, we must now determine whether the specific measure at issue is necessary within the meaning of the same paragraph.

7.104 The Panel notes that the term "necessary", as contained in paragraphs (b) and (d) of Article XX of GATT 1994 and paragraph (a) of Article XIV of the GATS, has been interpreted in a number of previous cases by the Appellate Body: the necessity of a measure should be determined through "a process of weighing and balancing a series of factors", which usually includes the assessment of the following three factors: the relative importance of the interests or values furthered by the challenged measure, the contribution of the measure to the realization of the ends pursued by it and the restrictive impact of the measure on international commerce. Once all those factors have been analyzed, the Appellate Body said a comparison should be undertaken between the challenged measure and possible alternatives. In performing this comparison, the Appellate Body also stated that the weighing and balancing process of the factors informs the determination of whether a WTO-consistent alternative measure, or a less WTO-inconsistent measure, which the Member concerned could reasonably be expected to employ, is available.

7.105 The Panel notes that both parties agreed that the elements identified by the Appellate Body were relevant to this case (including the assessment of the three factors, i.e. trade impact of the measure, importance of the interests protected and contribution of the measure to the realization of the end pursued). The Panel will be guided by this approach in its analysis of the necessity of Brazil's measure. Given that the three factors should be taken into account in the assessment of whether a WTO-consistent, or less WTO-inconsistent, alternative measure exists, the Panel will first consider those factors in more detail, and then examine, in light of this analysis, the alternatives identified by the European Communities.

7.106 Before turning to the examination of these factors, the Panel notes that, as stated by the Appellate Body 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 agreements.

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111 Article XIV(a) of the GATS reads: "necessary to protect public morals or to maintain public order".
114 Appellate Body Report on Dominican Republic – Import and Sale of Cigarettes, para. 70.
115 Brazil's first written submission, para. 99; Brazil's first oral statement, para. 45; European Communities, second oral statement, para. 7; first oral statement, para. 10.
116 Brazil adopts the reverse approach in its second written submission, discussing first the alternatives proposed by the European Communities, and then the effectiveness of its chosen measure, the import ban.
provisions in the first place. In the present case, the specific measure that has been found inconsistent with Article XI is the import ban on retreaded tyres. The Panel will focus its analysis in the following sections on this measure.

7.107 The Panel will not therefore examine here the manner in which the measure is implemented in practice, including any elements extraneous to the measure itself that could affect its ability to perform its function (i.e. the court injunctions leading to imports of used tyres)119, or consider situations in which the ban does not apply (i.e. the exemption of MERCOSUR imports).120 These elements will, however, be relevant to later parts of the Panel's assessment, especially under the chapeau of Article XX, where the focus will be, by contrast, primarily on the manner in which the measure is applied.

**Importance of the objective pursued**

7.108 As outlined by the Appellate Body in *Korea – Various Measures on Beef* 121 and recalled in *US – Gambling* 122, in its assessment of the measure claimed to be "necessary" to protect human, animal or plant life or health, the Panel may take into account the importance of the common interests or values that the measure is intended to protect. The Panel notes Brazil's argument that few interests are more "vital" and "important" than protecting human beings from health risks, and that protecting the environment is no less important.123 WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation, as acknowledged by the European Communities.124 The Panel notes that Brazil's chosen level of protection is the reduction of the risks of waste tyre accumulation to the maximum extent possible.125

7.109 The Panel recalls its findings in the previous section that Brazil has demonstrated the existence of risks to human, animal and plant life and health posed by mosquito-borne diseases and tyre fires. In relation to *risks to human health and life*, the Panel notes that the human pathologies which Brazil identified as being associated with the accumulation of waste tyres are of a very serious nature. They relate to: (i) the transmission of dengue, yellow fever and malaria through mosquitoes which use tyres as breeding grounds; and (ii) the exposure of human beings to toxic emissions caused by tyre fires which may cause loss of short-term memory, learning disabilities, immune system suppression, cardiovascular problems, but also cancer, premature mortality, reduced lung function, suppression of the immune system, respiratory effects, heart and chest problems.126

7.110 We note in this respect that the WHO has recognized dengue as "the most important emerging tropical viral disease" and "a major international public health concern"127 and that malaria can cause not only variable clinical features such as fever, chills, headache, muscular

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119 See e.g. European Communities, first written submission, para. 127.
120 See e.g. European Communities' answer to Panel Question 118.
123 Brazil's first written submission, para. 101.
124 European Communities' second written submission, para. 12. Appellate Body Report on *EC – Asbestos*, para. 168. The European Communities claims however that the real objective of Brazil's import ban on retreaded tyres is to protect Brazil's domestic retreading industry, not to protect human, animal or plant life and health (European Communities, second oral statement, paras. 10-13). The Panel is of the view that this question relates to the question whether the measure is a disguised restriction on international trade under the chapeau of Article XX and, more specifically, to the examination of the intent of the measure.
125 Brazil's second written submission, para. 43; Answer to question Nos. 36 and 73.
126 See paragraphs 0-0 above.
127 Brazil's first written submission, para. 23; Exhibits BRA-13-14.
aching and weakness, vomiting, cough, diarrhoea and abdominal pain, but also other symptoms related to organ failure such as acute renal failure, generalized convulsions, circulatory collapse, followed by coma and death.\footnote{128}{WHO, "International Travel and Health," pp. 132-133, 150 (January 2005) (Exhibit BRA-21).} Protection against such serious diseases is clearly an important objective.

7.111 The importance of a number of risks to human life or health has already been recognized in past cases. In EC – Asbestos, the Panel identified two pathologies associated with chrysotile, namely lung cancer and mesothelioma, which is also a form of cancer.\footnote{129}{Appellate Body Report on EC – Asbestos, para. 167.} The Appellate Body found that the objective pursued by the measure was the preservation of human life and health through the elimination, or reduction, of the health risks posed by asbestos fibres and that the value pursued was both vital and important in the highest degree.\footnote{130}{Appellate Body Report on EC – Asbestos, para. 172.} To the extent that this same value is being protected here, the same reasoning would apply. Therefore, the Panel is of the view that the objective of protecting human health and life against life-threatening diseases, such as dengue fever and malaria, is both vital and important in the highest degree.

7.112 The objective pursued is also the protection of animal and plant life and health. The risks at issue relate to: (i) the exposure of animals and plants to toxic emissions caused by tyre fires; and (ii) the transmission of a mosquito-borne disease (dengue) to animals. The Panel acknowledges that the preservation of animal and plant life and health, which constitutes an essential part of the protection of the environment, is an important value, recognized in the WTO Agreement. The Panel recalls that in US – Shrimp\footnote{131}{Appellate Body Report on US – Shrimp, para. 129.}, the Appellate Body underlined that the preamble of the Marrakesh Agreement establishing the WTO showed that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy.\footnote{132}{The preamble of the Marrakech Agreement establishing the WTO reads in its relevant part: "Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development". (emphasis added) Moreover, in the 1994 Ministerial Decision on Trade and Environment, Ministers took note, inter alia, of the Rio Declaration on Environment and Development and Agenda 21.132 Of particular relevance is paragraph 4.19 of Agenda 21, which states, in part: "(...) society needs to develop effective ways of dealing with the problem of disposing of mounting levels of waste products and materials. Governments, together with industry, households and the public, should make a concerted effort to reduce the generation of wastes and waste products (...)". The European Communities referred to the Rio Declaration and Agenda 21 in its response to question 37 by the Panel and in paragraph 138 of its first written submission.} Therefore, the Panel finds that the objective of protection of animal and plant life and health should also be considered important.

Trade-restrictiveness of the measure

7.113 Brazil recognizes that an import ban, by definition, has a restrictive effect and claims that such an effect is necessary for Brazil to avoid imports of shorter-lifespan tyres.\footnote{133}{Brazil's second written submission, para. 107; second oral statement, para. 103.} The European Communities\footnote{134}{European Communities' first written submission, para. 115; European Communities' first oral statement, para. 49.} contends that an import ban is the measure with the highest negative impact on international trade.\footnote{135}{Exhibit BRA-84. See also Exhibit EC-29.}

7.114 The Panel\footnote{136}{Exhibit BRA-84. See also Exhibit EC-29.} recalls that Article 40 of Portaria SECEX 14/2004 is the principal current legal basis of the ban on the importation of retreaded tyres into Brazil.\footnote{137}{Exhibit BRA-84. See also Exhibit EC-29.} This provision prohibits the issuance of import licences for retreaded tyres, thereby prohibiting imports of retreaded tyres,
except for retreaded tyres originating from MERCOSUR countries. Article 40 targets different types of retreaded tyres: for passenger car, bus, truck and aircraft. The Panel notes, as outlined by the Appellate Body in US – Shrimp136, that an import prohibition is, ordinarily, the heaviest "weapon" in a Member's armory of trade measures. Therefore, Brazil's measure is as trade-restrictive as can be, as far as retreaded tyres from non-MERCOSUR countries are concerned, since it aims to halt completely their entry into Brazil.

Contribution of the measure to the objective

7.115 In the previous section, the Panel found that Brazil's declared policy of reducing exposure to the risks to human, animal and plant life and health arising from the accumulation of waste tyres fell within the range of policies covered by paragraph (b) of Article XX.137 For that purpose, the Panel also assumed that a measure relating to retreaded tyres is capable of bearing a relationship to the risks arising from the accumulation of waste tyres. The Panel recalls the Appellate Body's statement that in the assessment of the necessity of a measure one of the factors that should be taken into account in the analysis is the contribution of the measure to the realization of the end pursued.138 The question before the Panel now is whether the import ban on retreaded tyres contributes to the realization of the policy pursued, i.e. the protection of human, animal and plant life and health from the risks posed by the accumulation of waste tyres.

7.116 The European Communities argues that the contribution of the measure cannot be a purely theoretical or potential contribution and that it must be demonstrated that the measure makes a real and verifiable contribution.139 The European Communities argues that Brazil is required to quantify, as precisely as possible, how its ban contributes to the reduction of waste tyres in Brazil.140 Specifically, the European Communities considers that Brazil should be able to provide information on "by how many tyres the import ban reduces the number of waste tyres accruing in Brazil".141 In the European Communities' view, such quantification of the impact of the import ban is a precondition in the contribution analysis required by Article XX(b).142 The European Communities argues that Brazil must prove its assertion that removing the import ban would result in "higher volumes of waste tyres" having to be disposed of in Brazil.143 In the European Communities' view, "higher volumes" is clearly a quantitative concept, and therefore requires a quantification of the volumes of waste tyres at issue.144

7.117 Brazil replies that not every risk can be expressed in strictly numeric terms and that this is exactly why the Appellate Body in EC – Asbestos has noted that "a risk may be evaluated either in quantitative or qualitative terms".145 Brazil contends that the Appellate Body categorically rejected the argument that a "quantification" of risks is necessary, and held that "there is no requirement under Article XX(b) ... to quantify, as such, the risk to human life or health".146 Brazil also contends that the contribution analysis may involve both an evaluation of

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137 See paragraphs 0-0 above.
139 European Communities' answer to Panel question 118.
140 European Communities' second written submission, para. 25.
141 European Communities' second written submission, para. 29.
142 European Communities' second written submission, para. 30.
143 European Communities' second written submission, para. 28, referring to Brazil's second concluding oral statement, para. 8.
144 European Communities' second written submission, para. 28.
145 Brazil's first concluding oral statement, para. 8; Brazil's second written submission, para. 112, quoting the Appellate Body Report on EC – Asbestos, at para. 167 (emphasis added).
146 Brazil's first concluding oral statement, para. 8; Brazil's second written submission, para. 112, quoting the Appellate Body Report on EC – Asbestos, at para. 167 (emphasis added).
the measure's capacity, by design, to contribute to the desired objective and an evaluation of the actual contribution of the measure. 147

7.118 The Panel notes that the European Communities' argument concerns the issue of quantification of the reduction of waste tyres in Brazil while Brazil's answer to that argument concentrates on the quantification of the risk to human health and life. As noted above, the Panel needs to assess here whether the import ban contributes to the reduction of the number of waste tyres to be disposed of in Brazil. In the Panel's view, this demonstration could be made through a quantification, where feasible, but it could also be made through any other means that might sufficiently demonstrate whether the measure can contribute to the reduction of the number of waste tyres. Therefore, the Panel does not consider that Brazil is necessarily required to quantify exactly the impact of the import ban on the reduction of the number of waste tyres.

7.119 In the Panel's view, a determination of a measure's contribution to a particular objective is primarily an analysis of the pertinence and relevance of the chosen means for the achievement of the aim pursued. In other words, our assessment at this stage of the analysis relates essentially to the "relationship of ends and means" 148 between the objective pursued and the chosen measure. This assessment relates to the capacity of the chosen measure to contribute to the realization of the objective.

7.120 Brazil claims that the import ban contributes in a significant manner to the reduction of the health and environmental risks that flow from waste tyre accumulation, transportation, and disposal. 149 Brazil argues that imports of retreaded tyres increase waste tyre volumes, and with them the associated risks and that without the import ban, Brazil could not effectively eliminate these risks. 150

7.121 The European Communities claims that Brazil has not shown that the ban on the importation of retreaded tyres contributes to the protection of human, animal or plant life or health. 151 The European Communities argues that the importation of retreaded tyres does not in any way increase the number of waste tyres to be disposed of in Brazil. 152

7.122 The Panel notes that both parties have linked the question of whether the import ban contributes to the reduction of the risks to human health, animal and plant life and health to its impact on the reduction of the number of waste tyres in Brazil. The Panel agrees that this approach constitutes, overall, the relevant benchmark for the assessment of the measure's contribution to the objective pursued. Therefore, the Panel will assess: (a) whether the import ban can contribute to the reduction of the number of waste tyres generated in Brazil; and (b) whether the reduction of the number of waste tyres can in turn contribute to the reduction of the risks to human, animal and plant life and health arising from waste tyres.

Contribution of the import ban to the reduction of the number of waste tyres

7.123 Brazil argues that, by prohibiting the importation of retreaded tyres that are at the end of their useful life – and therefore are not suitable for further retreading, Brazil is encouraging the

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147 Brazil's answer to Panel question 118.
148 See in the context of Article XX(g), Appellate Body Report on US – Shrimp, para. 136. In referring to this notion, we are mindful of the fact that our analysis under Article XX(b) differs from that to be conducted under Article XX(g), as it involves, overall, an assessment of whether the measure is "necessary" and not merely whether it is a measure "relating to" the interest to be protected.
149 Brazil's, second written submission, para. 109.
150 Brazil's first concluding statement, para. 13.
151 European Communities' first oral statement, para. 48.
152 European Communities' first written submission, para. 109.
local producers to retread the used tyres that are already in its territory, and thus avoiding the unnecessary generation of additional waste. 153 Brazil argues that every retreaded tyre that is not imported will be replaced by a locally retreaded tyre that would not have been retreaded otherwise and that any reduction in the importation of these short lifespan products necessarily also leads to a corresponding reduction in the volume of waste tyres generated in the importing country. 154 Brazil also argues that when imported retreaded tyres displace new tyres, they increase the waste tyre volumes. 155 Brazil claims that it actively promotes retreading of the tyres it consumes and that the country has a robust and well-established retreading industry, dating back to the early 1950s. 156

7.124 The European Communities claims that the import ban on retreaded tyres does not reduce the rate of the accumulation of waste tyres for the following two reasons. 157 First, imported retreaded tyres and domestic new tyres contribute equally to the accumulation of tyre waste, given that most new passenger tyres are not even suitable for retreading after a first life cycle on Brazilian roads and that not all retreadable passenger car tyres are in fact retreaded in Brazil. The European Communities argues that the import ban would only make a contribution to the reduction of the number of waste tyres arising in Brazil if it could be shown that new tyres are actually being retreaded after having been used in Brazil. 158 Second, it can be assumed that practically every potential sale of an imported retreaded tyre is currently, due to the import ban, substituted for by a sale in Brazil of a new (domestic or imported) tyre or of a domestic retreaded tyre, most likely manufactured from an imported used tyre, neither of which will, in the case of a passenger car tyre, be retreaded again. 159

7.125 The Panel notes that Brazil's explanation of the contribution of the import ban to the objective of reduction of waste tyres assumes that imported retreaded tyres would be replaced by domestically retreaded tyres made from tyres used in Brazil or new tyres capable of future retreading. The European Communities, however, suggests that the import ban on retreaded tyres does not contribute to reducing the number of waste tyres because imported retreaded tyres are likely to be replaced either by new tyres not suitable for retreading or by domestic retreaded tyres most likely manufactured from imported used tyres. Brazil has acknowledged that imported retreaded tyres compete on the Brazilian replacement tyre market not only with domestic retreaded tyres but also with new (domestic or imported) tyres. 160 Therefore, we must consider both of these possibilities in order to determine whether the import ban on retreaded tyres can contribute to the reduction of the number of waste tyres.

Substitution of new tyres for imported retreaded tyres

7.126 The question the Panel must consider here is whether the import ban on retreaded tyres will be able to contribute to the reduction of the number of waste tyres in Brazil, if the imported retreaded tyres are replaced on the market by new tyres.

7.127 The Panel notes Brazil's argument that imported retreaded tyres become waste sooner than new tyres, and thereby increase the waste volumes. 161 The Panel recalls that the parties

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153 Brazil's first written submission, para. 106.
154 Brazil's answer to panel question No. 40.
155 Brazil's second oral statement, para. 80.
156 Brazil's first written submission, para. 79.
157 European Communities' first written submission, para. 127.
158 European Communities' second written submission, para. 34; European Communities' answer to panel question No. 11, para. 30.
159 European Communities' first written submission, para. 127.
160 Brazil's answer to panel question No. 108. The Panel notes also that new cars are not allowed to be fitted with retreaded tyres.
161 Brazil's first written submission, para. 76; Brazil's second written submission, para. 111; Brazil's second oral statement, para. 81.
agree that under international standards, passenger car tyres may be retreaded only once, while commercial vehicle and aircraft tyres may be retreaded more than once. Therefore, the Panel notes that tyres of passenger cars can have a maximum of two "useful lives": (i) as new tyres; and (ii) as retreaded tyres. Thereafter, all passenger car tyres necessarily become waste. It is understood, however, that not all passenger car tyres have the capacity of having two useful lives; some of them may not be capable of being retreaded and become waste after one life only.

7.128 Assuming that on average a tyre, whether new or retreaded, can only be utilized on a passenger car for five years, the cumulative useful life of a new tyre that has been retreaded after five years is ten years, while the useful life of an already retreaded tyre is only five years. Therefore, the fact that a new tyre has the potential to last twice as long as an already retreaded tyre implies that overall less tyres could fulfil the needs of the market, thereby reducing the overall number of tyres becoming waste, if imported retreaded tyres are replaced by new tyres.

7.129 The Panel notes further Brazil's argument that "a retreaded tyre, no matter the type [passenger car, truck, or airplane retreaded tyre], will always have fewer remaining lifecycles and a shorter lifespan than a retreadable new tyre"). The European Communities also contends that passenger car tyres can only be retreaded once, while commercial vehicle tyres can be retreaded up to three to four times and aircraft tyres up to eight times. Therefore, parties agree that tyres of buses, trucks and aircraft may be retreaded more than once. Following the same reasoning as applied to passenger car tyres, a new tyre for commercial vehicles and aircraft similarly has more useful lives than an already retreaded tyre; this implies that overall less tyres could fulfill the needs of the market of commercial and aircraft tyres, thereby reducing the overall number of tyres becoming waste. Brazil also argues that a commercial vehicle retreaded tyre that is imported closer to the end of its useful life could have less than 20 per cent of its useful life left. However, by the same token, the Panel notes that an imported commercial vehicle retreaded tyre could have up to 80 per cent of its useful life remaining.

7.130 To conclude on this point, the Panel is of the view that all types of retreaded tyres (i.e. for passenger car, bus, truck and aircraft) have by definition a shorter lifespan than new tyres. Therefore, an import ban on retreaded tyres may lead to a reduction in the total number of waste tyres because imported retreaded tyres may be substituted for by new tyres which have a longer

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162 See UNECE Regulation No. 108 (1998), para. 6.2. European Communities' first oral statement, para. 33. Brazil's first written submission, para. 16.
163 See the answers of Brazil and the European Communities to panel question No. 90 on the average life of a passenger car tyre. Brazil estimates that a 175/30 passenger car tyre lasts about 60,000 km or about six years and a 165/70 tyre lasts about 40,000 km or four years. The European Communities indicates that, in Europe, the average number of kilometres which are driven with a passenger car tyre before it is replaced is between 60,000 and 75,000 kilometres and that the average lifespan of a passenger car tyre may be assumed to be between four and five years. The European Communities argues that the lower mileage of Brazilian tyres would appear to reflect the rougher road conditions in Brazil and the accordingly higher wear of tyres.
164 In its Arbitral Award of 25 October 2005 in the dispute between Argentina and Uruguay concerning the import ban on remoulded tyres, the MERCOSUR Tribunal provided a similar analysis: "Using simple arithmetic and on the basis of the optimistic expectation that a remoulded tyre could run the same distance as a new tyre, i.e. 60,000 km, it may be concluded that, after 120,000 km, a four-wheel vehicle that has used new tyres, subsequently remoulded, will have consumed four tyres; on the other hand, an identical vehicle that has used remoulds over the same period will have consumed eight tyres. Clearly, if the total service life of a remoulded tyre is less than that of a new tyre (since the latter can be remoulded once and the former not at all), the introduction into the domestic market of tyres remoulded abroad will over time create a greater environmental burden." (Exhibit EC-43, para. 98, translation by the WTO Secretariat)
165 It is understood, however, that not all passenger car tyres have the capacity of having two useful lives; some of them may not be capable of being retreaded and become waste after one life only.
166 European Communities' first written submission, para. 26. The European Communities also argues that the age of a casing for a passenger car tyre may not exceed 7 years when it is being retreaded, whereas no similar restriction exists for commercial vehicle and aircraft tyres. See European Communities' answer to panel question No. 4.
167 Brazil's first written submission, para. 16.
168 Brazil's answer to panel question No. 5.
lifespan. Consequently, while the extent of the reduction may vary in respect of commercial tyres depending on the stage at which they might be imported, in all cases, overall less tyres would be necessary to fulfil the needs of the market.169

Substitution of retreaded tyres made from domestic used tyres for imported retreaded tyres

7.131 The Panel notes Brazil’s argument that the contribution of the import ban to the reduction of the number of waste tyres lies in its capacity to promote retreading of domestic used tyres because imported retreaded tyres may be substituted for by retreaded tyres made from domestic used tyres that would not have been retreaded otherwise.170

7.132 The Panel needs here to determine whether a link exists between the replacement of imported retreaded tyres by domestically retreaded tyres and a reduction in the number of waste tyres in Brazil. For Brazil, the import ban on retreaded tyres is a way of encouraging domestic producers to collect and retread the used tyres that are already in its territory thereby extending the life cycle of domestic used tyres.171 This argument therefore assumes that an augmentation in the number of domestic used tyres being retreaded will contribute to the reduction of waste tyre accumulation.

7.133 The Panel is of the view that if a domestic retreaded tyre is manufactured from a tyre used in Brazil, the retreading of this domestic tyre contributes to the management and reduction of the number of waste tyres in Brazil, by ensuring that a tyre already used in Brazil gets a "second life" as a retreaded tyre. Therefore, the Panel agrees that if the domestic retreading industry retreads more domestic used tyres, the overall number of waste tyres will be reduced by giving a second life to some used tyres, which otherwise would have become waste immediately after their first and only life.

7.134 The Panel will consider next whether an import ban on retreaded tyres is capable of promoting the retreading of domestic used tyres. The direct effect of an import ban on retreaded tyres is to compel consumers of imported retreaded tyres to switch either to retreaded tyres produced domestically or to new tyres. Assuming that domestic used tyres are the only raw material available to retreaders in Brazil and that at least part of the domestic demand is satisfied by domestic retreaded tyres (as opposed to new tyres), an increase in the demand for domestic retreaded tyres can be expected to lead to a corresponding supply response, and hence to an increase in the retreading of domestic used tyres.172 Therefore, the Panel finds merit in the argument that an import ban on retreaded tyres can encourage domestic retreaders to retread more domestic used tyres than they might have done otherwise.173 This will be possible if domestic used tyres can be retreaded in Brazil.174 The Panel will now assess whether this assumption can be verified.

(...)

169 In its answer to panel question No. 117, Brazil provides some data on the imports of retreaded tyres by type of tyres in 2002/2003. According to these data, it seems that in practice most imports of retreaded tyres in the past have been passenger car retreaded tyres (i.e. 99.8 per cent).
170 See Brazil’s answer to panel questions Nos. 6 and 26.
171 Brazil’s first written submission, paras. 106-107.
172 We note Brazil’s argument that the fact that “local retreaders are desperately seeking to circumvent the import ban through court injunctions demonstrates ... that the ban is necessary to induce local retreaders to collect waste tyres accumulated in Brazil for retreading, rather than importing used tyres” (Brazil’s answer to panel question 19).
173 Brazil’s first written submission, para. 106.
174 Brazil’s first written submission, para. 108.
7.137 The Panel notes further that Brazil argued that it had taken a number of measures to facilitate the access of domestic retreaders to good quality used tyres. The Panel is of the view that such measures could indeed positively contribute to Brazil's capacity to retread its own tyres. First, according to Brazil, Resolution CONAMA 258/1999, as amended in 2002, provides for a collection and disposal scheme in Brazil and forces manufacturers and importers of new tyres to collect and dispose of waste tyres to a proportion of five waste tyres for every four new tyres. Brazil also indicates that Resolution CONAMA 258/1999 exempts domestic retreaders from disposal obligations, as long as they process tyres consumed within the country's territory. Moreover, Brazil claims that it has adopted demanding technical regulations for manufacturing of new tyres, which help produce better-quality tyres and, subsequently, better casings. The Panel notes the European Communities' claim concerning the existence in Brazil of cheap low-quality new tyres. Brazil replies that new tyres sold in Brazil (whether manufactured domestically or imported) are high-quality tyres that comply with strict technical and performance standards that are based on international standards and that tyres manufactured in accordance with these standards have the potential to be retreaded. Therefore, the Panel has no reason to believe that new tyres sold in Brazil are low-quality tyres.

7.138 Brazil has also indicated that automotive inspections are an important instrument to increase the number of retreadable casings in the country and that it continues to promote better tyre care to increase the collected tyres' suitability for retreading. However, the European Communities claims that currently there are no rules at the federal level, which would establish a mandatory vehicle inspection system. Brazil argues that the National Code of Traffic (Law 9503), enacted in 1997, mandates annual safety inspections of all vehicles and Bill 5979/2001, currently before the National Congress, establishes general rules to be applied by the states in these safety inspections. Brazil contends further that because the general rules to be applied by the Brazilian states are still under consideration of the National Congress, the states are applying their own technical guidelines in mandatory inspections, which occur when a vehicle is first licensed or when the ownership of a vehicle changes. Therefore, it appears that mandatory inspections are taking place in Brazil and that more frequent inspections are to be expected once Bill 5979/2001 is approved.

7.139 Furthermore, the Panel notes that both parties agreed that if imports of both used and retreaded tyres were banned, waste volumes would be at their lowest. For the ban on

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175 Brazil's first written submission, para. 81.
176 Brazil's first written submission, paras. 71-72; Brazil's second oral statement, para. 86. Exhibit BRA-4. Article 1 of this regulation states: "Tire manufacturers and importers are obliged to collect and definitively dispose of scrap tires in Brazil, in a proper manner, in the proportion stated herein with regard to quantities of manufactured and/or imported tires". Article 3.IV states: "a) manufacturers and importers should definitively dispose of five scrap tyres for every four new tyres manufactured in Brazil or new imported tires, including those fitted to imported vehicles; b) importers should definitively dispose of four scrap tyres for every three imported recycled [i.e. retreaded] tyres of any kind." [emphasis added] A scrap tyre is defined in Article 2 as a tyre "which can no longer be restored to permit further travel use". See also Resolution CONAMA 301/2002 (Exhibit Bra-68).
177 The Panel also notes that Brazil contends that it has enforced these obligations and imposed substantial fines in this regard; it has helped private companies set up collection centres ("ecopontos"); and it has intensified its own collection efforts.
178 Brazil's first written submission, para. 81.
179 Brazil's first written submission, para. 81.
180 European Communities' first oral statement, para. 28; European Communities' answer to panel question No. 11.
181 Brazil's answer to panel questions No. 12 and 91.
182 Brazil's answer to European Communities question No. 8.
183 Brazil's first written submission, para. 82.
184 European Communities' answer to panel question No. 87.
185 Exhibit BRA-102.
186 Brazil's first written submission, para. 82.
187 Brazil's answer to European Communities question No. 8.
188 Brazil's answer to European Communities question No. 9.
retreaded tyres to contribute to the objective of a reduction of waste tyres, it should not lead to a substitution of imported used tyres for imported retreaded tyres. The Panel notes that Article 40 of Portaria SECEX 14/2004 bans the importation of both used and retreaded tyres to Brazil. Therefore, the Panel observes that the import ban on used tyres supports the effectiveness of the import ban on retreaded tyres regarding the reduction of waste tyres.

7.140 The Panel notes further the European Communities' argument that in fact it can be assumed that practically every potential sale of an imported retreaded tyre is currently, due to the import ban, substituted by a sale in Brazil of a new tyre or of a domestic retreaded tyre most likely manufactured from an imported used tyre.190 The Panel notes that a number of preliminary injunctions have temporarily allowed local retreaders to import casings, thereby making it possible for domestically retreaded tyres to be made from such imported casings despite the prohibition of such imports in Article 40 of Portaria SECEX 14/2004.191 The Panel notes Brazil's explanation that the used tyre imports through injunctions are not part of the design of the measure and are rather an attempt to undermine the measure's design and application.192 As noted earlier, our analysis at this stage focuses on the measure itself, rather than on elements relating to the manner in which it is being applied, which will be relevant in the context of our analysis under the chapeau of Article XX.193 We will therefore reserve our examination of this element for that later stage.

7.141 Finally, it appears to the Panel that the Brazilian retreading industry has the production capacity to retread domestic used tyres at the end of their life. This conclusion can be drawn from the ABR report which shows that the production of the domestic retreading industry in 2005 was 10.8 million retreaded passenger car tyres and 7.8 million truck and bus tyres.194 This means that in total 18.6 million retreaded tyres were produced domestically in 2005. Brazil indicates also that, in 2005, 33.4 million new tyres (all types included) were sold in Brazil (either domestically produced or imported).195

7.142 In light of the above, the Panel is of the view that Brazil has established that it has the production capacity to retread domestic used tyres at the end of their life. This conclusion can be drawn from the ABR report which shows that the production of the domestic retreading industry in 2005 was 10.8 million retreaded passenger car tyres and 7.8 million truck and bus tyres.194 This means that in total 18.6 million retreaded tyres were produced domestically in 2005. Brazil indicates also that, in 2005, 33.4 million new tyres (all types included) were sold in Brazil (either domestically produced or imported).195

7.143 Brazil argues that it has demonstrated that the import ban contributes in a significant way to the reduction of the health and environmental risks that flow from waste tyre accumulation, transportation, and disposal.196 For Brazil, by reducing the volumes of waste tyres, and

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190 European Communities' first written submission, para. 127.
191 Brazil also argues that the fact that "local retreaders are desperately seeking to circumvent the import ban through court injunctions demonstrates ... that the ban is necessary to induce local retreaders to collect waste tyres accumulated in Brazil for retreading, rather than importing used tyres". Brazil's answer to panel question 19.
192 Brazil's answer to Panel question 118.
193 See para. 0 above.
194 Exhibit BRA-157, para. 2. The ABR report also indicates that "[t]here are 1257 tyre reforming companies operating with truck/bus tyres; 120 in the field of passenger car tyres; 100 in the field of agriculture/earthmoving tyres; 100 in the field of motorcycle tyres. That totals 1577 tyre reforming companies". Exhibit BRA-157, para. 1.
195 Brazil's answer to panel question No. 99 by the Panel.
196 Brazil's second written submission, para. 109.
consequently the amount of tyres that will be stockpiled or illegally dumped, the ban also reduces mosquito breeding grounds\footnote{Brazil's second written submission, para. 123.} and the health risks caused by tyre fires and toxic leaching.\footnote{Brazil's second written submission, para. 132.} For Brazil, the more waste tyres there are, the higher these risks.\footnote{Brazil's second oral statement, para. 78.} Brazil points out that in addition to collecting tyres, Brazil's campaign against dengue targets other key containers, educates the public about dengue prevention, carries out mosquito surveillance, monitors mosquito resistance to insecticides, and offers guidance on treatment of dengue patients.\footnote{Brazil's answer to panel questions Nos. 5, 100-102.} Brazil also argues that the level of risk from commercial vehicle retreaded tyres is higher than that from passenger car retreaded tyres because commercial vehicle retreads are substantially heavier and, thus, produce more waste.\footnote{Brazil's answer to panel question No. 89.}

7.144 The \textbf{European Communities} argues that, even if Brazil had established that its ban makes a contribution to the reduction of waste tyres, it has failed to demonstrate that this leads to a reduction of the risks to human life or health.\footnote{European Communities, first oral statement, para. 42.} In the European Communities' view, the problems arising from waste tyres are not attributable to imports of retreaded tyres but to the 100 million waste tyres scattered around the country, and the health problems continue since the ban was enacted.\footnote{European Communities,' second written submission, para. 55.}

7.145 In the Panel's view, it cannot be reasonably expected that the specific measure under consideration would entirely eliminate the risk to human health or life arising from the accumulation of waste tyres in Brazil, or even that its impact on the actual reduction of the incidence of the diseases at issue would manifest itself very rapidly after the enactment of the measure, especially when a number of factors beyond the specific product targeted by the measure (retreaded tyres) also contribute to the realization of the hazard.\footnote{See Brazil's response to Question No. 89 of the Panel; Brazil's second written submission, para. 126.}

7.146 The question here is whether a measure that contributes to the reduction of the amount of waste tyres in Brazil will contribute to the reduction of the risks arising from such accumulation. In this respect, the Panel considers it significant that the very essence of the problem is the actual accumulation of waste in and of itself. To the extent that this accumulation has been demonstrated to be associated with the occurrence of the risks at issue, including the providing of fertile breeding grounds for the vectors of these diseases, a reduction in this accumulation, even if it does not eliminate it, can reasonably be expected to constitute a step towards the reduction of the occurrence of the diseases and the tyre fires. The Panel also notes that the measure at issue is intended to operate in conjunction with a number of other measures taken by Brazil domestically to reduce the risks arising from the accumulation of waste tyres (such as tyre collection) as well as measures targeting mosquito-borne diseases, including measures intended to address key containers other than waste tyres that may act as breeding grounds for mosquito-borne diseases.\footnote{Brazil's second written submission, para. 126.}

7.147 In this context, the Panel finds it reasonable to consider that a measure that contributes to the reduction of the amount of waste tyres in Brazil also will contribute to the reduction of the risks to human, animal and plant life and health arising from the accumulation of waste tyres in Brazil.
Conclusion

7.148 In light of the above, the Panel concludes that the prohibition on the importation of retreaded tyres is capable of making a contribution to the objective pursued by Brazil, in that it can lead to a reduction in the overall number of waste tyres generated in Brazil, which in turn can reduce the potential for exposure to the specific risks to human, animal, plant life and health that Brazil seeks to address.

Availability of alternative measures

Approach by the Panel

7.149 Having reviewed the relevant factors identified by the Appellate Body, the Panel will now undertake a comparison between the challenged measure and possible alternatives. In this connection, the Panel recalls the Appellate Body's finding that a measure cannot be considered "necessary" within the meaning of Article XX if a WTO-consistent alternative measure, or less WTO-inconsistent measure, is "reasonably available" that would achieve the same end.205

7.150 As stated by the Appellate Body in *Dominican Republic – Import and Sale of Cigarettes*, the weighing and balancing process of the factors that we have considered above should inform the determination of whether a WTO-consistent alternative measure, or a less WTO-inconsistent measure, which the Member concerned could reasonably be expected to employ, is available.206

7.151 In this instance, we have determined above that the objective of protecting human health and life is both vital and important in the highest degree and the objective of protection of animal and plant life and health can also be considered important. We have also observed that the challenged measure, a complete import ban, is particularly restrictive of trade, but also that it is capable of contributing to the objective pursued, in that it can lead to a reduction in the overall number of waste tyres generated in Brazil, which in turn can reduce the potential for exposure to the specific risks to human, animal, plant life and health that Brazil seeks to address.

7.152 We must therefore now consider whether any alternative measure, less inconsistent with GATT 1994, that is, less trade-restrictive than a complete import ban, would have been reasonably available to Brazil to achieve the same objective, taking into account Brazil's chosen level of protection.207 The challenged measure could not be considered to be necessary if such an alternative measure was available.

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205 Appellate Body Report on *Korea – Various Measures on Beef*, paras. 165-166 and Appellate Body Report on *EC – Asbestos*, paras. 170-172. The Appellate Body, in addressing the "necessity" of the measures respectively under Articles XX(b) and XX(d) concerned in both cases, found that the standard set forth by the GATT panel in *US – Section 337 of the Tariff Act of 1930* was correct. The panel in *US – Section 337 of the Tariff Act of 1930* stated:

"In was clear to the Panel that a contracting party cannot justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions." (Panel report on *US – Section 337 of the Tariff Act of 1930*, BISD 36S/345, para. 5.10.)

206 Appellate Body Report on *Dominican Republic – Import and Sale of Cigarettes*, para. 70. Brazil also agrees to this approach. See Brazil's first written submission, paras. 112-113.

207 In this respect, we recall the Appellate Body's statement in *EC – Asbestos* that, given the value pursued in that case – the preservation of human life and health through elimination, or reduction, of the health risks posed by asbestos fibres – was both vital and important in the highest degree, the remaining question was whether there was an alternative measure that would achieve the same end and that is less restrictive of trade than a prohibition (the measure in that case) (Appellate Body Report on *EC – Asbestos*, para. 172).
7.155 The Panel recalls that the Appellate Body in US – Gambling found that the respondent only needs to make a prima facie case of the necessity of a measure and does not need to identify less WTO-inconsistent measures. The Appellate Body stated that:

"[i]t is for a responding party to make a prima facie case that its measure is 'necessary' by putting forward evidence and arguments that enable a panel to assess the challenged measure in the light of the relevant factors to be 'weighed and balanced' in a given case. The responding party may, in so doing, point out why alternative measures would not achieve the same objectives as the challenged measure, but it is under no obligation to do so in order to establish, in the first instance, that its measure is 'necessary'"208

7.156 The Appellate Body then found that once the complaining party comes forward with a WTO-consistent alternative measure, the respondent has to demonstrate why the measure at issue is necessary in light of the alternative measure raised by the complainant or why the proposed alternative is not "reasonably available":

"If, however, the complaining party raises a WTO-consistent alternative measure that, in its view, the responding party should have taken, the responding party will be required to demonstrate why its challenged measure nevertheless remains 'necessary' in the light of that alternative or, in other words, why the proposed alternative is not, in fact, 'reasonably available'. If a responding party demonstrates that the alternative is not 'reasonably available', in the light of the interests or values being pursued and the party's desired level of protection, it follows that the challenged measure must be 'necessary' ..."209

7.157 Following the same approach, we will first examine whether the European Communities has identified a measure, other than the import ban, that is compatible, or less incompatible, with the WTO Agreement and at the same time, in its view, was reasonably available to Brazil to achieve its policy objective. If the Panel finds that the European Communities has done so, we will then examine whether, in light of the alternative measures identified by the European Communities, Brazil has demonstrated why the import ban nevertheless remains necessary (i.e. why these alternative measures are not, in fact, reasonably available). We understand this assessment to involve in particular a consideration of the relative trade-restrictiveness of the proposed alternatives compared to that of the measure at issue, taking into account also the importance of the objective pursued and the ability of the proposed alternative measure to achieve this objective.

7.158 As to the elements that may guide our assessment as to whether such alternative measure is reasonably available, we find useful the following statement of the Appellate Body in US – Gambling:

"An alternative measure may be found not to be 'reasonably available', however, where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties. Moreover, a 'reasonably available' alternative measure must be a

measure that would preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued...210

Alternative measures identified by the European Communities

7.159 The European Communities has identified various measures as alternatives to Brazil's import prohibition. More specifically, the European Communities has presented these measures in two categories – alternative measures to reduce the number of waste tyres accumulating in Brazil and those to improve the management of waste tyres in Brazil.

7.160 First, the European Communities suggests that Brazil has not done "all it could" to reduce the accumulation of waste tyres in Brazil because there exist various other measures that Brazil could reasonably have been expected to employ to achieve the same objective. The European Communities argues that Brazil should have taken the following domestic measures: measures to encourage or ensure the retreading of domestic passenger cars, including, for example, measures such as education campaigns or the use of government procurement to require the installation of retreaded tyres on government vehicles; measures to improve the low suitability of Brazilian passenger car tyres for retreading211; measures that would reduce the use of cars in Brazil, for example through the promotion of public transport in urban areas212; as for tyres that have already been retreaded, any policy aiming at a longer safe use of retreaded tyres, such as better vehicles maintenance, including technical inspection, and educational campaigns on better driving habits213; and measures to prevent the constant and growing flow of used tyres into Brazil.214

7.161 Second, as alternative measures to improve the management of waste tyres, the European Communities first argues that Brazil already has a measure in its legislation that can achieve its policy objective, namely the collecting and disposal system such as that which has already been set up by CONAMA Resolution 258/1999, as amended in 2002. Similarly, the European Communities argues that Brazil should have adopted at the federal level voluntary programmes such as "Paraná Rodando Limpo" and other equivalent programmes implemented in some other States in Brazil. Finally, according to the European Communities, main disposal methods such as controlled landfilling, stockpiling, energy recovery and material recycling constitute alternative measures to the import ban.

Reasonable availability of alternative measures to Brazil

7.162 As noted above, the European Communities has identified the alternative measures consistent with the WTO Agreement that in its view would achieve Brazil's policy objective. We will now proceed to examine whether Brazil has demonstrated that these measures are not reasonably available to it.

210 Appellate Body Report on US – Gambling, para. 308. We also note that in Korea – Various Measures on Beef, the Appellate Body endorsed the approach taken by the panel in that case:

"Having found that possible alternative enforcement measures, consistent with the WTO Agreement, existed in other related product areas, the Panel went on to state that:

'... it is for Korea to demonstrate that such an alternative measure is not reasonably available or is unreasonably burdensome, financially or technically, taking into account a variety of factors including the domestic costs of such alternative measure, to ensure that consumers are not misled as to the origin of beef" (original footnote omitted)

211 European Communities' first oral statement, paras. 58-61.
212 European Communities' answer to Panel question No. 38.
213 European Communities' answer to Panel question No. 38.
214 European Communities' first oral statement, paras. 62-68.
7.163 Thus, bearing in mind the guidance provided by the Appellate Body, we will consider in turn the two different sets of measures suggested by the European Communities as alternatives to the import ban – first, measures to reduce the number of waste tyres and secondly, measures to improve the management of waste tyres.

Measures to reduce the number of waste tyres

7.164 The European Communities argues that Brazil does not seem to have taken measures to encourage domestic retreading or improve the retreadability of tyres, such as those listed in paragraph 0 above.

7.165 Regarding the alternative measures suggested by the European Communities to prevent the generation of waste, Brazil first responds that it actively promotes retreading of the tyres and has already implemented a number of measures that encourage non-generation and is in the process of implementing others. Brazil further submits that government procurement is not necessary in Brazil since Brazil already has a high demand for retreaded tyres. Furthermore, according to Brazil, in developing countries such as Brazil, the promotion of public transport is hardly necessary since most of the population do not own cars and already use public transportation.

7.166 In any event, Brazil submits that none of these measures can replace the import ban because they do not allow Brazil to achieve its goal of preventing tyre waste to the maximum extent possible. Brazil asserts that the non-generation solutions proposed by the European Communities could be alternatives only if Brazil sought to reduce waste tyre volumes by a particular amount and that these suggested measures are not alternatives within the meaning of Article XX(b), but rather additional measures, because without the import ban, some tyre waste that could have been prevented would not, in fact, be prevented.

7.167 The Panel first notes that the measures suggested by the European Communities to encourage domestic retreading or to improve the retreadability of domestic used tyres are less trade-restrictive than the import ban, in that they operate on the domestic market for imported and domestic tyres alike and do not involve any a priori import restrictions. Furthermore, they could contribute to the reduction in the number of waste tyres generated by domestic used tyres in Brazil by maximizing their overall lifespan.

7.168 However, as pointed out by Brazil, the promotion of domestic retreading and enhanced retreadability of locally used tyres in Brazil would not lead to the reduction in the number of waste tyres additionally generated by "imported short-lifespan retreaded tyres".

7.169 We also observe that Brazil has already implemented or is in the process of implementing such domestic measures. Indeed, the positive impact of both measures – i.e. the ban on imported short-lifespan retreaded tyres and domestic measures on domestic used tyres – could be cumulative rather than substitutable. We thus do not agree with the European Communities that the institution of domestic measures to encourage timely domestic retreading and to improve the retreadability of domestic used tyres would achieve the same outcome as the import ban on retreaded tyres.

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215 Brazil's second written submission, para. 104.
216 Brazil's second written submission, para. 104.
217 Brazil's answer to Panel question No. 122.
218 See paragraphs 0-0 above for such examples.
Finally, the European Communities also argues that Brazil has not taken measures to prevent the constant and growing flow of used tyres into Brazil due to the imports through court injunctions.219

In this respect, we note that by law, imports of used tyres are already prohibited, so that if the "alternative measure" proposed by the European Communities is the prohibition of used tyres, it could be said that Brazil actually already imposes that measure. Indeed, as noted above, this prohibition actually supports the effectiveness of the measure at issue.220 Further, this will be an issue relevant in our consideration of "whether the import ban is being applied in a manner consistent with its objective under the chapeau".

Therefore, in the Panel's view, Brazil has successfully demonstrated that the alternative measures identified by the European Communities to avoid the generation of waste do not constitute alternatives that could apply as a substitute for the import ban on retreaded tyres to achieve its goal of preventing the generation of waste tyres to the maximum extent possible. Rather, they would appear to be complementary measures that Brazil in fact already applies, at least in part.

Measures to improve the management of waste tyres

We will now examine the waste tyre management measures identified by the European Communities to determine whether Brazil has demonstrated that these measures do not constitute reasonably available alternative measures to the import ban.

Resolution CONAMA 258/1999 and "Paraná Rodando Limpo"

First, the European Communities submits that the Brazilian legislation itself contains one alternative to the import ban: the system for the final disposal of tyres adopted by Resolution CONAMA 258/1999 which makes it mandatory for domestic producers of new tyres and tyre importers to provide for the safe disposal of waste tyres ("unusable tyres" in the terminology of the Resolution) in specified proportions. The European Communities also suggests that a second alternative measure could exist in a programme put in place in the State of Paraná; it is a voluntary multi-sector programme called "Paraná Rodando Limpo" ("Paraná Rolling Clean"), in which more than 10 million old tyres have so far been disposed of, thus eliminating the waste tyre problem in that State.222 The European Communities also indicates that equivalent programmes are now being implemented in Pernambuco and Paraíba and suggests that Brazil could apply such a programme to the whole Union.223 The European Communities claims that such a disposal scheme is an alternative measure to the import ban and that the scheme, if enforced correctly, would eliminate the eventual health hazards created by waste tyres.224 According to the European Communities, schemes like these are even more effective than an import ban, since they cover all waste tyres; this would also correspond to the modern waste management policies adopted around the world.

Brazil argues, however, that collection schemes such as Resolution CONAMA 258/1999 and "Paraná Rodando Limpo" are only one component of Brazil's comprehensive waste

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219 European Communities' first oral statement, paras. 62-68.
220 See paragraph 0.
221 European Communities' first written submission, para. 113. See Exhibit EC-49.
222 European Communities' first written submission, para. 113.
223 European Communities' first written submission, para. 113.
224 European Communities' first written submission, para. 112.
management programme, which complements – but cannot substitute for – the import ban.225 This is because the Resolution, which is a measure dealing with the final disposal of waste tyres, by itself, does not achieve the desired "level" of protection sought by the import ban – i.e. non-generation of unnecessary additional tyre waste. Moreover, according to Brazil, even when the collection and disposal methods conform to the environmental legislation in force, in accordance with Resolution CONAMA 258/1999 and "Paraná Rodando Limpo", they pose health and environmental risks themselves, which are the very risks that Brazil seeks to prevent in the first place. Therefore, Brazil submits that its import ban is necessary because no lesser measure could contribute so effectively to the policy objective of protecting human life or health and the environment through the avoidance of the additional and unnecessary generation of waste tyres.

7.176 The Panel notes that, as Brazil explains, Resolution CONAMA 258/1999 imposes an obligation on importers of retreaded tyres to collect and ensure the "environmentally appropriate final disposal of four unusable tyres in Brazil" for every three retreaded tyres imported.226 We agree with the European Communities that the obligation to collect four waste tyres for every three retreaded tyres imported would seem to contribute to reducing the accumulation of waste tyres and consequently to reducing the types of the risks identified earlier in relation to the accumulation of waste tyres. Also, it is clearly less trade-restrictive than the import ban. Thus, it would seem, at least initially, that the Resolution could constitute an alternative measure to the import ban.

7.177 At the same time, however, we recall that Brazil's chosen level of protection is the reduction of the risks associated with waste tyre accumulation to the maximum extent possible and that Brazil purports to achieve this goal by reducing the "generation" of tyre waste as much as possible. Thus, insofar as the level of protection pursued by Brazil involves the "non-generation" of waste tyres in the first place, the Resolution would not seem able to achieve the same level of protection as the import ban. Furthermore, we also note Brazil's concern that collection schemes such as the Resolution do not even address, let alone eliminate, the very disposal risks that Brazil seeks to avoid.227 We consider the Appellate Body's observation in EC – Asbestos useful in this respect: "France could not reasonably be expected to employ any

225 Brazil's first written submission, para. 119.
226 Brazil's first written submission, para. 118.

Article 3 of the Resolution, as amended by the Resolution of 2002, provides:
"The time periods and quantities for collection and environmentally appropriate final disposal of unusable tyres resulting from use on automotive vehicles and bicycles covered by this Regulation are as follows:
I – as of 1 January 2002: for every four new tyres produced in Brazil or imported new or reconditioned tyres, including those on imported vehicles, manufacturers and importers must ensure final disposal of one unusable tyre;
 II – as of 1 January 2003: for every two new tyres produced in Brazil or imported new or reconditioned tyres, including those on imported vehicles, manufacturers and importers must ensure final disposal of one unusable tyre;
 III – as of 1 January 2004:
 a) for every one new tyre produced in Brazil or imported new tyre, including those on imported vehicles, manufacturers and importers must ensure final disposal of one unusable tyre;
 b) for every four imported reconditioned tyres, of any type, importers must ensure final disposal of five unusable tyres;
 IV – as of 1 January 2005:
 a) for every four new tyres produced in Brazil or imported tyres, including those on imported vehicles, manufacturers and importers must ensure final disposal of five unusable tyres;
 b) for every three imported reconditioned tyres, of any type, importers must ensure final disposal of four unusable tyres."

227 For the discussion on the risks from the disposal of waste tyres, see the section on disposal methods below, paragraphs 0-0.
alternative measure if that measure would involve a continuation of the very risk that the measure seeks to halt."228

7.178 In sum, the Panel is of the view that Brazil has demonstrated that collection and disposal schemes such as Resolution CONAMA 258/1999 as amended by Resolution CONAMA 301/2002 and Paraná Rodando Limpo have already been implemented in Brazil and that the overall objective of these schemes is, as recognized by the European Communities, ensuring environmentally appropriate collection and final disposal of waste tyres.229 The Panel is also of the view that, for the reasons expressed in the previous paragraphs, these schemes are not reasonably available to Brazil as an alternative to the import ban in light of the level of protection Brazil pursues in relation to the health risks concerned and since such disposal schemes do not address the risks associated with the disposal of waste tyres.

Disposal methods230

7.179 The European Communities has identified several disposal methods that, in its view, are reasonably available alternatives to the import ban on retreaded tyres. These methods are controlled landfilling and stockpiling; incineration of waste tyres in cement kilns and similar facilities; and material recycling.231

7.180 Brazil submits that every known disposal method capable of dealing with the existing volumes of waste tyres generated in Brazil, which amount to over 40 million waste tyres every year, carries with it serious risks and adverse effects to human health and the environment.232 Although Brazil recognizes that landfilling, stockpiling and tyre incineration may handle existing volumes of waste tyres233, it claims that these waste management methods present significant health and environmental risks.234 In relation to material recycling alternatives, Brazil argues that even if generally these are considered safer than stockpiling and incineration, such methods can only dispose of a small fraction of the waste tyres currently generated in Brazil.235 Thus, Brazil argues that the European Communities cannot expect Brazil to rely solely on disposal if the risks associated with disposal are the very risks that Brazil seeks to eliminate.

7.181 The Panel will now examine the specific disposal methods suggested by the European Communities as alternative measures.

(…) 

7.195 In sum, the Panel finds that Brazil has demonstrated that the currently available disposal methods capable of handling the existing volumes of waste tyres, namely landfilling, stockpiling and tyre incineration, even if performed under controlled conditions, pose risks to human health and cannot constitute an alternative to the import ban.

229 European Communities' first written submission, para. 110, 112, 113, 137; European Communities' second written, para. 109.
230 The Panel notes that the parties do not define the term "disposal" and disagree on whether a certain method is a "disposal" method for waste tyres, which is beyond the scope of the Panel's review in this case. As such, the Panel's reference to the term "disposal" in this Report is only in general sense and not by any means a judgment on whether a specific method dealing with waste tyres qualifies as a disposal method for waste tyres.
231 European Communities' second written submission, paras. 106, 107, 113 and 133.
232 Brazil's first written submission, paras. 4, 17, 21; Brazil's first oral statement, para. 80; Brazil's second written submission, paras. 41-42.
233 Brazil's first written submission, para. 4; Brazil's first oral statement, para. 2; Brazil's second written submission, paras. 42, 73-77.
234 Brazil's first written submission, paras. 3, 4, 18, 43, 44; Brazil's first oral statement, para. 28; Brazil's answer to panel question No. 35. 
235 Brazil's second written submission, para. 94.
7.196 Lastly, the European Communities claims that material recycling is one of the best waste management practices and therefore, another reasonably available alternative to the import ban. In the European Communities' view, material recycling of rubber includes the use of waste tyres in civil engineering projects, in other construction activities such as rubber asphalting, and in the production of a wide variety of rubber goods. The European Communities submits that material recycling methods do not pose substantial risks to human or animal health or the environment, and that they are able to dispose of substantial amounts of waste tyres.

7.197 Brazil submits that it is "practically impossible to recycle a tyre" due to its physical characteristics that make it a highly stable and rigid product. According to Brazil, the existing methods of material recovery are not able to produce high-quality rubber that may be reused in the production of new tyres. Brazil also argues that material recycling of tyres should not be considered as recycling "in its true sense" since the material is not reused in new tyres.

7.198 Brazil acknowledges nevertheless that waste tyre recycling is desirable and should be encouraged because the activities usually denominated as material recycling are generally safer than other disposal methods such as stockpiling and incineration and extract the greatest environmental benefit from the waste tyres, next to retreading. Brazil also submits that it actively promotes the development of new recycling applications for waste tyres and the improvement of the safety aspects and market acceptance of the existing ones. However, according to Brazil, material recycling of tyres cannot be an alternative to the import ban because, on the one hand, it poses certain risks to human health and the environment, and, on the other hand, this process can absorb only a fraction of the waste tyres annually generated in Brazil due to its frequent economical and technical unfeasibility.

7.199 The Panel will now examine whether various material recycling methods identified by the European Communities can constitute an alternative to the import ban.

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236 European Communities' first written submission, para. 112. The EC did not provide the Panel with an exhaustive list of activities that should be considered as material recycling. However, the EC seems to include within this category the following activities: civil engineering projects such as reusing discarded tyres to create artificial reefs, boat bumpers, slope stabilisers, irrigation channels and erosion layers on dams; the use of shredded and ground tyres as a base material in asphalt paving and road construction; and the use of rubber granulates in the production of new tyres, adhesives, wire and pipe insulation, brake linings, conveyor belts, carpet padding and hose pipes (European Communities' first oral statement, paras. 81-82).

237 European Communities' second written submission, paras. 133 and 139. The EC claims on the basis of the document titled Panorama dos Resíduos Sólidos no Brasil that in 2004 "17.65 per cent of waste tyres in Brazil were rolled into sheeting" and "19.65 per cent were transformed into goods and raw material" (Exhibit EC-114). The European Communities suggests that these figures demonstrate the considerable disposal potential of material recycling already used in Brazil. Additionally, according to the evidence submitted by the EC, the ground rubber applications market in certain countries is able to consume nearly 10 per cent of the scrap tyres generated (European Communities' second written submission, para. 135). The European Communities also submits that in countries such as Australia the market for civil engineering is of the order of 200,000 tyres per year and that ground rubber applications market in the US "consumed over 28 million tires in 2003, or nearly 10 per cent of the scrap tires generated" (Exhibit EC-113).

238 Brazil's first written submission, para. 52. In support of this assertion, Brazil quotes from a report by California Environmental Protection Agency (US):

"Generally, the use of recycled tire material in new tires is challenged by the fact that unlike paper, metals, plastics and glass, it is not currently possible to obtain materials from tires that have properties adequately similar to the original materials used in manufacturing tires. Tire rubber materials are highly engineered, with specific qualities... designed to optimize wet and dry traction, long life, low rolling resistance, comfortable ride responsive handling and performance characteristics, at an affordable cost. Unfortunately, the products currently available from recycled tires do not provide performance" ("Integrated Waste Management Board, Increasing the Recycled Content in New Tyres," (Exhibit BRA-59)).

239 Brazil's second written submissions, para. 94.

240 Brazil's second written submissions, para. 94; Brazil's second oral statement, paras. 47-49.

241 Brazil's second written submissions, para. 95; Brazil's second written submissions, para. 97.

242 Brazil's second oral statement, para. 48; Brazil's second written submissions, para. 94; Brazil First written submission, para. 123. In support of this argument Brazil presents the Panel with several studies that recognizes that the amount of post-consumer recycled material obtainable from a used tyre is "necessarily ... very limited" (Brazil's first written submission, para. 53) and that "material recycling uses remain limited and unable to absorb the existing volumes of wastes tyres" (Exhibit BRA-108).
7.208 For these reasons and based on the evidence before it, the Panel finds that it is not clear that material recycling applications are entirely safe. Furthermore, even if these various material recycling methods were completely harmless, Brazil has demonstrated that they would not be able to dispose of a quantity of waste tyres sufficient to achieve Brazil's desired level of protection due to their prohibitive costs and thus cannot constitute a reasonably available alternative to the import ban.

Conclusion on the necessity of the measure
7.209 As stated above, the Panel's assessment of the necessity of the measure under Article XX(b) will be the result of a "weighing and balancing" process, taking into account the factors considered above and the availability of a less trade-restrictive alternative measure, to determine whether the measure at issue is "necessary" within the meaning of Article XX(b).

7.210 We first recall that we have found the protection of human, animal, and plant life and health against risks arising from the accumulation of waste tyres to be an important objective. Specifically, we have found that the objective of protecting human life and health against life-threatening diseases, such as dengue fever and malaria, is both vital and important in the highest degree. This factor must be taken into account in assessing the challenged measure. At the same time, we agree with the European Communities that the importance of human life and health in and of itself is not sufficient to establish that a measure is necessary for the purposes of Article XX(b). Rather, we are required to assess whether the challenged measures, i.e. the specific measures chosen by Brazil in order to address this important objective, is necessary. In making this assessment, we must consider in particular the trade-restrictiveness of the challenged measure and its contribution to the achievement of the objective, in light of the availability to Brazil of any alternative measures.

7.211 In this instance, we have found that the challenged measure, being an import ban, was by design as trade-restrictive as can be in respect of the products that it covers, i.e. retreaded tyres. We note that the European Communities argued that this, in itself, made it "impossible to consider the challenged measure as "necessary"". We do not exclude, however, that there may be circumstances in which a highly restrictive measure is necessary, if no other less trade-restrictive alternative is reasonably available to the Member concerned to achieve its objective.

7.212 The Panel recalls the Appellate Body's statement that a "necessary" measure is located significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to". As we have determined above, an import ban on retreaded tyres has the potential to reduce the amount of waste tyres generated on Brazil's territory and, hence, can contribute to the realization of the stated objective, i.e. the protection of human, animal and plant life and health from the risks posed by the accumulation of waste tyres. Moreover, our examination of the alternatives identified by the European Communities suggests that no alternative measure is reasonably available that could avoid the generation of the specific risks.

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243 Brazil's first oral statement, para. 54.
245 See paragraphs 0-0 above.
246 European Communities' second written submission para. 13.
247 European Communities' first written submission paras. 114-115.
248 Indeed, the European Communities itself successfully defended an import ban on importation under Article XX, in the EC – Asbestos case.
arising from imported retreaded tyres. Alternatives that would involve management or disposal of the tyres once imported do exist, but raise their own concerns, either because they lead to the type of risks that Brazil seeks to avoid in the first place (unsafe stockpiling and emissions from incineration) or because they would not meet the level of protection sought by Brazil. The safest methods (material recycling) are useful but insufficient on their own to absorb the entire amount of waste from end-of-life tyres.

7.213 In "weighing and balancing" these elements, the Panel is mindful of the specific circumstances of this case. First, based on the elements presented by the parties, it appears to us that non-generation measures, i.e. measures that avoid the generation of waste tyres in the first place, are a pertinent way of addressing the risks arising from the accumulation of waste tyres. Secondly, it is clear from the submissions of both parties that in addressing such risks, including through the management of waste tyres, a combination of measures may be appropriate, so that the question of a specific measure's justification does not necessarily present itself in terms of simple alternatives or the replacement of one specific measure by another, as it is possible that different measures may address different aspects of the same risk and complement each other towards addressing this risk.

7.214 In this instance, the chosen measure only addresses a specific component of the overall risk arising from the accumulation of waste tyres in Brazil, namely the importation of tyres that have already exhausted part of their useful life by the time they enter Brazil, and it is applied by Brazil in combination with other measures addressing other aspects of the overall risk. The European Communities has suggested a number of alternative ways to address the challenges arising from the management and disposal of waste tyres. None of these methods, by hypothesis, involve avoiding the entry of the imported retreaded tyres into Brazil in the first place. Rather, they would aim to address the management and disposal of such tyres, as part of Brazil's overall management and disposal strategy for waste tyres in general. Our examination of these alternatives suggests that none of these, either individually or collectively, would be such that the risks arising from waste tyres in Brazil would be safely eliminated, as is intended under the current import ban. In fact, it appears that Brazil already implements some of the alternative measures identified by the European Communities in order to address the challenges arising from the management of waste tyres. The imposition of an import ban on retreaded tyres thus appears to be consistent with other efforts by Brazil to control the risks arising from the accumulation and disposal of waste tyres.

7.215 In light of these elements and of our analysis of the different factors above, the Panel concludes that Brazil has demonstrated that the alternative measures identified by the European Communities do not constitute reasonably available alternatives to the import ban on retreaded tyres that would achieve Brazil's objective of reducing the accumulation of waste tyres on its territory and find that Brazil's import ban on retreaded tyres can be considered "necessary" within the meaning of Article XX(b) and is thus provisionally justified under Article XX(b).

7.216 We wish to stress that we reach this conclusion on the basis, inter alia, of a consideration of the import ban on retreaded tyres as designed, and in light of the considerations reflected in paragraphs 0-0 in relation to the circumstances in which such an import ban would apply. We make no determination, at this stage of our analysis, as to how this measure actually is applied by Brazil. This question will be considered hereafter in the context of our examination of whether the challenged measure is applied consistently with the requirements of the chapeau of Article XX.

(b) Is the measure applied consistently with the requirements of the chapeau of Article XX?
7.217 The European Communities submits that the import ban does not satisfy the requirements of the chapeau of Article XX.250 Brazil responds that the import ban is applied in a reasonable, consistent and predictable manner and that it constitutes neither a means of "arbitrary or unjustifiable discrimination" between countries where the same conditions prevail nor a disguised restriction on international trade.251

(i) General considerations

7.218 Brazil argues that Members of the WTO have the right under Article XX to adopt and enforce measures which constitute general exceptions to the provisions of the GATT, provided that those measures are applied in good faith.252 Brazil claims that the manner in which Brazil applies the import ban on retreaded tyres constitutes neither a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, nor a disguised restriction on international trade.

7.219 The European Communities submits that in US – Gasoline, the Appellate Body stated that "the purpose and object of the introductory clauses of Article XX is generally the prevention of abuse of the exceptions of [Article XX].",253 and in US – Shrimp the Appellate Body added that the "chapeau" is: (i) a balancing principle to mediate between the right of a Member to invoke an Article XX derogation and its obligation to respect the right of other Members254; (ii) a qualification making the Article XX exemptions limited and conditional255; and (iii) an expression of the principle of good faith in international law.256 The European Communities claims that the import ban on retreaded tyres adopted by Brazil does not fulfil any of these requirements.257

7.220 The Panel first observes that, as the Appellate Body noted in US – Gasoline, "[t]he chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied".258 Therefore, pursuant to the chapeau of Article XX, we will need to address whether, although the measure itself falls within the terms of Article XX(b), the application by Brazil of its import ban on retreaded tyres is such as to constitute "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail" or "a disguised restriction on international trade".

7.221 In proceeding with our analysis, we also have in mind the guidance provided in earlier panel and Appellate Body rulings with respect to the chapeau of Article XX of GATT 1994. In particular, we note the Appellate Body's indication that "the fundamental theme – when interpreting the chapeau – is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX",259 and that the task of interpreting this introductory paragraph is essentially the "delicate one of locating and marking out a line of equilibrium "between the rights of the Member invoking the exception and those of other WTO Members. This line of equilibrium is not fixed and unchanging and moves

250 European Communities' first written submission, para. 142.  
251 Brazil's first written submission, para. 130.  
253 European Communities' first written submission, para. 144.  
254 European Communities' first written submission, para. 144, quoting the Appellate Body Report on US – Shrimp, para. 156.  
256 European Communities' first written submission, para. 144, quoting the Appellate Body Report on US – Shrimp, para. 158.  
257 European Communities' first written submission, para. 145.  
"as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ."260

7.222 We also recall that, as clarified by the Appellate Body, the burden of demonstrating that a measure provisionally justified under one or more of the exceptions set out in the individual paragraphs of Article XX does not, in its application, constitute abuse of such exception under the chapeau, rests on the party invoking the exception. In this case, therefore, Brazil bears the burden of demonstrating that its import ban on retreaded tyres is not applied in a manner that would constitute "arbitrary or unjustifiable" discrimination or a "disguised restriction on international trade".261

7.223 As set out by the Appellate Body, in US – Shrimp and US – Shrimp (Article 21.5), three types of situations regarding the application of measures provisionally justified under a specific paragraph of Article XX might lead to an inconsistency with the chapeau of Article XX:262

(a) arbitrary discrimination between countries where the same conditions prevail;
(b) unjustifiable discrimination between countries where the same conditions prevail; and
(c) a disguised restriction on international trade.

7.224 The existence of one of these situations would lead to the measure not being justified under Article XX.263

7.225 The first two elements ("arbitrary" and "unjustifiable" discrimination), both of which relate to the existence of discrimination, will be considered together in light of the close relationship between them. The existence of a "disguised restriction on international trade" is then considered separately.

(ii) Arbitrary or unjustifiable discrimination

7.226 As clarified by the Appellate Body in previous rulings, a measure should be considered to be applied in a manner which constitutes a means of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail", if three conditions are met:

(a) First, the application of the measure results in discrimination;
(b) Second, the discrimination is arbitrary or unjustifiable in character;
(c) Third, this discrimination occurs between countries where the same conditions prevail.265

7.227 We will therefore first consider whether Brazil's application of its import ban on retreaded tyres results in discrimination. If that is the case, then we will need to consider whether such discrimination is "arbitrary or unjustifiable" and, if so, whether it occurs between countries where the same conditions prevail.

Is the import ban on retreaded tyres applied in a manner that results in discrimination?

7.228 Brazil recalls the Appellate Body's explanation that the standard of discrimination contemplated in the chapeau of Article XX is different from the standard of discrimination in the treatment of products under other substantive obligations of the GATT.266

7.229 The Panel agrees that, as clarified by the Appellate Body, the "nature and quality" of the discrimination referred to in the chapeau of Article XX is different from the discrimination in the treatment of products that might already have been found to be inconsistent with one of the substantive obligations of the GATT 1994. In this instance, the initial violation identified in relation to this measure is a prohibition or restriction on importation within the meaning of Article XI. This type of measure (an import ban in this instance), does not necessarily ipso facto result in discrimination, as an inconsistency with Articles I or III would. Thus, any discrimination alleged to exist in the application of the measure would arise, in this case, in addition to the restriction that is inherently present in the measure by its very nature.

7.230 Brazil claims that the manner in which it applies this measure is reasonable and in strict observance of the express terms of Portaria SECEX 14/2004.267

7.231 The European Communities, however, identifies different sources of discrimination arising from Brazil's application of its import ban on retreaded tyres. First, it argues that discrimination arises from the fact that the ban does not apply to retreaded tyres imported into Brazil from other MERCOSUR countries, even though they produce the same environmental externalities.268 Secondly, the European Communities argues that the fact that the import ban on used tyres has been "suspended" by Brazilian courts has allowed Brazilian manufacturers of retreaded tyres to use imported casings, which in the opinion of the European Communities also constitutes discrimination against retreaded tyres imported from the European Communities.269 Finally, in relation to new tyres, the European Communities claims that there is discrimination because Brazil has not adopted any measure to ensure that new tyres consumed in its territory are retreaded when they become used tyres and because Brazil does not restrict the importation and sale of non-retreadable tyres.270

7.232 It is worth highlighting in this context that the European Communities has also clearly indicated that it is not alleging that the non-application of the ban to retreaded tyres made from domestic used tyres constitutes arbitrary or unjustifiable discrimination.272

7.233 We will consider in turn the different elements of discrimination identified by the European Communities in the application of Brazil's import ban on retreaded tyres.

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266 Brazil's first written submission, para. 133.
267 Brazil's first written submission, para. 134.
268 European Communities' first written submission, para. 147.
269 European Communities' first written submission, para. 147.
270 European Communities' first written submission, para. 149.
271 European Communities' second oral statement, para. 92.
272 European Communities' first oral statement, para. 94.
Does discrimination arise from the exemption of imports of remoulded tyres originating in MERCOSUR countries from the import ban on retreaded tyres (the "MERCOSUR exemption")?

7.234 Turning first to the difference in treatment between MERCOSUR and non-MERCOSUR countries, the Panel notes that discrimination is alleged to exist in favour of countries benefiting from the MERCOSUR exemption. It is useful to recall in this respect that the Appellate Body has clarified that "discrimination" within the meaning of the chapeau could occur between different exporting Members, as well as between exporting Members and the importing Member concerned."273

7.235 In this instance, Brazil does not deny that the exemption of imports of remoulded tyres originating in MERCOSUR countries gives rise to discrimination between those imports and those of the European Communities (and other WTO Members).274 Indeed, the exemption, by its very nature, allows imports originating from other MERCOSUR countries to enter Brazil while the same products are not authorized for importation, if they originate in other WTO Members. The exemption therefore gives rise to discrimination, between MERCOSUR countries and other WTO Members.

7.236 The MERCOSUR exemption is contained in Portaria SECEX 14/2004, which is also the very instrument that provides the legal basis for the import ban. We recall that in our consideration of the provisional justification of the import ban under paragraph (b), we focused our analysis on the import ban itself, i.e. on the measure that had been found to be inconsistent with Article XI.1 of GATT 1994 in the first place. At this stage of our analysis, however, we are required to focus on the manner in which the measure is applied.275

7.237 The fact that the MERCOSUR exemption is foreseen in the very legal instrument containing the import ban itself does not, in our view, prevent us from taking it into consideration in the context of our examination, under the chapeau, of the manner in which the measure is applied. In its ruling in US – Shrimp, the Appellate Body clarified that "the application of a measure may be characterized as amounting to an abuse or misuse of an exception of Article XX not only when the detailed operating provisions of the measure prescribe the arbitrary or unjustifiable activity, but also where a measure, otherwise fair and just on its face, is actually applied in an arbitrary or unjustifiable manner"(emphasis added)276. This clearly supports the view that an unjustifiable discrimination can arise from elements actually prescribed in the measure itself. This was in fact the case in US-Gasoline, where the Appellate Body examined the contents of the statutory baselines for different suppliers in the context of the chapeau, rather than under paragraph (g).277

7.238 The Panel finds therefore that the MERCOSUR exemption can be considered to form part of the manner in which the import ban imposed by Brazil on retreaded tyres – the measure provisionally justified under Article XX(b) – is applied and that it gives rise to discrimination within the meaning of the chapeau of Article XX, between MERCOSUR and non-MERCOSUR countries.

274 Brazil's first written submission, para. 136 and European Communities' first written submission, para. 147.
Does discrimination arise from the importation of used tyres through court injunctions?

7.239 The European Communities also alleges that discrimination arises from the fact that the import ban imposed by Brazil on used tyres (also contained in Portaria SECEX 14/2004) has been, in the words of the European Communities, "suspended" through the grant of court injunctions allowing such imports in spite of the ban.

7.240 Brazil considers that the import ban on used tyres is not "suspended" and is both in force and enforced. Brazil has recognized, however, that "limited quantities" of used tyres are being imported under court injunctions. Brazil has also clarified, in response to questions by the Panel, that these court injunctions have been granted as a result of challenges to the legality and constitutionality of the ban enacted through Portaria SECEX 14/2004 and that the Federal Supreme Court has already rejected three of the four arguments typically raised in these proceedings. Brazil also indicated that it anticipates that the same court will soon reject also the fourth argument, namely that the ban "interferes with the constitutional principle of free enterprise because it restricts access to supplies of raw material necessary for domestic retreaders to carry on their business".

7.241 The Panel first observes that it is undisputed that court injunctions have been granted, which have enabled the importation of used tyres, from the European Communities and elsewhere, and that at least some of these injunctions are presently in place. The European Communities argues that this discriminates in favour of domestic retreaded tyres made from imported used tyres, which generate the same waste as that arising from imported retreads.

7.242 It has not been suggested that there is any significant difference between retreaded tyres made in Brazil from imported casings and imported retreaded tyres. Further, Brazil has not disputed that retreaded tyres made from imported used tyres would produce the same environmental externalities and waste management issues as imported retreads.

7.243 In light of these elements, the Panel finds that to the extent that it enables retreaded tyres to be produced in Brazil from imported casings while retreaded tyres using the same casings cannot be imported, permitting imports of used tyres through court injunctions results in discrimination in favour of tyres retreaded in Brazil using imported casings, to the detriment of imported retreaded tyres.

(…)

Conclusion

7.251 The Panel has determined above that discrimination arises in the application of the measure at issue from two sources: discrimination arising from the exemption from the measure at issue of imports of remoulded tyres originating in MERCOSUR and discrimination arising from the importation of used tyres under court injunctions. In light of the above determinations, we need to consider further whether such discrimination is "arbitrary or unjustifiable" within the meaning of the chapeau of Article XX and arises between countries where the same conditions prevail. As stated by the Panel in EC – Asbestos, "if the application of the measure is found to be discriminatory, it still remains to be seen whether it is arbitrary and/or unjustifiable between countries where the same conditions prevail".

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278 Brazil's second written submission, para. 151.
279 See Brazil's answer to panel question No. 14.
280 European Communities' first oral statement para. 94.
Is the discrimination in the application of the measure "arbitrary" and/or "unjustifiable"?

7.252 We have determined above that two elements result in discrimination in the application of the measure: the MERCOSUR exemption and the allowance, through court injunctions, of imports of used tyres. We will therefore consider in turn whether either source of discrimination is "arbitrary" or "unjustifiable". Before turning to this assessment, we first consider the meaning of these terms.

Approach of the Panel

7.253 In the view of the European Communities, the terms "arbitrary" and "unjustifiable" both qualify decisions or conduct that are not reasonable. The European Communities submits that the term "arbitrary" has its "centre of gravity" in the lack of consistency and predictability in the application of the measure, while the term "unjustifiable" refers more to the lack of motivation and capacity to convince.282 Moreover, the European Communities submits that what is arbitrary and unjustifiable discrimination must be established in relation to the objectives of the measure at issue, in the present case, the protection of human life and health.283

7.254 According to Brazil, the term "arbitrary" is defined as "dependent on will or pleasure", "discretionary", "based on mere opinion or preference", "capricious, unpredictable, inconsistent", "unrestrained in the exercise of will or authority", "despotic, tyrannical."284 Brazil also submits that the word "unjustifiable" denotes that which cannot be "legally or morally justified", or shown to be "just, reasonable, or correct", or "defensible."285 Based on these definitions, Brazil submits that the only question that the Panel must examine is whether Brazil's measures are applied reasonably and in good faith.286

7.255 As required by Article 3.2 of the DSU, the Panel must interpret these terms in accordance with the customary rules of interpretation of public international law. As noted earlier, these customary rules are reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT).

7.256 In accordance with Article 31.1 of that convention, we must consider "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". We therefore consider the ordinary meaning of the terms "arbitrary" and "unjustifiable", read in their context and in light of the object and purpose of the treaty.

7.257 We first observe that definitions of "arbitrary", as set out in The Shorter Oxford English Dictionary, provide some guidance as to the ordinary meaning of the term:

"arbitrary" 1 Dependent on will or pleasure; 2 Based on mere opinion or preference as opp. to the real nature of things; capricious, unpredictable, inconsistent; 3 Unrestrained in the exercise of will or authority; despotic, tyrannical."287

7.258 In US – Shrimp (Article 21.5 – Malaysia), the Panel similarly considered "the ordinary meaning of the word 'arbitrary', i.e. 'capricious, unpredictable, inconsistent'".288 In the same case, the Appellate Body highlighted two factors that it found, in that case, to be relevant to an assessment of whether the measure was arbitrary within the meaning of the chapeau of

282 European Communities' first written submission, para. 152.
283 European Communities' first oral statement, para. 92; European Communities' second written submission, para. 152.
284 Brazil's first written submission, para. 135.
285 Brazil's first written submission, para. 135.
286 Brazil's first oral statement, para. 62.
Article XX, namely "rigidity and inflexibility" of the application of the measure; and the fact that the measure is imposed without inquiring into its appropriateness for the conditions prevailing in the exporting countries.289

7.259 As to the term "unjustifiable", definitions set out in *The Shorter Oxford English Dictionary*, provide some guidance on its ordinary meaning:

"unjustifiable" Not justifiable, indefensible."290

"justifiable" 2 Able to be legally or morally justified; able to be shown to be just, reasonable, or correct; defensible."291

7.260 Read in the context of the chapeau of Article XX, these definitions suggest, overall, the need to be able to "defend" or convincingly explain the rationale for any discrimination in the application of the measure.

7.261 In its ruling on *US – Gasoline*, the Appellate Body found that discrimination that could have been "foreseen" and that was not "merely inadvertent or unavoidable" would be unjustifiable.292 Two specific elements for the justification of discrimination can also be identified in the Panel and Appellate Body reports in *US – Shrimp* and *US – Shrimp (Article 21.5 - Malaysia)*: first, a serious effort to negotiate with the objective of concluding bilateral and multilateral agreements for the achievement of a certain policy goal, and secondly, the flexibility of the measure. These examples provide useful illustrations on what might render discrimination "unjustifiable" within the meaning of the chapeau of Article XX.

7.262 We do not assume, however, that exactly the same elements will necessarily be determinative in every situation, in assessing whether discrimination in a given case is "arbitrary" or "unjustifiable". We recall in this regard the Appellate Body's observation, in its ruling in *US – Shrimp*, that the "location of the line of equilibrium [between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions], as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ".293

7.263 Against this background, the Panel will assess whether the discrimination resulting from the manner Brazil has applied its import ban on retreaded tyres may be described as "arbitrary" and "unjustifiable" within the meaning of the chapeau of Article XX.

Is the discrimination arising from the MERCOSUR exemption "arbitrary" or "unjustifiable"?

7.264 The *European Communities* submits that the discrimination between retreaded tyres imported from MERCOSUR member States and those imported from non-MERCOSUR countries is unreasonable, and therefore arbitrary, because all retreaded tyres, irrespective of their country of origin, produce the same environmental externalities.294 The European Communities also considers that the same reasons make the discrimination "unjustifiable". The European Communities further argues that retreaded tyres coming from its territory and those coming from

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293 Appellate Body Report on *US – Shrimp*, para. 159.
294 European Communities' first written submission, para. 154.
other MERCOSUR countries differ in no way and that in fact, the latter are largely produced with casings imported from the European Communities and other non-MERCOSUR countries.295

7.265 Brazil recalls that the exception of remoulded tyres coming from other MERCOSUR countries was introduced through Portaria SECEX 2/2002, after Uruguay prevailed in the proceedings against Brazil under the MERCOSUR dispute settlement system.296 Therefore, Brazil claims that its decision to exempt the MERCOSUR countries from the ban was thus made in compliance with its international law obligations297 and that far from being either arbitrary or unjustifiable, it is an expression of Brazil's adherence to the rule of law.298

7.266 Brazil further argues that the very language of the regulation that the European Communities challenges explicitly provides for the MERCOSUR exception. According to Brazil, assuming that the exemption is permitted under Articles XXIV and XX(d), "there is nothing arbitrary about applying the WTO-consistent law as it is written."299

7.267 The European Communities further submits that the existence of an international agreement to which Brazil is a party or the fact that the application of the import ban is mandated by law cannot justify the introduction of unjustifiable and arbitrary discrimination; otherwise, the European Communities submits, it would be very easy for any WTO Member to circumvent the requirements of the chapeau of Article XX by simply concluding agreements with other WTO Members or by providing for a discriminatory application in the law itself."300

7.268 Finally, the European Communities claims that the discrimination in the present case is all the more unreasonable because Brazil is at least partially responsible for the obligation it now invokes.301 According to the European Communities, Brazil consciously chose not to defend itself against Uruguay on grounds related to human health and safety, whereas it is now invoking this defence against the European Communities. In the view of the European Communities, this behaviour by itself constitutes arbitrary and unjustifiable discrimination between countries where the same conditions prevail.302

7.269 In response, Brazil explained that the dispositive question in the case against Uruguay was whether or not Portaria 8/00 was a new import restriction, in violation of the Decision CMC 22/2000. Brazil claims that its attorneys believed that they needed only to show that the import ban had been in effect since 1991, and that the 2000 regulation merely clarified the scope of that prohibition.303

7.270 The Panel first notes that there has been no suggestion that remoulded tyres imported from MERCOSUR countries would differ in any significant way from their European counterparts.304 The health impact of both types of tyres can thus be expected to be comparable. Indeed, Brazil does not seek to justify the discrimination on the basis of any difference in the

295 European Communities' second written submission, para. 151.
296 Brazil's first written submission, para. 138. Brazil identifies the following provisions as those requiring compliance with the MERCOSUR arbitral tribunal's decision: Brazil was thus required, under the Treaty of Asuncion and its Protocols of Brasilia and Ouro Preto, the Brazilian implementing legislation, the Decision CMC No. 22/00 and the arbitral award of the MERCOSUR tribunal, to exempt the MERCOSUR countries from the import ban (see Brazil's first written submission, para. 137).
297 Brazil's first written submission, para. 137.
298 Brazil's first written submission, para. 137. Brazil clarifies that it implemented the MERCOSUR ruling in the most narrow way possible. It exempted from the import ban only remolded tyres (a subcategory of retreaded tyres) from MERCOSUR countries, because the MERCOSUR case referred only to that category of retreaded tyres.
299 Brazil's first oral statement, para. 64.
300 European Communities' second written submission, paras. 154, 157-58. The European Communities also claims that Brazil's argument would also run against the spirit of Article 34 of the Vienna Convention on the Law of Treaties, which precludes a treaty, in this case the Treaty of Asuncion, from affecting the rights and obligations of a third State without its consent, European Communities' first oral statement, para. 93.
301 European Communities' second oral statement, para. 96.
302 European Communities' second written submission, para. 165.
303 Brazil's answer to the European Communities' question No. 18.
304 As noted in footnote 36 above, remoulded tyres are one of three types of retreaded tyres.
impact of the products in relation to the achievement of its policy objective of reducing the accumulation of waste tyres. Rather, Brazil argues that the MERCOSUR exemption is neither arbitrary nor unjustifiable because it finds its origin in Brazil's obligation to implement a ruling of a MERCOSUR tribunal, which required it to allow MERCOSUR imports of remolded tyres. Brazil also argues that "Brazil's different treatment of its MERCOSUR partners is explicitly authorized under Article XXIV of GATT 1994 and, therefore, cannot be arbitrary and unjustifiable".305

7.271 The key factual circumstances that ultimately led to the exemption of remoulded tyres originating in other MERCOSUR countries are undisputed. Both parties agree that the import ban, as it was originally designed in Portaria 8/2000, applied to all retreaded tyres regardless of their country of origin, and that it was only after a dispute settlement tribunal established under MERCOSUR found Brazil's restrictions on the importation of a certain type of retreaded tyres (remoulded tyres) to be in violation of its obligations under MERCOSUR that Brazil exempted that particular kind of retreaded tyres from the application of the import ban. This ruling arose in the context of a challenge initiated by Uruguay against Brazil's import ban on remoulded tyres, on the grounds that it constituted a new restriction on trade prohibited under the MERCOSUR agreements. We also note that MERCOSUR rulings are *res judicata* for the parties involved and that the European Communities does not dispute that Brazil had an obligation, under MERCOSUR, to implement the ruling.

7.272 The exception of remoulded tyres originating in MERCOSUR therefore does not seem to be motivated by capricious or unpredictable reasons. It was adopted further to a ruling within the framework of MERCOSUR, which has binding legal effects for Brazil, as a party to MERCOSUR.

7.273 We also note that this ruling was adopted specifically in the context of an agreement intended to liberalize trade among its members. This type of agreement inherently provides for preferential treatment in favour of its members, thus leading to discrimination between those members and other countries. To the extent that the existence of some discrimination in favour of other members of a customs union is an inherent part of its operation, the possibility that such discrimination might arise between members of MERCOSUR and other WTO Members as a result of the implementation of the MERCOSUR Agreement is not, in our view, *a priori* unreasonable.

7.274 We note that this type of agreement is expressly recognized in Article XXIV, which provides a framework for WTO Members to discriminate in favour of their partners in customs unions or free trade areas, subject to certain conditions. In making this observation, we make no determination as to whether MERCOSUR meets the requirements of Article XXIV in respect of customs unions.306

7.275 The European Communities submits, however, that Brazil is at least partially responsible for the obligation it now invokes.307 According to the European Communities, Brazil consciously chose not to defend itself against Uruguay on grounds related to human health and

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305 Brazil's second oral statement, para. 107.
306 In this part of our analysis, we do not consider whether the exemption is in conformity with Article XXIV, as a measure taken within a customs union complying with the requirements of Article XXIV. At this stage, we merely observe that the fact that the MERCOSUR exemption was enacted in the context of an agreement that establishes further liberalization among its partners provides support for the proposition that there is a rational basis for it. We recall that Brazil has also specifically argued that its "different treatment of MERCOSUR partners cannot be considered arbitrary or unjustifiable under Article XX, if it is explicitly authorized under Article XXIV". However, we do not consider that the fact that the measure may be *authorized* under Article XXIV dispenses Brazil from complying with the requirements of Article XX, including the requirements of the chapeau. In particular, we note that Article XXIV.8(a)(i) provides members of a customs union sufficient flexibility to eliminate or not eliminate restrictive regulations of commerce as necessary in relation to measures taken under, *inter alia*, Article XX.
307 European Communities' second oral statement, para. 96.
safety under Article 50(d) of the Montevideo Treaty, whereas it is now invoking this defence against the European Communities. Brazil has acknowledged that it did not invoke the relevant exceptions in the Montevideo treaty before the MERCOSUR tribunal, but has explained that, in light of the legal issues raised by the case, it had seemed, at the time, that defences based on other grounds were more appropriate.  

7.276 We do not consider that we are in a position to assess in detail the choice of arguments by Brazil in the MERCOSUR proceedings or to second-guess the outcome of the case in light of Brazil's litigation strategy in those proceedings. Nor would it be appropriate for us to engage in such an exercise. We need only consider the details of those proceedings to the extent necessary to determine the consistency of the MERCOSUR exemption with the requirements of the chapeau of Article XX, and specifically, at this stage of our analysis, whether as a result the import ban on retreaded tyres is being applied as a means of "arbitrary" or "unjustifiable" discrimination. In this respect, we note that, although the litigation strategy chosen by Brazil during the MERCOSUR proceedings failed to persuade the MERCOSUR tribunal, it does not, in itself, seem unreasonable or absurd. Brazil has explained that it chose to defend its measures in consideration of the specific legal claims raised against it in the proceedings. Furthermore, while the particular litigation strategy followed in that instance by Brazil turned out to be unsuccessful, it is not clear that a different strategy would necessarily have led to a different outcome.  

7.277 The European Communities also argues that the MERCOSUR Arbitral Tribunal simply decided that Portaria 8/00 was incompatible with Brazil's obligations under MERCOSUR and did not require it to discriminate between MERCOSUR and other WTO Members. Brazil, for its part, argued that it was required under the Treaty of Asunción and its Protocols of Brasilia and Ouro Preto, the Brazilian implementing legislation, the Decision CMC 22/00 and the arbitral award of the MERCOSUR Tribunal, to exempt MERCOSUR countries from the import ban.  

7.278 Here again, we consider Brazil's obligations under the ruling by the MERCOSUR tribunal only to the extent necessary to determine whether the application by Brazil of the MERCOSUR exemption is "arbitrary" or "unjustifiable" within the meaning of the chapeau of Article XX. We note that the text of the decision itself only indicates that Brazil is required to adapt its internal legislation in light of the inconsistency found by the arbitral body. The decision did not expressly provide for a particular course of action to implement the ruling.  

7.279 Brazil has argued that the exemption of MERCOSUR imports was effectively the only course of action available to it for the implementation of the ruling. We also note Brazil's indication that eliminating the import ban altogether was not a reasonable option for the implementation of the ruling, "because it would have forced Brazil to abandon its policy objective and its level of protection, which is to reduce unnecessary generation of tyre waste to the maximum extent possible". We note further Brazil's indication that it implemented the exemption in the most narrow way possible, taking into account all of its international law obligations under Article XX of the Agreement.  

308 Brazil has explained that it argued before the tribunal that it was entitled to maintain the ban against all imports of retreaded tyres, regardless of the country of origin, including on imports from MERCOSUR countries, because the ban was merely a continuation of an existing measure. Brazil also explains that the tribunal did not agree with Brazil's arguments and decided instead that the application of the import ban to MERCOSUR countries pursuant to Portaria No. 8/00 was contrary to Decision CMC No. 22 of 29 June 2000, which prohibits the adoption of new trade restrictive measures by MERCOSUR countries inter se (Brazil's first written submission, para. 137).  

309 In a similar case between Argentina and Uruguay, the tribunal also reached the conclusion that the restriction was unjustified, despite the invocation of the relevant exception by Argentina in those proceedings.  

310 European Communities' first written submission, para. 72.  

311 Brazil's first written submission, para. 137.  

312 See Brazil's answer to panel question No. 73 ("Apart from non-compliance, the only alternative available to Brazil was to exempt MERCOSUR member states from the import ban").  

313 Brazil's response to Panel question No. 73.
obligations, and limited the exemption to the exact product that had been the object of the MERCOSUR ruling, namely remoulded tyres.

7.280 Whether or not this was the only course of action for Brazil to follow, it does not appear to us to be a capricious or unpredictable action, in light of Brazil's obligation to comply with the MERCOSUR ruling.

7.281 In light of the above, the discrimination resulting from the MERCOSUR exemption cannot, in our view, be said to be "capricious" or "random". To that extent, the measure at issue is not being applied in a manner that would constitute arbitrary discrimination.

7.282 The European Communities argues that what constitutes an arbitrary or unjustifiable discrimination must be established in relation to the objectives of the measure at issue, in the present case, the protection of human life and health, and that to rule otherwise would mean that WTO Members could discriminate in the application of measures simply by concluding international agreements providing for discriminatory application of such measures. The European Communities also argues that this is also contrary to Article XXIV:8(a), which specifically excludes measures taken under Article XX from the need to liberalize "substantially all trade" within a customs union or free trade area.

7.283 However, in observing that the MERCOSUR ruling provided a reasonable basis for Brazil to enact an exemption from the import ban in favour of remoulded tyres originating in MERCOSUR, we are not suggesting that the invocation of any international agreement would be sufficient under any circumstances, in order to justify the existence of discrimination in the application of a measure under the chapeau of Article XX. Rather, we have considered the specific circumstances of the case, including the nature of the international agreement and of the ruling on the basis of which Brazil has acted, and concluded that in the circumstances, this provided a reasonable basis for Brazil to enact an exemption from the import ban in favour of its MERCOSUR partners.

7.284 We also do not consider that it is contrary to the terms of Article XXIV:8(a) for us to take into account, in our assessment of the measure under Article XX, the fact that the MERCOSUR exemption was adopted as a result of Brazil's obligations under MERCOSUR. As noted by the Appellate Body, Article XXIV:8(a) provides "some flexibility" to the members of the members of a customs union to maintain certain restrictive regulations of commerce. In this instance, Brazil has not maintained the import ban vis-à-vis its MERCOSUR partners, and this has resulted in discrimination towards other WTO Members. Our task under the terms of the chapeau of Article XX is to consider whether this discrimination is arbitrary or unjustifiable. This is a distinct assessment from that which might arise under Article XXIV:8(a) as to whether restrictive regulations of commerce have been eliminated on "substantially all the trade" in a manner consistent with the terms of that provision.

7.285 However, the fact that we give due consideration to the existence of Brazil's commitments under MERCOSUR in our assessment does not imply that the exemption must

314 Brazil's second written submission para. 149.
315 See European Communities' first oral statement, para. 91.
316 See European Communities' first oral statement, paras. 92 and 93. The European Communities also argues in the same paragraph that this would "run against the spirit of" Article 34 of the Vienna Convention on the Law of Treaties, which precludes a treaty from affecting the rights and obligations of a third state without its consent. We note that the European Communities does not suggest that it would actually be contrary to the terms of that provision, which provides that "[a] treaty does not create obligations or rights for a third State without its consent". Indeed, in taking account, in the context of our assessment of the consistency of Brazil's measure under Article XX, the fact that Brazil is a member of MERCOSUR and has incurred obligations under that agreement, we do not believe that we are affecting the rights or obligations of the European Communities under the WTO Agreement, and more specifically under Article XX. Nor does this amount, in our view, to a situation in which the MERCOSUR agreement would have created rights or obligations for the European Communities without its consent.
necessarily be justified. Rather, we must now examine the manner in which the import ban is applied, taking into account the existence of an exemption for MERCOSUR members, in order to determine whether the discrimination arising from the MERCOSUR exemption is arbitrary or unjustifiable.

7.286 The MERCOSUR exemption entails that certain imports of retreaded tyres may take place. We also note that Brazil has confirmed that under the MERCOSUR exemption, it is quite possible for retreaders from MERCOSUR countries benefiting from the exemption to source casings from abroad (for example from the European Communities), retread them locally, and then export the retreaded tyre to Brazil under the MERCOSUR exemption. This means that casings from non-MERCOSUR countries, as well as casings originally used in MERCOSUR, may be retreaded in a MERCOSUR country and exported to Brazil as originating in MERCOSUR. This further increases the potential for imports of retreaded tyres to enter into Brazil through the MERCOSUR exemption.

7.287 If such imports were to take place in such amounts that the achievement of the objective of the measure at issue would be significantly undermined, the application of the import ban in conjunction with the MERCOSUR exemption would constitute a means of unjustifiable discrimination. The more imports enter Brazilian territory through the exemption, the more Brazil's declared policy objective of reducing the unnecessary accumulation of waste tyres to the greatest extent possible will be undermined, thereby affecting the justification for the maintenance of the import ban vis-à-vis non-MERCOSUR WTO Members. This is a matter of preserving the "line of equilibrium" between Brazil's right to invoke Article XX and the rights of other WTO Members under the Agreement.

7.288 As of the time of the Panel's examination, however, volumes of imports of retreaded tyres under the exemption appear not to have been significant. The European Communities has indicated that such imports had increased tenfold since 2002, from 200 to 2,000 tons per year by 2004. That figure remains much lower than the 14,000 tons per year imported from the European Communities alone prior to the imposition of the import ban. Even if all the retreaded tyres imported from MERCOSUR countries were made from used tyres of EC origin, the import ban would still have resulted in eighty six percent of the previous imports from the European Communities not taking place, for the year 2004. Thus, the measure's ability to fulfil its objective does not appear to have been significantly undermined by the occurrence of imports from other sources, even in the presence of an exemption for MERCOSUR imports.

7.289 The Panel finds, therefore, that, as of the time of the Panel's ruling, the operation of the MERCOSUR exemption has not resulted in the measure being applied in a manner that would constitute arbitrary or unjustifiable discrimination.

Is the discrimination arising from the importation of used tyres through court injunctions "arbitrary" or "unjustifiable"?

7.290 The European Communities submits that the import ban is also applied in an arbitrary and unjustifiable manner because, due to the injunctions granted to importers of used tyres, retreaded tyres continue to be produced in Brazil using imported carcasses. According to the European Communities the discrimination is not reasonable, and therefore it is arbitrary, because all retreaded tyres, made from used tyres not originating in Brazil produce the same

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318 See Brazil's answer to panel question No. 72 ("it is possible for tyres used in the EC to be remolded in a Mercosur country and then exported to Brazil because Brazil has no control over remolded tyre production in other Mercosur members").
319 European Communities' first written submission, para. 83.
320 European Communities' first written submission, para. 80.
321 European Communities' second written submission, para. 169.
environmental externalities in Brazil irrespective of the country where they are produced. It also argues that the same reasons could be referred to in order to find the discrimination "unjustifiable".

7.291 **Brazil** clarifies that the import ban on used tyres has not been suspended in any way and that the government of Brazil has consistently opposed in court the injunctions granted to used tyre importers. Brazil agrees that the used tyres imported into Brazil on the basis of the preliminary injunctions have the same environmental externalities in its territory irrespective of the country where they are produced. However, Brazil adds that this is precisely the reason why it has consistently opposed them.

7.292 The **Panel** first notes that the importation of used tyres into Brazil is prohibited, under the terms of Article 40 of Portaria SECEX 14/2004. There is no disagreement between the parties that used tyres have been imported into Brazil in recent years only as a result of injunctions granted by Brazilian courts in specific cases. Furthermore, Brazil has provided evidence that it has judicially challenged such injunctions, with a certain degree of success. Therefore, the fact that Brazilian retreaders are still able to use imported casings to manufacture their products does not seem to be the result of a capricious or unpredictable action of Brazil. Rather, it was the result of successful court challenges to the import ban and finds its basis in the customs authorities' need to give effect to judicial orders authorizing the introduction into Brazil of products, the importation of which would otherwise be legally impossible.

7.293 Brazil has provided the Panel with information concerning the arguments submitted by the used tyres importers when requesting the preliminary injunctions and the Brazilian authorities' challenges to such injunctions. As in the context of our earlier examination of the MERCOSUR ruling that led to the MERCOSUR exemption, our consideration of these elements is limited to what is necessary in order for us to determine whether the measure is being applied in a such manner as to result in arbitrary or unjustifiable discrimination within the terms of the chapeau of Article XX. Here again, we consider that nothing in the evidence before us suggests that the decisions of the Brazilian courts granting these injunctions were capricious or unpredictable. Moreover, the decision of the Brazilian administrative authorities to comply with the preliminary injunctions does not seem irrational or unpredictable either.

7.294 In light of the above, the discrimination resulting from the importation of used tyres into Brazil resulting from the injunctions granted to domestic tyre retreaders cannot, in our view, be said to be the result of "capricious" or "random" action. To this extent, the measure at issue is not being applied in a manner that would constitute *arbitrary* discrimination.

7.295 Nonetheless, the existence of such discrimination leads to a situation in which the very casings that Brazil seeks to prevent from entering Brazilian territory, i.e. used tyres that have been first used in other (non-MERCOSUR) countries, are in fact entering Brazil through the court injunctions. As noted earlier, the measure's capacity to contribute to the objective of reducing the number of waste tyres accumulating in Brazil is premised on imports of used tyres being prohibited, so that "second-life" tyres do not enter Brazilian territory, be it as used tyres or as retreaded tyres. The granting of injunctions allowing used tyres to be imported, however, runs directly counter to this premise, as it effectively allows the very used tyres that are prevented from entering into Brazil after retreading to be imported before retreading.

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322 European Communities' first written submission, para. 155. The European Communities claims that in fact, retreading in Brazil should be more problematic, since Brazil also has to deal with some degree of industrial losses which inevitably occur, European Communities' second written submission, para. 169.
323 Brazil's first written submission, para. 76; Brazil's second written submission, paras. 152 and 153.
324 Brazil's second written submission, para. 153.
325 See the European Communities' answer to panel question No. 22 and Brazil's answers to panel question Nos. 13 and 98.
326 Brazil's answer to panel question No. 14.
7.296 This has the direct potential to undermine the objective of the prohibition on importation of retreaded tyres. Indeed, to the extent that some of these used tyres are not retreaded and end up as waste in Brazil without being used further at all, the adverse impact of these imports is greater than the importation of the same casings after retreading would be.\(^{327}\) If these imports were to take place in volumes so as to significantly undermine the achievement of Brazil's declared objective of avoiding the unnecessary generation of waste tyres to the greatest extent possible, this would lead to the measure being applied in a manner that would constitute a means of unjustifiable discrimination.

7.297 Indeed, the volumes of imports of used tyres that have actually taken place under the court injunctions confirm that the objective of the import ban on retreaded tyres, i.e. prevent the entry of short-life tyres into Brazil, has been significantly undermined.

7.298 Brazil describes the amount of imports of used tyres into Brazil as "limited quantities"\(^{328}\) and claims that with the exception of 2004 and 2005, imports of used tyres through preliminary injunctions have not been "particularly high".\(^{329}\) It has not been able, however, in the course of the proceedings, to clarify exactly how many injunctions remain in place and what volumes of imports they represent.\(^{330}\) One of the exhibits submitted by Brazil identifies 24 companies benefiting from one or more injunctions authorizing them to import used tyres, as of 15 September 2006.\(^{331}\)

7.299 The European Communities presents the following figures for imports of used tyres into Brazil, citing as source the Brazilian development Ministry's database: \(^{332}\)

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<td>1,407,618</td>
<td>2,396,898</td>
<td>2,659,704</td>
<td>4,240,474</td>
<td>7,564,360</td>
<td>10,478,466</td>
</tr>
</tbody>
</table>

7.300 Brazil has not disputed these figures. The European Communities also provides figures showing volumes of imports of used and retreaded tyres from the European Communities, as follows:

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\(^{327}\) See Brazil's answer to panel question No. 16: "in 2005, Brazilian retreaders imported almost 11 million casings, of which only 6 million were retreaded or stocked for later use by the importers" and that "the remaining casings were either illegally sold or disposed of." (Exhibit BRA-94, however suggests a figure of 1 million imported used tyres a year are rejected as industrial losses). See also Brazil's answer to question 93 by the Panel ("at least nine percent [1 million] of the used tyres imported as raw material for retreading are sold to the general public as part-worn (used) tyres" although such sales are illegal in Brazil). Brazil also adds, based on Exhibit BRA-69, that domestic retreaders have been fined for reselling imported used tyres as part-worns. The EC suggests that the figures are much smaller (EC comment to Question 93).

\(^{328}\) Brazil's second written submission, paras. 151-152.

\(^{329}\) Brazil's answer to panel question No. 18, para. 65.

\(^{330}\) In response to a question from the Panel as to how many injunctions are currently in force and what volumes of imports this represents, Brazil replied that to obtain the information required by the Panel, the Brazilian Government would need to consult Brazil's five Appeals Courts (Brazil's answer to question 18 by the Panel). Brazil stated later in the proceedings that in 2006, until July, out of sixteen preliminary injunctions filed requesting authorizations to import used tyres, thirteen had been denied \(\textit{ad portas}\), while the remaining three have been appealed and will be adjudicated by the High Courts (Regional Federal Tribunals) (Brazil's second written submission, para.137).

\(^{331}\) Exhibit BRA-168.

\(^{332}\) European Communities' answer to panel question No. 118. Brazil has also indicated that according to the industry data, 27 million used tyres were imported between 2001 and 2005 (Brazil's answers to panel questions Nos. 20 and 41, Brazil's second written submission, para. 135). Brazil states that a total of 272,017 units of retreaded tyres were imported in 2002-2003 (Brazil's answer to panel question No. 117).
The European Communities further states that in 2005, Brazil imported, largely for the purposes of domestic retreading, 10.5 million used tyres (out of which 8.4 million came from the European Communities), while the total number of retreaded tyres imported annually to Brazil, from all sources, was 2-3 million prior to the import ban.

These figures suggest that imports of used tyres have taken place in significant amounts. More specifically, the figures before us, as cited above, show that in 2005 (the last year for which we have complete figures, and also the last full year prior to establishment of this Panel), Brazil imported approximately 10.5 million used tyres, compared to 1.4 million in 2000, the year in which the ban on imports of used and retreaded tyres was first enacted in, at the time, Portaria 8/00. This means that imports of used tyres to Brazil have not only continued, but increased, by 2005, to reach levels (i.e. 10.5 million) representing approximately three times the amount of retreaded plus used tyres (2 million plus 1.4 million) that were annually imported in the year 2000.

The result of the court injunctions is therefore that used tyres of foreign origin from which retreaded tyres are made are in fact allowed to enter Brazil, with at best the same adverse impact or, at worse, a more negative impact on the objective Brazil asserts than the importation of retreaded tyres themselves would have, directly defeating the objective of the import ban itself. Such imports have taken place in significant amounts.

We take note of the Brazilian government's efforts, within the Brazilian domestic legal system, to prevent the grant, or seek reversal, of court injunctions for the importation of used tyres. We also take note of the initiative taken in the course of these proceedings to resolve the matter in a definitive manner through the initiation of proceedings at the federal level.

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333 European Communities' first written submission, para. 84.
334 European Communities' first oral statement, para. 39. Brazil does not contest the validity of this figure, i.e. 10.5 million used tyres imported in 2005 (Brazil's answer to panel questions No. 26). In response to panel question No. 16, Brazil states that in 2005, Brazilian retreaders imported "almost 11 million casings".
335 European Communities' answer to panel question No. 118.
336 The European Communities has provided that the amount of Brazil's retreaded tyre imports in 2000 is between 2 and 3.3 million (European Communities' answer to panel question No. 118). For the purpose of our analysis, we have referred to the more conservative figure, 2 million.
337 See Brazil's comments on question 118 of the Panel.
However, we also note that, while it hopes to succeed in halting the flow of imports of used tyres arising from such injunctions, the Government has not been able, so far, to ensure that no such imports occur. It is also not in a position to guarantee that such imports will cease in the near future.

7.305 While the Panel appreciates the practical difficulties that may be associated with the prevention of such imports within Brazil's domestic legal system, it is of the view that it remains incumbent upon Brazil to ensure that it applies its measure in a manner that is consistent with the requirements of Article XX. The fact that the imports arise from court rulings does not exonerate Brazil from its obligation to comply with the requirements of Article XX. Rather, as noted by the Appellate Body in *US – Shrimp*, a Member of the WTO "bears responsibility for acts of all its department of government, including its judiciary".338

7.306 The Panel finds, therefore, that, since used tyre imports have been taking place under the court injunctions in such amounts that the achievement of Brazil's declared objective is being significantly undermined, the measure at issue is being applied in a manner that constitutes a means of unjustifiable discrimination.

Does the discrimination occur between countries where the same conditions prevail?

7.307 Having determined that the measure is being applied in a manner that constitutes a means of unjustifiable discrimination, the Panel must now consider whether such discrimination occurs between countries where the same conditions prevail.

7.308 We first recall that the discrimination at issue, which arises from the importation through court injunctions of used tyres, favours tyres retreaded in Brazil using imported casings, to the detriment of imported retreaded tyres made from the same casings. The discrimination thus arises between Brazil and other WTO Members, including the European Communities.

7.309 The European Communities has argued that "it is manifest that a casing originating in the European Communities is not more problematic from a waste management point of view just because it is retreaded in the European Communities rather than in Brazil".339 In this respect, we recall our earlier observation that it has not been suggested by either party that there was any significant difference between retreaded tyres made in Brazil from imported casings and imported retreaded tyres.340 We also note that Brazil has not identified any difference between the conditions prevailing in Brazil and in other WTO Members, that would be pertinent in the context of considering whether the discrimination between retreaded tyres made in Brazil from imported casings and imported retreaded tyres occurs between countries where the same conditions prevail. In light of these elements, we conclude that this discrimination occurs between countries where the same conditions prevail.

7.310 Consequently, the Panel also concludes that since used tyre imports have been taking place under the court injunctions in such amounts that the achievement of Brazil's declared objective is being significantly undermined, the measure at issue is being applied in a manner that constitutes a means of unjustifiable discrimination where the same conditions prevail.

338 See the Appellate Body Report on *US – Shrimp*, para. 173 and the references cited in the footnote 177 to that paragraph. See also Article 4 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (2001), which provides that "The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State". The Panel also notes in this context the provisions of Article XVI:4 of the WTO Agreement, requiring that "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed agreements", and the terms of Article XXV:12 of GATT 1994, which foresees that "Each Member shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories".

339 European Communities' second written submission, para. 169.

340 See paragraph 0 above.
(iii) Is the measure applied in a manner that constitutes a disguised restriction on international trade?

7.311 The application of a measure "in a manner that would constitute … a disguised restriction on international trade" is the third situation envisaged by the chapeau of Article XX, which would lead a measure otherwise provisionally justified under one of the paragraphs of Article XX to be in violation of that provision.

7.312 In this instance, Brazil considers that though the import ban imposes restrictions on international trade, these restrictions are not "disguised" because there is nothing disguised, deceptive or concealed about the ban's application.341

7.313 The European Communities, however, argues that the import ban on retreaded tyres constitutes a disguised restriction on international trade, to the benefit of new tyre manufacturers located in Brazil, and to the benefit of Brazilian and other MERCOSUR retreaders.

7.314 The Panel first turns to the notion of "disguised restriction on international trade" within the meaning of the chapeau of Article XX, before considering whether, in this instance, the import ban imposed by Brazil on retreaded tyres is applied in a manner that constitutes such disguised restriction.

Approach by the Panel

7.315 Under the very terms of the provision, three elements would need to exist for a violation to arise under this part of the chapeau:

(a) first, this assessment, like those considered above in relation to other aspects of the chapeau, relates to the manner in which the measure is applied;

(b) secondly, the measure is applied in a manner that would constitute a restriction on international trade; and

(c) thirdly, a violation arises if this restriction on international trade is disguised.

7.316 As far as the first element is concerned, we note that the observations made above in the context of the chapeau in general remain pertinent in this context. As expressed by the Appellate Body, the chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied.342

7.317 With respect to the second element, namely the existence of a "restriction on international trade", we agree with Brazil that, just as the standard of "arbitrary or unjustifiable discrimination" under the chapeau of Article XX differs from that applied to the determination of the type of discrimination that leads to a violation of Articles I or III, the standard of "disguised restriction" under the chapeau also differs from the standard of "prohibition or restriction" referred to in Article XI.1.343 In this instance, the existence of a restriction on international trade is inherent in the very notion of import ban, and this restriction is the basis on which the measure has initially been found to be inconsistent with Article XI.1. What we are required to examine in this part of our analysis is whether the import ban, which by its very nature involves a restriction on international trade, is applied in a manner that constitutes a disguised restriction on international trade.

341 Brazil's first written submission, para. 146.
343 See Brazil's first written submission, para. 144.
trade. This assessment goes beyond a consideration of the existence of the type of restriction inherent in an import ban as such.

7.318 As to what constitutes such a "disguised restriction" within the meaning of the chapeau, the Appellate Body has clarified that:

"'Arbitrary discrimination', 'unjustifiable discrimination' and 'disguised restriction' on international trade may ... be read side-by-side; they impart meaning to one another. It is clear to us that 'disguised restriction' includes disguised discrimination in international trade. It is equally clear that concealed or unannounced restriction or discrimination in international trade does not exhaust the meaning of 'disguised restriction'." 344

7.319 From the above, we understand that a restriction need not be formally "hidden" or "dissimulated" in order to constitute a disguised restriction on international trade within the meaning of the chapeau. We also note that the existence of a restriction on international trade could be derived from "the kinds of considerations" that are otherwise also relevant under other parts of the chapeau. We therefore do not exclude that the elements we have considered earlier in determining whether the application of the import ban amounts to "arbitrary or unjustifiable discrimination", may also be pertinent in determining the existence of a "disguised restriction" on international trade in the application of the import ban.

7.320 More generally, we observe that these terms, as interpreted by the Appellate Body, do not suggest that a single test might uniformly apply in all cases to determine the existence of a "disguised restriction on international trade". Rather, the Appellate Body's understanding of the terms suggests that the existence of a "disguised restriction on international trade" might be derived from a variety of situations where a restriction on international trade, arising in the application of a measure provisionally justified under a specific paragraph of Article XX, would lead to that exception being abused or illegitimately used.

7.321 As to the elements that might indicate the existence of such disguised restriction on international trade in a given case, both parties highlighted, in response to a question by the Panel, the Appellate Body's observation that the chapeau is "but one expression of the principle of good faith". 345 The European Communities suggests that "all aspects of the relevant measure have to be considered in order to prevent the abuse of the exceptions under Article XX". 346 Brazil agrees with the European Communities that both the intent and the effect of a measure can play a valuable role in the analysis of a measure under the chapeau, and notes that their relative value will depend on the nature of the specific measure at issue and that the specific facts of the case should determine factors that are most relevant to the "disguised restriction" analysis under the chapeau. 347 Brazil considers that there is no "ready formula to help determine whether a measure is applied in a manner which would constitute a disguised restriction on international trade". 348

7.322 Bearing in mind our earlier observations and the Appellate Body's ruling as cited above, we agree that no single element will necessarily be determinative in each and every case, and that a range of factors may be relevant to our determination.

7.323 With these considerations in mind, we turn to an examination of the application of the measure at issue in this case.

345 See responses to Panel Question No. 127.
346 European Communities’ answer to panel question No. 127.
347 Brazil’s answer to panel question No. 127.
348 Brazil's answer to panel question No. 127.
Assessment by the Panel

7.324 The European Communities argues that "the import ban of retreaded tyres was not adopted in 2000 with the intention of protecting the public health or the environment. On the contrary, its disguised purpose as well as its effect was to protect the Brazilian industry through a restriction of international trade in violation of the objectives of the WTO Agreements" (emphases added).349

7.325 Brazil considers, however, that there is nothing deceptive or concealed about the application of the ban350, and that Brazil protects neither its domestic new tyres manufacturers nor domestic and MERCOSUR retreaders. Brazil further submits that it has imposed collection and disposal obligations on new tyre importers and manufacturers that demonstrate that there is no protectionist intent behind the import ban.351

7.326 The Panel first recalls its earlier observation that a restriction need not be formally concealed in order to constitute a disguised restriction on international trade within the meaning of the chapeau of Article XX. In this instance, Portaria SECEX 14/2004, which constitutes the current legal basis for the ban (as well as SECEX 8/2000, the initial instrument in which an express prohibition on the importation of retreaded tyres was imposed) has been published. It is therefore not "concealed" in any formal sense. However, this is not in itself determinative of whether it might nonetheless be applied in a manner that would constitute a disguised restriction on international trade.

7.327 As described earlier in the justification of the measure under Article XX(b), Brazil has explained that the object of the measure was to reduce as much as possible the further accumulation of waste tyres in Brazil, and we have found such a policy to fall within the terms of Article XX(b).

7.328 The European Communities argues, however, that the import ban on retreaded tyres "has, as main objective, to protect the Brazilian tyre industry from the competition of the foreign industry, by restricting international trade".352 The European Communities argues that the protective application of the ban is apparent from the fact that it emanates from the Ministry responsible for Development, Industry and Foreign Trade by means of the measures challenged in this case, which, none of them, make any link to the legislation adopted by the Ministry in charge of the environment.353 It also refers to various statements made in the course of a domestic proceeding "against the lifting of the retread import ban for MERCOSUR", and to a draft decree introduced by three Brazilian senators to abrogate Portaria SECEX No.8/2000. The European Communities concludes that "the structure of the Brazilian legislation and the statements described above prove that the import ban of retreaded tyres was not adopted in 2000 with the intention of protecting the public health or the environment".354

7.329 Brazil responds that regardless of any statement that may have been made by a trade official before the Brazilian National Congress, and wrongly used by the European Communities in these proceedings, what is relevant in this case is that Brazil clearly demonstrated that there is a legitimate environmental and health rationale behind the import ban. It argues that today, there can be no question that the purpose behind the import ban is to protect public health and the environment from harms caused by waste tyre accumulation and disposal.355

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349 European Communities' first written submission para. 167.
350 Brazil's first written submission, para. 146.
351 Brazil's second written submission, para. 155.
352 European Communities' first written submission, para. 160.
353 European Communities' first written submission, para. 162.
354 European Communities' first written submission, paras. 164-167.
355 Brazil's answer to panel question No. 129. Brazil refers to a statement by the International Court of Justice (Namibia (Legal
The Panel agrees that an examination of intent may be helpful in determining whether a measure is applied in a manner that constitutes a disguised restriction, in that it may reveal whether "a restriction which formally meets the requirements of Article XX(b)" "is in fact only a disguise to conceal the pursuit of trade-restrictive objectives". We are mindful, however, that, as the Appellate Body noted in Japan – Alcoholic Beverages II, "the aim of a measure may not be easily ascertained".

We first note that Portaria SECEX 14/2004 was adopted by the Ministry of Development, Industry and Foreign Trade, Secretariat for Foreign Trade, inter alia "with a view to consolidating the rules governing import operations...". It contains, in Article 40, a general prohibition on the granting of import licences for both used and retreaded tyres. The design of the measure is therefore consistent with Brazil's declared objective of reducing the further accumulation of waste tyres in its territory by avoiding the importation of short-lifespan tyres. The fact that it has been adopted by the Ministry of Development, Industry and Foreign Trade in an instrument regulating import licensing does not, in our view, imply that the specific prohibition it contains in relation to retreaded tyres could not have reflected health and environmental objectives.

The Panel first notes that the fact that the European Communities no longer exports retreaded tyres to Brazil is, in itself, inherent in the existence of an import ban. This fact alone, which is an inevitable consequence of the very existence of the measure provisionally justified under Article XX(b), could not be, in this instance, the sole basis for a finding of "disguised restriction on international trade" within the meaning of the chapeau. More specifically however, the European Communities argues that this trade has been replaced by trade in used tyres to Brazil and other MERCOSUR countries, due to the MERCOSUR exemption and the imports of used tyres to be retreaded. The European Communities further argues that the ban protects new tyre manufacturers in Brazil, who benefit from not facing competition from imported retreads, and that the import ban is applied in a manner that amounts to a disguised restriction on international trade, to the benefit of Brazilian and other MERCOSUR retreaders. As we understand the European Communities' argument, the existence of a disguised restriction on international trade in Brazil's application of the import ban on retreaded tyres arises as a result of the same circumstances that we have considered in section (c) above, namely, the importation of used tyres through court injunctions, and the application of the MERCOSUR exemption. We thus consider both aspects in turn.

Imports of used tyres through court injunctions

The Panel first recalls its earlier conclusion that the import ban on retreaded tyres can contribute to the reduction of accumulation of waste tyres when applied in conjunction with an import ban on used tyres. As noted above, Portaria SECEX 14/2004 does indeed ban both imports of used tyres and imports of retreaded tyres. In practice, however, as also noted above, a number of injunctions have been requested and granted, in order to import used tyres
despite the ban imposed on their importation. It is undisputed that, as a result, imports of used tyres have taken place under these injunctions, and both parties agree that all imports of used tyres that have occurred since the imposition of the ban have taken place under these injunctions.361

7.348 We have already found above that the importation of used tyres through these court injunctions results in the measure at issue being applied in a manner that constitutes unjustifiable discrimination. The granting of court injunctions for the importation of used tyres has also in effect meant that, contrary to the intended design of the measure, domestic retreaders have been able to continue to benefit from the importation of used tyres as material for their own activity in significant amounts,362 while their competitors from non-MERCOSUR countries have been kept out of the Brazilian market. The restriction on international trade inherent in the banning of imports of retreaded tyres has thus operated to the benefit of domestic retreaders, while the fulfilment of the purpose for which it has been justified is being significantly undermined.

7.349 In light of the above, we find that, since imports of used tyres take place in significant amounts under court injunctions to the benefit of the domestic retreading industry, the import ban on retreaded tyres is being applied in a manner that constitutes a disguised restriction on international trade.

The MERCOSUR exemption

7.350 The European Communities argues that the MERCOSUR exemption results in the application of the measure in a manner that constitutes a disguised restriction on international trade, as it alters trade flows in a manner that benefits, in addition to Brazilian retreaders, retreaders from other MERCOSUR countries.

7.351 The Panel understands the European Communities' argument in respect of the MERCOSUR exemption to entail that MERCOSUR retreaders do not have to face competition from the European Communities or other non-MERCOSUR retreaded tyres on the Brazilian market (since, under Portaria SECEX 14/2004, such imports are prohibited), while they at the same time have access to this market and can source used casings from the European Communities and elsewhere for importation into Brazil.

7.352 We agree that, to the extent that they are able to import remoulded tyres into Brazil through the MERCOSUR exemption without facing competition from any non-MERCOSUR country, retreaders from other MERCOSUR countries benefit from the application of the import ban on retreaded tyres originating in other countries. We also recall that under the MERCOSUR exemption, it is quite possible for retreaders from MERCOSUR countries benefiting from the exemption to source casings from abroad (for example from the European Communities), retread them locally, and then export the retreaded tyre to Brazil under the MERCOSUR exemption.363 As noted earlier, this further increases the potential for imports of retreaded tyres to enter into Brazil through the MERCOSUR exemption.

7.353 If such imports were to occur in significant amounts, they would have the potential to undermine the achievement of the stated objective of the prohibition on the importation of retreaded tyres, while protecting the retreading industry in the beneficiary countries. If this were the case, the measure would be being applied in a manner that constitutes a disguised restriction on international trade.

361 European Communities Answer to Panel Question No 22 and Brazil's Answer to Panel Question Nos 13 and 98
362 See above paragraphs 0-0 on the volumes of imports of used tyres that have occurred through the injunctions.
363 See Brazil's answer to panel question No. 72 (“it is possible for tyres used in the European Communities to be remolded in a Mercosur country and then exported to Brazil because Brazil has no control over remolded tyre production in other Mercosur members”).
7.354 To date, it appears, however, that the volume of imports of remoulded tyres that has actually taken place under the MERCOSUR exemption has not been significant. In these circumstances, we find that the MERCOSUR exemption, to the extent that it results only in volumes of imports that do not significantly undermine the ability of the general import ban on retreaded tyres to fulfil its intended objective, does not result in the measure being applied in a manner that constitutes a disguised restriction on international trade.

7.355 In conclusion, the Panel finds that, since imports of used tyres are taking place to the benefit of the Brazilian retreading industry in such quantities as to seriously undermine the achievement of the stated objective of avoiding the further accumulation of waste tyres in Brazil, the measure at issue is being applied in a manner that constitutes a disguised restriction on international trade. We also find that the MERCOSUR exemption, although it also has the potential to similarly undermine the achievement of the stated objective of the measure, has not been shown to date to result in the measure at issue being applied in a manner that would constitute such a disguised restriction on international trade.

(c) Overall conclusion

7.356 In conclusion, the Panel finds that the importation of used tyres through court injunctions results in the import ban being applied in a manner that constitutes a means of unjustifiable discrimination and a disguised restriction to trade within the meaning of the chapeau of Article XX.

7.357 In light of this conclusion, we find that the measure at issue is not justified under Article XX of GATT 1994.

(…)

VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 In light of the above, the Panel concludes that:

(a) with respect to Brazil's import prohibition on retreaded tyres:

(i) Portaria SECEX 14/2004 is inconsistent with Article XI:1 of GATT 1994 in that it prohibits the issuance of import licences for retreaded tyres, and is not justified under Article XX(b) of GATT 1994.

(ii) 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 GATT 1994.

(…)

8.3 Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment. The Panel concludes that, to the extent that the measures listed above are inconsistent with GATT 1994, they have nullified or impaired benefits accruing to the European Communities under that agreement.

8.4 Accordingly, the Panel recommends that the Dispute Settlement Body request Brazil to bring these inconsistent measures as listed above into conformity with its obligations under the GATT 1994.

364 See paragraph 0 above.
Update: The Mercosur Exemption Reversed – Conflict between WTO and Mercosur Rulings and Its Implications for Environmental Values

Since the Panel issued its decision in June 2007, there have been two major developments in this case. First, on appeal of the Panel’s decision by the European Communities, the Appellate Body issued its decision in December 2007.[1] The Appellate Body upheld the Panel’s finding that Brazil’s import ban on retreaded tyres was “necessary” to protect public health and the environment within the meaning of Article XX(b), but reversed the Panel’s findings concerning the Mercosur exemption under the chapeau of Article XX. Subsequently, a WTO arbitral award was issued in August 2008, giving Brazil until December 17, 2008 to implement the WTO rulings.[2] On January 5, 2009, the EC agreed to give Brazil more time for compliance.

The Appellate Body decision, together with the subsequent arbitral award, has given rise to a conflict between the rulings of the WTO and Mercosur. This conflict can have further implications for the environmental values at issue.

The Appellate Body’s Decision

Article XX(b) of the GATT permits the implementation by a WTO Member of measures “necessary to protect human, animal or plant life or health”, but the chapeau of Article XX requires that such measures not be “applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade”. The key differences between the Appellate Body’s decision and the Panel’s lie in their interpretation of the chapeau language.

The Panel had focused on the trade effect in its interpretation of the term “unjustifiable” discrimination. The Panel found that the Mercosur exemption discriminated between Mercosur countries and other WTO Members, but such discrimination was not “unjustifiable” within the meaning of the chapeau because, at the time, the volume of retreaded tyres imported from Mercosur countries was not significant enough to undermine the objective of the import ban. Applying the same “effect” test, the Panel found that imports of used tyres through Brazilian court injunctions resulted in “unjustifiable” discrimination because the volume of such imports was so large that the objective of the import ban was being significantly undermined.

The Appellate Body rejected this quantitative approach, which would characterize discrimination as “unjustifiable” only if the volume of imports is large enough to significantly undermine achievement of a measure’s objective. In its view, the assessment of whether discrimination is unjustifiable “will usually involve an analysis that relates primarily to the cause or the rationale of the discrimination.”[3] While acknowledging that the effects of the discrimination “may be a relevant factor” for determining whether the discrimination is justifiable, the Appellate Body nonetheless found that the Panel erred in focusing “exclusively” on the relationship between the effects of the discrimination and its justifiable character.[4]

The Appellate Body also disagreed with the Panel’s interpretation of the term “arbitrary” discrimination. The Panel had found that the discrimination resulting from the Mercosur exemption was not arbitrary because Brazil enacted the exemption to comply with the ruling of a Mercosur tribunal, rather than out of its capricious or random decision. Similarly, the Panel had found the imports of used tyres did not result in arbitrary discrimination because they were made
through court injunctions. While agreeing that acts implementing a decision of a judicial or quasi-judicial body can hardly be characterized as a decision that is “capricious” or “random,” the Appellate Body held that discrimination resulting from a rational decision or behavior can still be arbitrary or unjustifiable if “it is explained by a rationale that bears no relationship to the objective of a measure provisionally justified under one of the paragraphs of Article XX, or goes against that objective.” [5]

For these reasons, the Appellate Body concluded that the Mercosur exemption, as well as the used tyre imports through court injunctions, resulted in Brazil’s import ban being applied in a manner that constitutes “arbitrary or unjustifiable discrimination” within the meaning of the chapeau. Accordingly, Brazil is required to bring its measure into conformity with its WTO obligations.

The Arbitral Award

Brazil may have “a reasonable period of time” to implement the WTO rulings. [6] A WTO arbitrator was appointed to determine what constitutes the reasonable period in this case, after the EC and Brazil failed to reach agreement.

In the arbitral proceeding, Brazil requested that it have until September 2009 to achieve full compliance. According to Brazil, because the Mercosur exemption was mandated by a Mercosur ruling, it would have to negotiate an arrangement with its Mercosur partners and the earliest time for such arrangement to take effect would be September 2009. The EC opposed, arguing that a Mercosur-wide arrangement would not lead to removal of the Mercosur exemption and that Brazil should not be given time for pursuing measures that obviously would not bring about compliance.

While recognizing that Brazil may choose to negotiate with other countries as a way to implement a WTO ruling, the arbitrator found that such negotiation is an “external” process outside the law-making and regulatory system of Brazil, and is therefore not indispensable for Brazil’s implementation of the WTO decision. [7] Accordingly, the arbitrator decided not to factor into his determination any time needed for such negotiation. Based on the time necessary for Brazil to change its domestic law concerning the imports of used tyres through court injunctions, the arbitrator set December 17, 2008 as the deadline for Brazil’s compliance.

Implications

Both the Panel and the Appellate Body decisions resoundingly affirm that import bans unilaterally imposed to protect health and the environment can be compatible with the WTO Agreement. In a sense, the Appellate Body’s decision can be viewed as even more pro-environment than the Panel’s since it requires Brazil’s import ban to be complete and fully consistent with its environmental purposes.

Under current circumstances, however, Brazil cannot remove the Mercosur exemption without disobeying the ruling of the Mercosur tribunal. Thus, unless it can make an arrangement within Mercosur to overcome the effect of that ruling, the only way Brazil can comply with both its WTO and Mercosur obligations is to withdraw the import ban, which of course would defeat its environmental purposes.

This potential conflict between the rulings of the WTO and the Mercosur tribunal is only accentuated by the arbitral award. By disallowing time for Brazil to secure a negotiated solution
within Mercosur, the arbitrator has forced Brazil into a legal bind between the WTO and Mercosur systems. If Brazil fails to remove the Mercosur exemption or otherwise maintains an incomplete import ban after December 17, 2008, it may face further WTO proceedings on sanctions against its noncompliance.\[8\]

It should be pointed that this conflict between the WTO and Mercosur decisions is not inherent or inevitable. As the Appellate Body noted, Article 50(d) of the Treaty of Montevideo contains a provision similar to Article XX(b) of the GATT, exempting measures taken by a Mercosur member for the protection of human, animal or plant life and health.\[9\] Brazil could have defended its import ban on these grounds in front of the Mercosur tribunal, but chose not to.\[10\] This fact apparently complicated Brazil’s position in the WTO litigation.\[11\]

It should also be pointed out, however, that there was no assurance that the Mercosur tribunal would have found the import ban justifiable under Article 50(d) had Brazil invoked that provision for defense.\[12\] The Mercosur tribunal is a separate international forum, whose interpretation of the same treaty language in a given case may or may not be consistent with that of the WTO. Hence, the issue raised here is one of the fragmentation of international law.\[13\]

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Footnotes
[7] See Award, supra note 2, paras. 78-80.
[8] The EC is entitled to request authorization from the WTO to retaliate against Brazil after 20 days of the expiry of the deadline for compliance. See DSU, Article 22.2. While the EC has agreed to refrain from making the request for now, it has reserved the right to do so in the future.\[9\] Report of the Appellate Body, supra note 1, para. 234.
[11] Supra note 8. See also Award, supra note 2, paras. 81-82.
[12] In a similar dispute involving Argentina’s import ban on retreaded tryes, the Mercosur tribunal rejected the defense invoked by Argentina under Article 50(d). See Award, supra note 2, fn. 141.
I. Introduction

1. The European Communities appeals certain issues of law and legal interpretations developed in the Panel Report, Brazil – Measures Affecting Imports of Retreaded Tyres (the "Panel Report"). The Panel was established to consider a complaint by the European Communities concerning the consistency of certain measures imposed by Brazil on the importation and marketing of retreaded tyres with the General Agreement on Tariffs and Trade 1994 (the "GATT 1994").

2. Before the Panel, the European Communities claimed that Brazil imposed a prohibition on the importation of retreaded tyres, notably by virtue of 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")\(^{367}\), and that this prohibition was inconsistent with Article XI:1 of the

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366Retreaded tyres are used tyres that are reconditioned for further use by stripping the worn tread from the skeleton (casing) and replacing it with new material in the form of a new tread, and sometimes with new material also covering parts or all of the sidewalls. (See Panel Report, para. 2.1) Retreaded tyres can be produced through different methods, all indistinctively referred to as "retreading". These methods are: (i) top-capping, which consists of replacing only the tread; (ii) re-capping, which entails replacing the tread and part of the sidewall; and (iii) remoulding, which consists of replacing the tread and the sidewall including all or part of the lower area of the tyre. (See ibid., para. 2.2) The retreaded tyres covered in this dispute are classified under subheadings 4012.11 (motor cars), 4012.12 (buses and lorries), 4012.13 (aircraft), and 4012.19 (other types) of the International Convention on the Harmonized Commodity Description and Coding System, done at Brussels, 14 June 1983. In contrast, used tyres are classified under heading 4012.20. New tyres are classified under heading 4011. (See ibid., para. 2.4)
367Exhibits BRA-84 and EC-29 submitted by Brazil and the European Communities, respectively, to the Panel. Article 40 of Portaria SECEX 14/2004 reads as follows:
The European Communities also contended that certain Brazilian measures providing for the imposition of fines on the importation of retreaded tyres, and on the marketing, transportation, storage, keeping, or warehousing of imported retreaded tyres, were similarly inconsistent with Article XI:1 or, alternatively, Article III:4 of the GATT 1994. In addition, the European Communities made claims under Article III:4 of the GATT 1994 in respect of certain state measures prohibiting the marketing of, and/or imposing disposal obligations on the importers of, imported retreaded tyres. Finally, the European Communities challenged the exemption from the import prohibition on retreaded tyres and associated fines provided by Brazil to retreaded tyres originating in countries of the Mercado Común del Sur ("MERCOSUR") (Southern Common Market). The European Communities contended that these exemptions were inconsistent with Articles I:1 and XIII:1 of the GATT 1994.

3. Brazil did not contest that the prohibition on the importation of retreaded tyres and associated fines were prima facie inconsistent with Article XI:1, or that state measures prohibiting the marketing of, and/or imposing disposal obligations on the importers of, imported retreaded tyres were prima facie inconsistent with Article III:4; or that the exemptions from both the import prohibition and associated fines afforded to retreaded tyres imported from MERCOSUR countries were prima facie inconsistent with Articles I:1 and XIII:1 of the GATT 1994. Instead, Brazil submitted that the prohibition on the importation of retreaded tyres and associated fines, and state measures restricting the marketing of imported retreaded tyres, were all

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Article 40 – An import license will not be granted for retreaded and used tires, whether as a consumer product or feedstock, classified under NCM code 4012, except for remoulded tires, classified under NCM codes 4012.11.00, 4012.12.00, 4012.13.00 and 4012.19.00, originating and proceeding from the MERCOSUR Member States under the Economic Complementation Agreement No. 18.

(See Panel Report, para. 2.7)
justified under Article XX(b) of the GATT 1994.\textsuperscript{377} Brazil contended that the fines associated with the import prohibition on retreaded tyres were justified also under Article XX(d) of the GATT 1994.\textsuperscript{378} Brazil further maintained that the exemption from the import prohibition and associated fines afforded to imports of \textit{remoulded} tyres from MERCOSUR countries was justified under Articles XX(d) and XXIV of the GATT 1994.\textsuperscript{379}

4. The Panel Report was circulated to Members of the World Trade Organization (the "WTO") on 12 June 2007. The Panel found that the import prohibition on retreaded tyres was inconsistent with Article XI:1 and not justified under Article XX of the GATT 1994.\textsuperscript{380} In its analysis, the Panel found that the import prohibition on retreaded tyres was provisionally justified as "necessary to protect human, animal or plant life or health" under Article XX(b).\textsuperscript{381} However, the Panel also found that the importation of used tyres under court injunctions resulted in the import prohibition on retreaded tyres being applied by Brazil in a manner that constituted both "a means of unjustifiable discrimination [between countries] where the same conditions prevail"\textsuperscript{382} and "a disguised restriction on international trade"\textsuperscript{383}, within the meaning of the chapeau of Article XX of the GATT 1994.

5. The Panel found further that the fines associated with the import prohibition on retreaded tyres were inconsistent with Article XI:1 and not justified under either paragraph (b) or (d) of Article XX of the GATT 1994.\textsuperscript{384} The Panel also determined that state law restrictions on the marketing of imported retreaded tyres and associated disposal obligations were inconsistent with Article III:4 and not justified under Article XX(b) of the GATT 1994.\textsuperscript{385} The Panel exercised judicial economy with respect to the European Communities' claims that the exemption from the import prohibition and associated fines afforded to retreaded tyres imported from MERCOSUR countries was inconsistent with Articles I:1 and XIII:1 of the GATT 1994, and with respect to Brazil's related defence under Articles XX(d) and XXIV of the GATT 1994.\textsuperscript{386} The Panel accordingly recommended that the Dispute Settlement Body (the "DSB") request Brazil to bring those measures found to be inconsistent into conformity with its obligations under the GATT 1994.\textsuperscript{387}

[...]  

\textbf{III. Issues Raised in This Appeal}

117. The following issues are raised in this appeal:

with respect to the Panel's analysis of "necessity" within the meaning of Article XX(b) of the GATT 1994:

\textsuperscript{377}ibid., paras. 7.2, 7.217, 7.359, and 7.392.  
\textsuperscript{378}ibid., para. 7.359.  
\textsuperscript{379}ibid., para. 7.449.  
\textsuperscript{380}Panel Report, paras. 7.357 and 8.1(a)(i) and (ii).  
\textsuperscript{381}ibid., para. 7.215.  
\textsuperscript{382}ibid., para. 7.310; see also para. 7.306.  
\textsuperscript{383}ibid., para. 7.349.  
\textsuperscript{384}ibid., para. 8.1(b). The Panel did not rule on the European Communities' alternative claim that the fines associated with the prohibition on the importation of retreaded tyres were inconsistent with Article III:4 of the GATT 1994. (See ibid., para. 7.364)  
\textsuperscript{385}ibid., para. 8.1(c).  
\textsuperscript{386}ibid., paras. 7.456 and 8.2.  
\textsuperscript{387}ibid., para. 8.4.
whether the Panel erred in finding that the Import Ban is "necessary" to protect human or animal life or health\textsuperscript{388}, and

whether the Panel breached its duty under Article 11 of the DSU to make an objective assessment of the facts;

with respect to the Panel's interpretation and application of the chapeau of Article XX of the GATT 1994:

whether the Panel erred in finding that the MERCOSUR exemption has not resulted in the Import Ban being applied in a manner that is inconsistent with the chapeau\textsuperscript{389}; and

whether the Panel erred in its analysis of whether imports of used tyres under court injunctions have resulted in the Import Ban being applied in a manner that is inconsistent with the chapeau; and

if the Appellate Body does \textit{not} find that the MERCOSUR exemption results in the Import Ban being applied in a manner that is inconsistent with the chapeau of Article XX of the GATT 1994, then:

whether the Panel erred in exercising judicial economy in relation to the European Communities' separate claim that the MERCOSUR exemption is inconsistent with Articles I:1 and XIII:1 of the GATT 1994; and, if so

whether the MERCOSUR exemption is inconsistent with Articles I:1 and XIII:1 and is not justified under Article XXIV or Article XX(d) of the GATT 1994.

IV. Background and the Measure at Issue

A. Factual Background

118. Tyres are an integral component in passenger cars, lorries, and airplanes and, as such, their use is widespread in modern society. New passenger cars are typically sold with new tyres. When tyres need to be replaced, consumers in some countries\textsuperscript{390} may have a choice between new tyres or "retreaded" tyres. This dispute concerns the latter category of tyres.\textsuperscript{391} Retreaded tyres are used tyres that have been reconditioned for further use by stripping the worn tread from the skeleton (casing) and replacing it with new material in the form of a new tread, and sometimes

\textsuperscript{388}Panel Report, para. 7.215.
\textsuperscript{389}\textit{Ibid.}, paras. 7.289 and 7.354.
\textsuperscript{390}We note that Brazil is not the only WTO Member that has adopted a ban on imports of retreaded tyres. According to Brazil, countries that have restricted imports of used and retreaded tyres include Argentina, Bangladesh, Bahrain, Nigeria, Pakistan, Thailand, and Venezuela. (Brazil's first submission to the Panel, para. 67) At the oral hearing, Brazil identified the following as countries that ban imports of retreaded tyres: Argentina, Morocco, Nigeria, Pakistan, Thailand, Tunisia, and Venezuela.
\textsuperscript{391}Retreaded tyres are classified in the \textit{International Convention on the Harmonized Commodity Description and Coding System}, done at Brussels, 14 June 1983, under subheadings 4012.11 (motor cars), 4012.12 (buses and lorries), 4012.13 (aircraft), and 4012.19 (other types). (Panel Report, para. 2.4)
with new material also covering parts or all of the sidewalls. Retreaded tyres can be produced through different methods, one of which is called "remoulding". Retreaded tyres can be produced through different methods, one of which is called "remoulding". 393

119. At the end of their useful life, tyres become waste, the accumulation of which is associated with risks to human, animal, and plant life and health. Specific risks to human life and health include:

   (i) the transmission of dengue, yellow fever and malaria through mosquitoes which use tyres as breeding grounds; and (ii) the exposure of human beings to toxic emissions caused by tyre fires which may cause loss of short-term memory, learning disabilities, immune system suppression, cardiovascular problems, but also cancer, premature mortality, reduced lung function, suppression of the immune system, respiratory effects, heart and chest problems. 396

Risks to animal and plant life and health include: "(i) the exposure of animals and plants to toxic emissions caused by tyre fires; and (ii) the transmission of a mosquito-borne disease (dengue) to animals." 397

120. Governments take actions to minimize the adverse effects of waste tyres. Policies to address "waste" include preventive measures aiming at reducing the generation of additional waste tyres, as well as remedial measures aimed at managing and disposing of tyres that can no longer be used or retreaded, such as landfilling, stockpiling, the incineration of waste tyres, and material recycling.

121. The Panel observed that the parties to this dispute have not suggested that retreaded tyres used on vehicles pose any particular risks compared to new tyres, provided that they comply with appropriate safety standards. Various international standards exist in relation to retreaded tyres, including, for example, the norm stipulating that passenger car tyres may be retreaded only once. One important difference between new and retreaded tyres is that the latter have a shorter lifespan and therefore reach the stage of being waste earlier.

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392Panel Report, para. 2.1.
393"Remoulding" consists of replacing the tread and the sidewall including all or part of the lower area of the tyre. The other two methods of retreading are "top-capping", which consists of replacing only the tread, and "re-capping", which entails replacing the tread and part of the sidewall. (Ibid., para. 2.2)
394The Panel assumed that, on average, a tyre—whether new or retreaded—can be used on a passenger car for five years before it becomes a used tyre. (Ibid., para. 7.128)
395Ibid., para. 7.109.
396Panel Report, para. 7.109. See also Ibid., paras. 7.53-7.83.
397Ibid., para. 7.112.
398See the Panel's finding, in paragraph 7.100 of its Report, that "policies to address 'waste' by non-generation of additional waste are a generally recognized means of addressing waste management issues", as well as footnote 1170 thereto, detailing the evidence on which the Panel relied in reaching this conclusion.
399Ibid., para. 2.3.
400Ibid., paras. 7.129 and 7.130.
B. The Measure at Issue

122. 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") reads as follows:

Article 40 – An import license will not be granted for retreaded tyres and used tyres, whether as a consumer product or feedstock, classified under NCM code 4012, except for remoulded tyres, classified under NCM codes 4012.11.00, 4012.12.00, 4012.13.00 and 4012.19.00, originating and proceeding from the Mercosur Member States under the Economic Complementation Agreement No. 18.  

Article 40 of Portaria SECEX 14/2004 contains three main elements: (i) an import ban on retreaded tyres (the "Import Ban"); (ii) an import ban on used tyres; and (iii) an exemption from the Import Ban of imports of certain retreaded tyres from other countries of the Mercado Común del Sur ("MERCOSUR") (Southern Common Market), which has been referred to in this dispute as the "MERCOSUR exemption". The MERCOSUR exemption did not form part of previous regulations prohibiting the importation of retreaded tyres, notably Portaria SECEX No. 8 of 25 September 2000 ("Portaria SECEX 8/2000"), but was introduced as a result of a ruling issued by a MERCOSUR arbitral tribunal.

123. This dispute concerns the Import Ban and the MERCOSUR exemption in Article 40 of Portaria SECEX 14/2004, but not the import ban on used tyres. In its request for the establishment of a panel, the European Communities identified the Import Ban and the MERCOSUR exemption as distinct measures, and made separate claims against each of these measures. The European Communities claimed that the Import Ban was inconsistent with Article XI:1 of the GATT 1994, and could not be justified under Article XX of the GATT.
The European Communities also made distinct claims that the MERCOSUR exemption was inconsistent with Article I:1 and Article XIII:1 of the GATT 1994, and could not be justified under either Article XXIV:5 of the GATT 1994 or the Enabling Clause. In comments made during the interim review, Brazil stated that it had treated the Import Ban and the MERCOSUR exemption as two separate measures contained in the same legal instrument.

Following the approach of the parties, the Panel analyzed the claim made against the Import Ban separately from the claims made against the MERCOSUR exemption. The Panel found the Import Ban to be inconsistent with Article XI:1 of the GATT 1994. It then turned to Brazil's related defence under Article XX(b) of the GATT 1994, stating that its analysis of Brazil's justification of the violation should focus also on the Import Ban, because this was the "specific measure" that had been found to be inconsistent with Article XI:1. Thus, according to the Panel, its analysis of the necessity of that specific measure should not have taken account of "elements extraneous to the measure itself" or of situations in which the Import Ban "does not apply (i.e. the exemption of MERCOSUR imports)". The Panel recognized, nonetheless, that "the MERCOSUR exemption is foreseen in the very legal instrument containing the import ban". It then included the MERCOSUR exemption in its analysis of the chapeau of Article XX, because the chapeau involves consideration of the manner in which the specific measure to be justified (in this case, the Import Ban) is applied.

On appeal, the European Communities indicated, in response to questioning at the oral hearing, that the Import Ban and the MERCOSUR exemption are two aspects of a single measure—that is, Article 40 of Portaria SECEX 14/2004—and that this provision is the measure at issue. Notwithstanding this position, the European Communities does not appeal the Panel's analytical approach. More specifically, the European Communities does not contend that the Panel erred in identifying and separately treating as two distinct matters before it: a claim relating to the Import Ban; and a claim concerning the discrimination introduced by the MERCOSUR exemption.

We observe, nonetheless, that the Panel might have opted for a more holistic approach to the measure at issue by examining the two elements of Article 40 of Portaria SECEX 14/2004 that relate to retreaded tyres together. The Panel could, under such an approach, have analyzed whether the Import Ban in combination with the MERCOSUR exemption violated Article XI:1, and whether that combined measure, or the resulting partial import ban, could be considered "necessary" within the meaning of Article XX(b).

Yet, the Panel's approach reflects the manner in which the European Communities formulated its claims to the Panel, and the fact that the MERCOSUR exemption was not part of the original ban on the importation of retreaded tyres adopted by Brazil (Portaria SECEX 8/2000), but was only introduced following a ruling in 2002 by a MERCOSUR arbitral tribunal.

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409 See, for instance, European Communities' first written submission to the Panel, paras. 89-168.
410 Supra, footnote 670. See also European Communities' first written submission to the Panel, paras. 193-222.
411 Panel Report, para. 6.17.
412 The Panel found that the prohibition of the issuance of import licences for retreaded tyres has the effect of prohibiting the importation of retreaded tyres, and is thus inconsistent with Article XI:1 of the GATT 1994. (Ibid., paras. 7.14, 7.15, and 7.34) In making the finding that Portaria SECEX 14/2004 is inconsistent with Article XI:1, the Panel focused on the import prohibition; its reasoning reflects the notion that an exemption from an import ban by its nature does not constitute a prohibition or restriction.
413 Ibid., para. 7.106.
414 Ibid., para. 7.107. (footnote omitted)
415 Ibid., para. 7.237; see also para. 6.19.
416 Indeed, two of the third participants in this appeal—Australia and the United States—suggest that the Panel should have adopted such an approach. (Australia's third participant's submission, paras. 4 and 5; United States' third participant's submission, para. 5)
These considerations prompt us to examine the issues appealed on the basis of the conceptual approach adopted by the Panel in defining the scope of the measure at issue, which, as indicated above, has not specifically been appealed by the European Communities.

C. Related Measures

128. In addition to the Import Ban, Brazil has adopted a variety of other measures which were also challenged or discussed before the Panel. Although none of these measures are directly at issue in this appeal, we consider it useful to identify them briefly.

129. Presidential Decree 3.179, as amended \(^{417}\), provides sanctions applicable to conduct and activities harmful to the environment, and other provisions, and its Article 47-A subjects the importation, as well as the marketing, transportation, storage, keeping or warehousing, of imported used and retreaded tyres to a fine of R$400/unit.

130. Resolution No. 258 of 26 August 1999 of the Conselho Nacional do Meio Ambiente ("CONAMA") (National Council for the Environment of the Ministry of the Environment) ("CONAMA Resolution 258/1999") \(^{418}\), as amended by CONAMA Resolution No. 301 of 21 March 2002 \(^{419}\), created a collection and disposal scheme that makes it mandatory for domestic manufacturers of new tyres and tyre importers to provide for the safe disposal of waste tyres in specified proportions. \(^{420}\) CONAMA Resolution 258/1999, as amended in 2002, aims to ensure the environmentally appropriate final disposal of unusable tyres. Also, by exempting domestic retreaders from disposal obligations as long as they process tyres consumed within Brazil \(^{421}\), CONAMA Resolution 258/1999, as amended in 2002, seeks to encourage Brazilian retreaders to retread more domestically used tyres.

131. Brazilian states have also enacted measures aiming at reducing risks arising from the accumulation of waste tyres. Law 12.114 of the State of Rio Grande do Sul prohibits the commercialization of imported used tyres within its territory, which includes imported retreaded tyres, as well as retreaded tyres made in Brazil from imported casings. \(^{422}\) A 2005 amendment to that law allows the importation and marketing of imported retreaded tyres provided that the importer proves that it has destroyed ten used tyres in Brazil for every retreaded tyre imported. In the case of imports of used tyre casings, however, the destruction of only one used tyre per imported tyre is required. \(^{423}\) The State of Paraná has adopted Paraná Rodando Limpo, a voluntary programme to collect, \textit{inter alia}, all existing unusable tyres currently discarded throughout the territory of Paraná. \(^{424}\)

132. Finally, we note that, notwithstanding the import ban on used tyres contained in Article 40 of Portaria SECEX 14/2004, a number of Brazilian retreaders have sought, and obtained, injunctions allowing them to import used tyre casings in order to manufacture retreaded tyres from those used tyres. \(^{425}\) Although the Brazilian government has, within the Brazilian domestic

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\(^{417}\)See supra, footnote 369.
\(^{418}\)Exhibits BRA-4 and EC-47 submitted by Brazil and by the European Communities, respectively, to the Panel.
\(^{419}\)Exhibit BRA-68 submitted by Brazil to the Panel.
\(^{420}\)See para. 0 and footnote 496 thereto of this Report.
\(^{421}\)Panel Report, para. 7.137.
\(^{422}\)Ibid., para. 2.11.
\(^{423}\)Ibid., para. 2.12.
\(^{424}\)Ibid., paras. 7.66, 7.174, 7.175, and 7.178.
\(^{425}\)Ibid., paras. 7.241 and 7.92-7.305.
legal system, opposed these injunctions, it has had mixed results in its efforts to prevent the grant, or obtaining the reversal, of court injunctions for the importation of used tyres.\textsuperscript{426}

V. The Panel's Analysis of the Necessity of the Import Ban

\textit{A. The Panel's Necessity Analysis under Article XX(b) of the GATT 1994}

133. The first legal issue raised by the European Communities' appeal relates to the Panel's finding that the Import Ban is "necessary" within the meaning of Article XX(b) of the GATT 1994.\textsuperscript{427} The European Communities challenges three specific aspects of the Panel's analysis under Article XX(b). First, the European Communities contends that the Panel applied an "erroneous legal standard"\textsuperscript{428} in assessing the contribution of the Import Ban to the realization of the ends pursued by it, and that it did not properly weigh this contribution in its analysis of the necessity of the Import Ban. Secondly, the European Communities submits that the Panel did not define correctly the alternatives to the Import Ban and erred in excluding possible alternatives proposed by the European Communities.\textsuperscript{429} Thirdly, the European Communities argues that, in its analysis under Article XX(b), the Panel did not carry out a proper, if any, weighing and balancing of the relevant factors.\textsuperscript{430} We will examine these contentions of the European Communities in turn.

1. The Panel's Analysis of the Contribution of the Import Ban to the Achievement of Its Objective

134. In the analysis of the contribution of the Import Ban to the achievement of its objective, the Panel first recalled its previous findings that, through the Import Ban, Brazil pursued the objective of reducing exposure to the risks to human, animal, and plant life and health arising from the accumulation of waste tyres, and that such policy fell within the range of policies covered by paragraph (b) of Article XX of the GATT 1994.\textsuperscript{431} The Panel also found that Brazil's chosen level of protection is the "reduction of the risks of waste tyre accumulation to the maximum extent possible".\textsuperscript{432} In analyzing whether the Import Ban "contributes to the realization of the policy pursued, i.e. the protection of human, animal and plant life and health from the risks posed by the accumulation of waste tyres"\textsuperscript{433}, the Panel examined two questions. First, the Panel sought to assess whether the Import Ban can contribute to the reduction in the number of waste tyres generated in Brazil. Secondly, the Panel sought to evaluate whether a reduction in the number of waste tyres can contribute to the reduction of the risks to human, animal, and plant life and health arising from waste tyres.\textsuperscript{434}

135. Regarding the first question, the Panel noted Brazil's explanation that the Import Ban would contribute to the achievement of the objective of reducing the number of waste tyres if imported retreaded tyres would be replaced either with domestically retreaded tyres made from tyres used in Brazil, or with new tyres capable of future retreading. The Panel began by examining the replacement of imported retreaded tyres with new tyres on Brazil's market.\textsuperscript{435} The
Panel determined that "all types of retreaded tyres (i.e. for passenger car, bus, truck and aircraft) have by definition a shorter lifespan than new tyres." Accordingly, the Panel reasoned that "an import ban on retreaded tyres may lead to a reduction in the total number of waste tyres because imported retreaded tyres may be substituted for by new tyres which have a longer lifespan." The Panel verified next whether there is a link between the replacement of imported retreaded tyres with domestically retreaded tyres and a reduction in the number of waste tyres in Brazil. If retreaded tyres are manufactured in Brazil from tyres used in Brazil, the retreading of these used tyres contributes to the reduction of the accumulation of waste tyres in Brazil by "giving a second life to some used tyres, which otherwise would have become waste immediately after their first and only life." The Panel added that "an import ban on retreaded tyres can encourage domestic retreaders to retread more domestic used tyres than they might have done otherwise", because it "compel[s] consumers of imported retreaded tyres to switch either to retreaded tyres produced domestically or to new tyres." The Panel then assessed whether domestic used tyres can be retreaded in Brazil. On the basis of the evidence provided by the parties, the Panel found that "at least some domestic used tyres are being retreaded in Brazil", that Brazil "has the production capacity to retread domestic used tyres", and that new tyres sold in Brazil have the potential to be retreaded. The Panel also observed that "Article 40 of Portaria SECEX 14/2004 bans the importation of both used and retreaded tyres to Brazil" and that "the import ban on used tyres supports the effectiveness of the import ban on retreaded tyres regarding the reduction of waste tyres." The Panel concluded that the Import Ban "is capable of contributing to the reduction of the overall amount of waste tyres generated in Brazil.

136. The Panel then turned to the question of whether the reduction in the number of waste tyres would contribute to a reduction of the risks to human, animal, and plant life and health arising from waste tyres. For the Panel, "the very essence of the problem is the actual accumulation of waste in and of itself." The Panel added that "[t]o the extent that this accumulation has been demonstrated to be associated with the occurrence of the risks at issue, including the providing of fertile breeding grounds for the vectors of these diseases, a reduction in this accumulation, even if it does not eliminate it, can reasonably be expected to constitute a step towards the reduction of the occurrence of the diseases and the tyre fires." The Panel concluded that:

... the prohibition on the importation of retreaded tyres is capable of making a contribution to the objective pursued by Brazil, in that it can lead to a reduction in the overall number of waste tyres generated in Brazil, which in turn can reduce the potential for exposure to the specific risks to human, animal, plant life and health that Brazil seeks to address.
137. According to the European Communities, the Panel, in its assessment of the contribution of the Import Ban to the realization of the ends pursued by it, referred only to the potential contribution this measure might make. The European Communities argues that the Panel applied an "erroneous legal standard" in so doing, and that the Panel should have sought "to establish the actual contribution of the measure to its stated goals, and the importance of this contribution". For the European Communities, the Panel was required to determine the extent to which the Import Ban makes a contribution to the achievement of its stated objective because, otherwise, it is not possible to weigh and balance properly this contribution against other relevant factors. Accordingly, the European Communities contends, the Panel erred by not quantifying the reduction of waste tyres resulting from the Import Ban. For the European Communities, "[t]he very indirect nature of the alleged risks attributed to imported retreaded tyres should have called for a particularly diligent examination of the contribution made by the ban to the reduction of the number of the waste tyres arising in Brazil."

138. Brazil counters that the Panel correctly assessed the contribution of the Import Ban to the achievement of its objective. Brazil argues that actual contribution is properly assessed under the chapeau of Article XX of the GATT 1994, which focuses on the application of the measure. Brazil asserts further that the Appellate Body expressly recognized, in EC – Asbestos, that "a risk may be evaluated either in quantitative or qualitative terms" and, therefore, the Panel was under no obligation to quantify the Import Ban's contribution to the reduction in waste tyre volumes.

139. We begin by recalling that the analysis of a measure under Article XX of the GATT 1994 is two-tiered. First, a panel must examine whether the measure falls under at least one of the ten exceptions listed under Article XX. Secondly, the question of whether the measure at issue satisfies the requirements of the chapeau of Article XX must be considered.

140. We note at the outset that the participants do not dispute that it is within the authority of a WTO Member to set the public health or environmental objectives it seeks to achieve, as well as the level of protection that it wants to obtain, through the measure or the policy it chooses to adopt.

141. Article XX(b) of the GATT 1994 refers to measures "necessary to protect human, animal or plant life or health". The term "necessary" is mentioned not only in Article XX(b) of the GATT 1994, but also in Articles XX(a) and XX(d) of the GATT 1994, as well as in Article XIV(a), (b), and (c) of the GATS. In Korea – Various Measures on Beef, the Appellate Body underscored that "the word 'necessary' is not limited to that which is 'indispensable". The Appellate Body added:

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450European Communities' appellant's submission, para. 168.
451Ibid., para. 166.
452Ibid., para. 167.
453Ibid., para. 171.
454Ibid., para. 174.
455European Communities' appellant's submission, para. 177.
456Brazil's appellee's submission, para. 81 (quoting Appellate Body Report, EC – Asbestos, para. 167). (emphasis added by Brazil)
458In other words, the policy objective of the measure at issue must fall under the range of policies covered by the paragraphs of Article XX of the GATT 1994. (See, for instance, Appellate Body Report, US – Shrimp, para. 149)
Measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfill the requirements of Article XX(d). But other measures, too, may fall within the ambit of this exception. As used in Article XX(d), the term "necessary" refers, in our view, to a range of degrees of necessity. At one end of this continuum lies "necessary" understood as "indispensable"; at the other end, is "necessary" taken to mean as "making a contribution to." We consider that a "necessary" measure is, in this continuum, located significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to."  

142. In Korea – Various Measures on Beef, the Appellate Body explained that determining whether a measure is "necessary" within the meaning of Article XX(d):

... involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.

143. In US – Gambling, the Appellate Body addressed the "necessity" test in the context of Article XIV of the GATS. The Appellate Body stated that the weighing and balancing process inherent in the necessity analysis "begins with an assessment of the 'relative importance' of the interests or values furthered by the challenged measure," and also involves an assessment of other factors, which will usually include "the contribution of the measure to the realization of the ends pursued by it" and "the restrictive impact of the measure on international commerce."

144. It is against this background that we must determine whether the Panel erred in assessing the contribution of the Import Ban to the realization of the objective pursued by it, and in the manner in which it weighed this contribution in its analysis of the necessity of the Import Ban. We begin by identifying the objective pursued by the Import Ban. The Panel found that the objective of the Import Ban is the reduction of the "exposure to the risks to human, animal or plant life or health arising from the accumulation of waste tyres," and noted that "few interests are more 'vital' and 'important' than protecting human beings from health risks, and that protecting the environment is no less important." The Panel also observed that "Brazil's chosen level of protection is the reduction of the risks of waste tyre accumulation to the maximum extent possible." Regarding the trade restrictiveness of the measure, the Panel noted that it is "as trade-restrictive as can be, as far as retreaded tyres from non-MERCOSUR countries are concerned, since it aims to halt completely their entry into Brazil."
145. We turn to the methodology used by the Panel in analyzing the contribution of the Import Ban to the achievement of its objective. Such a contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue. The selection of a methodology to assess a measure's contribution is a function of the nature of the risk, the objective pursued, and the level of protection sought. It ultimately also depends on the nature, quantity, and quality of evidence existing at the time the analysis is made. Because the Panel, as the trier of the facts, is in a position to evaluate these circumstances, it should enjoy a certain latitude in designing the appropriate methodology to use and deciding how to structure or organize the analysis of the contribution of the measure at issue to the realization of the ends pursued by it. This latitude is not, however, boundless. Indeed, a panel must analyze the contribution of the measure at issue to the realization of the ends pursued by it in accordance with the requirements of Article XX of the GATT 1994 and Article 11 of the DSU.

146. We note that the Panel chose to conduct a qualitative analysis of the contribution of the Import Ban to the achievement of its objective. In previous cases, the Appellate Body has not established a requirement that such a contribution be quantified. To the contrary, in EC – Asbestos, the Appellate Body emphasized that there is "no requirement under Article XX(b) of the GATT 1994 to quantify, as such, the risk to human life or health". In other words, "[a] risk may be evaluated either in quantitative or qualitative terms." Although the reference by the Appellate Body to the quantification of a risk is not the same as the quantification of the contribution of a measure to the realization of the objective pursued by it (which could be, as it is in this case, the reduction of a risk), it appears to us that the same line of reasoning applies to the analysis of the contribution, which can be done either in quantitative or in qualitative terms.

147. Accordingly, we do not accept the European Communities' contention that the Panel was under an obligation to quantify the contribution of the Import Ban to the reduction in the number of waste tyres and to determine the number of waste tyres that would be reduced as a result of the Import Ban. In our view, the Panel's choice of a qualitative analysis was within the bounds of the latitude it enjoys in choosing a methodology for the analysis of the contribution.

148. The Panel analyzed the contribution of the Import Ban to the achievement of its objective in a coherent sequence. It examined first the impact of the replacement of imported retreaded tyres with new tyres on the reduction of waste. Secondly, the Panel sought to determine whether imported retreaded tyres would be replaced with domestically retreaded tyres, which led it to examine whether domestic used tyres can be and are being retreaded in Brazil. Thirdly, it considered whether the reduction in the number of waste tyres would contribute to a reduction of the risks to human, animal, and plant life and health.

149. The Panel's analysis was not only directed at an assessment of the current situation and the immediate effects of the Import Ban on the reduction of the exposure to the targeted risks. The Panel's approach also focused on evaluating the extent to which the Import Ban is likely to result in a reduction of the exposure to these risks. In the course of its reasoning, the Panel made and tested some key hypotheses, including: that imported retreaded tyres are being

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470 Ibid., para. 7.118.
472 Appellate Body Report, EC – Asbestos, para. 167. (original emphasis; footnote omitted)
473 Ibid.
474 European Communities, appellant's submission, para. 174.
475 In the Panel's view, "it cannot be reasonably expected that the specific measure under consideration would entirely eliminate the risk ... or even that its impact on the actual reduction of the incidence of the diseases at issue would manifest itself very rapidly after the enactment of the measure." (Panel Report, para. 7.145)
replaced with new tyres\textsuperscript{476} and domestically retreaded tyres\textsuperscript{477}; that some proportion of domestic used tyres are retreadable and are being retreaded\textsuperscript{478}, that Brazil introduced a number of measures to facilitate the access of domestic retreaders to good-quality used tyres\textsuperscript{479}; that more automotive inspections in Brazil lead to an increase in the number of retreadable used tyres\textsuperscript{480}; and that Brazil has the production capacity to retread such tyres.\textsuperscript{481} The Panel sought to verify these hypotheses on the basis of the evidence adduced by the parties and found them to be logically sound and supported by sufficient evidence. In the next Section, we will examine the European Communities' claim that the Panel failed to make an objective assessment of the facts with respect to the verification of some of these hypotheses. Assuming, for the time being, that the Panel assessed the facts in accordance with Article 11 of the DSU, it appears to us that the Panel's analysis supports its conclusion that the Import Ban is capable of making a contribution and can result in a reduction of exposure to the targeted risks.\textsuperscript{482} We have now to determine whether this was sufficient to conclude that the Import Ban is "necessary" within the meaning of Article XX(b) of the GATT 1994.

150. As the Panel recognized, an import ban is "by design as trade-restrictive as can be."\textsuperscript{483} We agree with the Panel that there may be circumstances where such a measure can nevertheless be necessary, within the meaning of Article XX(b). We also recall that, in \textit{Korea – Various Measures on Beef}, the Appellate Body indicated that "the word 'necessary' is not limited to that which is 'indispensable'".\textsuperscript{484} Having said that, when a measure produces restrictive effects on international trade as severe as those resulting from an import ban, it appears to us that it would be difficult for a panel to find that measure necessary unless it is satisfied that the measure is apt to make a material contribution to the achievement of its objective. Thus, we disagree with Brazil's suggestion that, because it aims to reduce risk exposure to the maximum extent possible, an import ban that brings a marginal or insignificant contribution can nevertheless be considered necessary.\textsuperscript{485}

151. This does not mean that an import ban, or another trade-restrictive measure, the contribution of which is not immediately observable, cannot be justified under Article XX(b). We recognize that certain complex public health or environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures. In the short-term, it may prove difficult to isolate the contribution to public health or environmental objectives of one specific measure from those attributable to the other measures that are part of the same comprehensive policy. Moreover, the results obtained from certain actions—for instance, measures adopted in order to attenuate global warming and climate change, or certain preventive actions to reduce the incidence of diseases that may manifest themselves only after a certain period of time—can only be evaluated with the benefit of time.\textsuperscript{486} In order to justify an import

\textsuperscript{476}Ibid., para. 7.130.
\textsuperscript{477}Ibid., paras. 7.133-7.135.
\textsuperscript{478}Ibid., para. 7.136.
\textsuperscript{479}Panel Report, para. 7.137.
\textsuperscript{480}Ibid., para. 7.138.
\textsuperscript{481}Ibid., para. 7.141.
\textsuperscript{482}Ibid., para. 7.148.
\textsuperscript{483}Ibid., para. 7.211.
\textsuperscript{485}Brazil's appellee's submission, paras. 80 and 83. According to Brazil, given its chosen level of protection to reduce the risk of waste tyre accumulation to the maximum extent possible, "[i]f the Panel finds that there are no reasonable alternatives to the measure, the measure is necessary—no matter how small its contribution—because the WTO does not second-guess the Member’s chosen level of protection." (\textit{Ibid.}, para. 80)
\textsuperscript{486}In this respect, we note that, in \textit{US – Gasoline}, the Appellate Body stated, in the context of Article XX(g) of the GATT 1994, that, "in the field of conservation of exhaustible natural resources, a substantial period of time, perhaps years, may have to elapse before the effects attributable to implementation of a given measure may be observable." (Appellate Body Report, \textit{US – Gasoline}, p. 21, DSR 1996:I, 3, at 20)
ban under Article XX(b), a panel must be satisfied that it brings about a material contribution to the achievement of its objective. Such a demonstration can of course be made by resorting to evidence or data, pertaining to the past or the present, that establish that the import ban at issue makes a material contribution to the protection of public health or environmental objectives pursued. This is not, however, the only type of demonstration that could establish such a contribution. Thus, a panel might conclude that an import ban is necessary on the basis of a demonstration that the import ban at issue is apt to produce a material contribution to the achievement of its objective. This demonstration could consist of quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence.

152. We have now to assess whether the qualitative analysis provided by the Panel establishes that the Import Ban is apt to produce a material contribution to the achievement of the objective of reducing exposure to the risks arising from the accumulation of waste tyres.

153. We observe, first, that the Panel analyzed the contribution of the Import Ban as initially designed, without taking into account the imports of remoulded tyres under the MERCOSUR exemption. As we indicated above, this is not the only possible approach. Nevertheless, we proceed with our examination of the Panel's reasoning on that basis for the reasons we explained earlier. In the light of the evidence adduced by the parties, the Panel was of the view that the Import Ban would lead to imported retreaded tyres being replaced with retreaded tyres made from local casings, or with new tyres that are retreadable. As concerns new tyres, the Panel observed, and we agree, that retreaded tyres "have by definition a shorter lifespan than new tyres" and that, accordingly, the Import Ban "may lead to a reduction in the total number of waste tyres because imported retreaded tyres may be substituted for by new tyres which have a longer lifespan." As concerns tyres retreaded in Brazil from local casings, the Panel was satisfied that Brazil had the production capacity to retread domestic used tyres and that "at least some domestic used tyres are being retreaded in Brazil." The Panel also agreed that Brazil has taken a series of measures to facilitate the access of domestic retreaders to good-quality used tyres, and that new tyres sold in Brazil are high-quality tyres that comply with international standards and have the potential to be retreaded. The Panel's conclusion with which we agree was that, "if the domestic retreading industry retreads more domestic used tyres, the overall number of waste tyres will be reduced by giving a second life to some used tyres, which otherwise would have become waste immediately after their first and only life." For these reasons, the Panel found that a reduction of waste tyres would result from the Import Ban and that, therefore, the Import Ban would contribute to reducing exposure to the risks associated with the accumulation of waste tyres. As the Panel's analysis was qualitative, the Panel did not seek to estimate, in quantitative terms, the reduction of waste tyres that would result from the Import Ban, or the time horizon of such a reduction. Such estimates would have been very useful and, undoubtedly, would have strengthened the foundation of the Panel's findings. Having said that, it does not appear to us erroneous to conclude, on the basis of the hypotheses made, tested, and accepted by the Panel, that fewer waste tyres will be generated with the Import Ban than otherwise.

487Panel Report, paras. 7.126-7.130.
488Ibid., paras. 7.131-7.142.
489Ibid., para. 7.130.
490Panel Report, para. 7.130.
491Ibid., para. 7.141. The Panel noted that, in 2005, 33.4 million new tyres (all types included) were sold in Brazil (either domestically produced or imported) and 18.6 million retreaded tyres were produced domestically.
492Ibid., para. 7.136.
493Ibid., para. 7.137.
494Ibid.
495Ibid., para. 7.133.
154. Moreover, we wish to underscore that the Import Ban must be viewed in the broader context of the comprehensive strategy designed and implemented by Brazil to deal with waste tyres. This comprehensive strategy includes not only the Import Ban but also the import ban on used tyres, as well as the collection and disposal scheme adopted by CONAMA Resolution 258/1999, as amended in 2002, which makes it mandatory for domestic manufacturers and importers of new tyres to provide for the safe disposal of waste tyres in specified proportions.\textsuperscript{496} For its part, CONAMA Resolution 258/1999, as amended in 2002, aims to reduce the exposure to risks arising from the accumulation of waste tyres by forcing manufacturers and importers of new tyres to collect and dispose of waste tyres at a ratio of five waste tyres for every four new tyres. This measure also encourages Brazilian retreaders to retread more domestic used tyres by exempting domestic retreaders from disposal obligations as long as they process tyres consumed within Brazil.\textsuperscript{497} Thus, the CONAMA scheme provides additional support for and is consistent with the design of Brazil's strategy for reducing the number of waste tyres. The two mutually enforcing pillars of Brazil's overall strategy—the Import Ban and the import ban on used tyres—imply that the demand for retreaded tyres in Brazil must be met by the domestic retreaders, and that these retreaders, in principle, can use only domestic used tyres for raw material.\textsuperscript{498} Over time, this comprehensive regulatory scheme is apt to induce sustainable changes in the practices and behaviour of the domestic retreaders, as well as other actors, and result in an increase in the number of retreadable tyres in Brazil and a higher rate of retreading of domestic casings in Brazil. Thus, the Import Ban appears to us as one of the key elements of the comprehensive strategy designed by Brazil to deal with waste tyres, along with the import ban on used tyres and the collection and disposal scheme established by CONAMA Resolution 258/1999, as amended in 2002.

155. As we explained above, we agree with the Panel's reasoning suggesting that fewer waste tyres will be generated with the Import Ban in place. In addition, Brazil has developed and implemented a comprehensive strategy to deal with waste tyres. As a key element of this strategy, the Import Ban is likely to bring a material contribution to the achievement of its objective of reducing the exposure to risks arising from the accumulation of waste tyres. On the

\textsuperscript{496}Article 3 of CONAMA Resolution 258/1999, as amended in 2002, provides:

The time periods and quantities for collection and environmentally appropriate final disposal of unusable tyres resulting from use on automotive vehicles and bicycles covered by this Regulation are as follows:

I – as of 1 January 2002: for every four new tyres produced in Brazil or imported new or reconditioned tyres, including those on imported vehicles, manufacturers and importers must ensure final disposal of one unusable tyre;

II – as of 1 January 2003: for every two new tyres produced in Brazil or imported new or reconditioned tyres, including those on imported vehicles, manufacturers and importers must ensure final disposal of one unusable tyre;

III – as of 1 January 2004:

a) for every one new tyre produced in Brazil or imported new tyre, including those on imported vehicles, manufacturers and importers must ensure final disposal of one unusable tyre;

b) for every four imported reconditioned tyres, of any type, importers must ensure final disposal of five unusable tyres;

IV – as of 1 January 2005:

a) for every four new tyres produced in Brazil or imported tyres, including those on imported vehicles, manufacturers and importers must ensure final disposal of five unusable tyres;

b) for every three imported reconditioned tyres, of any type, importers must ensure final disposal of four unusable tyres.

\textsuperscript{497}Panel Report, para. 7.137.

\textsuperscript{498}Leaving aside, as explained above, the imports under the MERCOSUR exemption and under court injunctions.
basis of these considerations, we are of the view that the Panel did not err in finding that the Import Ban contributes to the achievement of its objective.

2. The Panel’s Analysis of Possible Alternatives to the Import Ban

156. In order to determine whether a measure is "necessary" within the meaning of Article XX(b) of the GATT 1994, a panel must assess all the relevant factors, particularly the extent of the contribution to the achievement of a measure's objective and its trade restrictiveness, in the light of the importance of the interests or values at stake. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with its possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued. It rests upon the complaining Member to identify possible alternatives to the measure at issue that the responding Member could have taken. As the Appellate Body indicated in US – Gambling, while the responding Member must show that a measure is necessary, it does not have to "show, in the first instance, that there are no reasonably available alternatives to achieve its objectives." We recall that, in order to qualify as an alternative, a measure proposed by the complaining Member must be not only less trade restrictive than the measure at issue, but should also "preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued." If the complaining Member has put forward a possible alternative measure, the responding Member may seek to show that the proposed measure does not allow it to achieve the level of protection it has chosen and, therefore, is not a genuine alternative. The responding Member may also seek to demonstrate that the proposed alternative is not, in fact, "reasonably available." As the Appellate Body indicated in US – Gambling, "[a]n alternative measure may be found not to be 'reasonably available' ... where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties." If the responding Member demonstrates that the measure proposed by the complaining Member is not a genuine alternative or is not "reasonably available", taking into account the interests or values being pursued and the responding Member's desired level of protection, it follows that the measure at issue is necessary.

157. Before the Panel, the European Communities put forward two types of possible alternative measures or practices: (i) measures to reduce the number of waste tyres accumulating in Brazil; and (ii) measures or practices to improve the management of waste tyres in Brazil. The Panel examined the alternative measures proposed by the European Communities in some detail, and in each case found that the proposed measure did not constitute a reasonably available alternative to the Import Ban. Among the reasons that the Panel gave for its rejections were that the proposed alternatives were already in place, would not allow Brazil to achieve its chosen level of protection, or would carry their own risks and hazards.

158. Regarding the measures to reduce the accumulation of waste tyres, the Panel first discussed measures to encourage domestic retreading or improve the retreadability of domestic used tyres. The Panel observed that these measures had already been implemented or were in the

500 Ibid., para. 309. (original emphasis)
501 Ibid., para. 308.
502 Ibid., para. 311.
504 Ibid., para. 311.
505 Panel Report, para. 7.159.
process of being implemented \(^{506}\) so that the impact of these measures and the Import Ban "could be cumulative rather than substitutable".\(^{507}\) Therefore, the Panel disagreed with the European Communities that "the institution of domestic measures to encourage timely domestic retreading and to improve the retreadability of domestic used tyres would achieve the same outcome as the import ban".\(^{508}\)

159. The Panel went on to discuss the European Communities' contention that Brazil should prevent imports of used tyres into Brazil through court injunctions. The Panel noted that imports of used tyres were already prohibited by law in Brazil, "so that if the 'alternative measure' proposed by the European Communities is the prohibition of used tyres, it could be said that Brazil actually already imposes that measure."\(^{509}\) Accordingly, the Panel concluded that the possible alternative measures identified by the European Communities to avoid the generation of waste tyres could not "apply as a substitute" for the Import Ban but are, rather, complementary measures that Brazil already applies, at least in part.\(^{510}\)

160. Turning to alternatives aiming to improve management of waste tyres, the Panel examined, first, collection and disposal schemes and, secondly, disposal methods.

161. The European Communities referred mainly to two collection and disposal schemes.\(^{511}\) In the analysis of these schemes, the Panel recalled that "Brazil's chosen level of protection is the reduction of the risks associated with waste tyre accumulation to the maximum extent possible".\(^{512}\) According to the Panel, "insofar as the level of protection pursued by Brazil involves the 'non-generation' of waste tyres in the first place", collection and disposal schemes, such as that adopted by CONAMA Resolution 258/1999 or the Paraná Rodando Limpo\(^{513}\) programme, "would not seem able to achieve the same level of protection as the import ban".\(^{514}\) The Panel also noted Brazil's concern that these collection and disposal schemes do not address or eliminate disposal risks.\(^{515}\) The Panel concluded that these schemes cannot be considered as alternatives to the Import Ban at the level of protection sought by Brazil, because they were already implemented in Brazil and do not address the risks associated with the disposal of waste tyres.\(^{516}\)

162. The Panel then examined the following disposal methods identified by the European Communities: (i) landfilling; (ii) stockpiling; (iii) incineration of waste tyres in cement kilns and similar facilities; and (iv) material recycling.

163. Concerning landfilling, the Panel found that the landfilling of waste tyres may pose the very risks Brazil seeks to reduce through the Import Ban, and for this reason cannot constitute a reasonably available alternative.\(^{517}\) For the Panel, landfilling of waste tyres poses problems, including the "instability of sites that will affect future land reclamation, long-term leaching of
toxic substances, and the risk of tyre fires and mosquito-borne diseases.\textsuperscript{518} The Panel also observed that the evidence it examined showing the existence of such risks did not make a clear distinction between landfilling of shredded tyres (also referred to as "controlled landfilling") and landfilling of whole tyres ("uncontrolled landfilling"). Thus, for the Panel, it was not possible to conclude that landfilling of shredded tyres does not pose risks similar to those linked to other types of waste tyre landfills.\textsuperscript{519}

164. Regarding stockpiling\textsuperscript{520}, the Panel observed that this method does not "dispose of" waste tyres\textsuperscript{521}, and added that "the evidence shows that even the so-called 'controlled stockpiling' that is to say stockpiles designed to prevent the risk of fires and pests may still pose considerable risks to human health and the environment."\textsuperscript{522} The Panel concluded that stockpiling did not constitute an alternative to the Import Ban.\textsuperscript{523}

165. With respect to the incineration of waste tyres, the Panel found that sufficient evidence demonstrated that health risks exist in relation to the incineration of waste tyres, even if such risks could be significantly reduced through strict emission standards.\textsuperscript{524} For the Panel, the evidence suggested that "the question still remains whether toxic chemicals emitted by incineration of waste tyres, regardless of the level of emission, may potentially pose health risks to humans."\textsuperscript{525} The Panel added that, although emission levels can vary largely depending on the emission control technology, "the most up-to-date technology that can control toxic emissions to minimum levels is not necessarily readily available, mostly for financial reasons."\textsuperscript{526}

166. Finally, the Panel examined material recycling applications. Regarding civil engineering applications using waste tyres, the Panel found that demand for these applications was fairly limited partly due to their high costs, that they are capable of disposing of only a small number of waste tyres, and that the evidence casts doubt on the safety of some of these engineering applications.\textsuperscript{527} With respect to rubber asphalt, the Panel found that the information showed that "the use of rubber asphalt results in higher costs."\textsuperscript{528} Consequently, "the demand for this technology is limited and its waste disposal capacity is reduced."\textsuperscript{529} The Panel also noted that the use of rubber granulates in the production of certain products may dispose of only a limited amount of waste tyres.\textsuperscript{530} Finally, as regards devulcanization and other forms of chemical or thermal transformation, the Panel observed that, "under current market conditions, the economic viability of these options has yet to be demonstrated."\textsuperscript{531} In the light of these considerations, the Panel concluded that "it is not clear that material recycling applications are entirely safe,"\textsuperscript{532} and that even if they were completely harmless, "they would not be able to dispose of a quantity of waste tyres sufficient to achieve Brazil's desired level of protection due to their prohibitive costs and thus cannot constitute a reasonably available alternative".\textsuperscript{533}
On appeal, the European Communities contends that the Panel erred in its analysis of the measures or practices that were presented as possible alternatives to the Import Ban. In particular, the European Communities submits that the Panel used in its analysis an incorrect concept of "alternative". In addition, the European Communities argues that the Panel should have considered as alternatives to the Import Ban a better enforcement of the ban on imports of used tyres and of existing collection and disposal schemes.

Brazil asserts that the Panel was correct in finding that none of the alternative measures suggested by the European Communities constituted "reasonably available" alternatives to the Import Ban. For Brazil, the Panel correctly took account of Brazil's chosen level of protection—that is, the reduction of risks associated with the generation of waste tyres in Brazil to the maximum extent possible—in concluding that none of the alternatives suggested by the European Communities avoided the generation of additional waste tyres in the first place.

The Panel examined each of the measures or practices put forward by the European Communities in order to determine whether they were reasonably available alternatives in the light of the objective of the Import Ban and Brazil's chosen level of protection.

We note that the objective of the Import Ban is the reduction of the "exposure to the risks to human, animal or plant life or health arising from the accumulation of waste tyres" and that "Brazil's chosen level of protection is the reduction of [these] risks ... to the maximum extent possible", and that a measure or practice will not be viewed as an alternative unless it "preserve[s] for the responding Member its right to achieve its desired level of protection with respect to the objective pursued".

Among the possible alternatives, the European Communities referred to measures to encourage domestic retreading or improve the retreadability of used tyres, as well as a better enforcement of the import ban on used tyres and of existing collection and disposal schemes. In fact, like the Import Ban, these measures already figure as elements of a comprehensive strategy designed by Brazil to deal with waste tyres. Substituting one element of this comprehensive strategy by another measure is not in the process of implementing measures to encourage domestic retreading or improve the retreadability of tyres. (Panel Report, para. 7.169)
policy for another would weaken the policy by reducing the synergies between its components, as well as its total effect. We are therefore of the view that the Panel did not err in rejecting as alternatives to the Import Ban components of Brazil's policy regarding waste tyres that are complementary to the Import Ban.

173. We move now to the other measures or practices proposed by the European Communities as alternatives to the Import Ban.\(^{541}\) The European Communities contends that the Panel committed an error of law by applying a "narrow definition of alternative\(^{542}\), according to which an alternative to the Import Ban is "a measure that must avoid the waste tyres arising specifically from imported retreaded tyres\(^{543}\), or one "equal to a waste non-generation measure".\(^{544}\) For the European Communities, this narrow definition differs from "the objective allegedly pursued by the challenged measure\(^{545}\), and resulted in the rejection of several disposal and waste management measures presented by the European Communities that should have been accepted as alternatives to the Import Ban.

174. In evaluating whether the measures or practices proposed by the European Communities were "alternatives", the Panel sought to determine whether they would achieve Brazil's policy objective and chosen level of protection\(^{546}\), that is to say, reducing the "exposure to the risks to human, animal or plant life or health arising from the accumulation of waste tyres\(^{547}\) to the maximum extent possible.\(^{548}\) In this respect, we believe, like the Panel, that non-generation measures are more apt to achieve this objective because they prevent the accumulation of waste tyres, while waste management measures dispose of waste tyres only once they have accumulated. Furthermore, we note that, in comparing a proposed alternative to the Import Ban, the Panel took into account specific risks attached to the proposed alternative, such as the risk of leaching of toxic substances that might be associated to landfilling\(^{549}\), or the risk of toxic emissions that might arise from the incineration of waste tyres.\(^{550}\) In our view, the Panel did not err in so doing. Indeed, we do not see how a panel could undertake a meaningful comparison of the measure at issue with a possible alternative while disregarding the risks arising out of the implementation of the possible alternative.\(^{551}\) In this case, the Panel examined as proposed alternatives landfilling, stockpiling, and waste tyre incineration, and considered that, even if these disposal methods were performed under controlled conditions, they nevertheless pose risks to human health similar or additional to those Brazil seeks to reduce through the Import Ban.\(^{552}\) Because these practices carry their own risks, and these risks do not arise from non-generation

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\(^{541}\) These measures or practices are the following disposal methods: landfilling; stockpiling; incineration of waste tyres; and material recycling.

\(^{542}\) European Communities' appellant's submission, para. 227.

\(^{543}\) Ibid., para. 219. (underlining omitted)

\(^{544}\) Ibid., para. 222.

\(^{545}\) Ibid., para. 221.

\(^{546}\) Panel Report, para. 7.157.

\(^{547}\) Ibid., para. 7.102.

\(^{548}\) Ibid., para. 7.108. (footnote omitted) See also ibid., para. 7.152:

We must therefore now consider whether any alternative measure, less inconsistent with GATT 1994, that is, less trade-restrictive than a complete import ban, would have been reasonably available to Brazil to achieve the same objective, taking into account Brazil's chosen level of protection. (footnote omitted)

\(^{549}\) Ibid., para. 7.183.

\(^{550}\) Ibid., para. 7.194.

\(^{551}\) This was recognized by the Appellate Body in EC – Asbestos, where it stated that the risks attached to a proposed measure should be included in the exercise of comparison aiming to determine whether it is a reasonably available alternative to the measure at issue. (Appellate Body Report, EC – Asbestos, para. 174)

\(^{552}\) Panel Report, para. 7.195; see also para. 7.186 (landfilling); para. 7.189 (stockpiling); and para. 7.194 (waste tyre incineration).
measures such as the Import Ban, we believe, like the Panel, that these practices are not reasonably available alternatives.

175. With respect to material recycling, we share the Panel's view that this practice is not as effective as the Import Ban in reducing the exposure to the risks arising from the accumulation of waste tyres. Material recycling applications are costly, and hence capable of disposing of only a limited number of waste tyres. We also note that some of them might require advanced technologies and know-how that are not readily available on a large scale. Accordingly, we are of the view that the Panel did not err in concluding that material recycling is not a reasonably available alternative to the Import Ban.

3. The Weighing and Balancing of Relevant Factors by the Panel

176. The European Communities argues that, in its analysis of the necessity of the Import Ban, the Panel stated that it had weighed and balanced the relevant factors, but it "has not actually done it". According to the European Communities, although the Appellate Body has not defined the term "weighing and balancing", "this language refers clearly to a process where, in the first place, the importance of each element is assessed individually and, then, its role and relative importance is taken into consideration together with the other elements for the purposes of deciding whether the challenged measure is necessary to attain the objective pursued." The European Communities reasons that, "since the Panel failed to establish ... the extent of the actual contribution the [Import Ban] makes to the reduction of the number of waste tyres arising in Brazil, ... it was incapable of 'weighing and balancing' this contribution against any of the other relevant factors." In addition, the European Communities contends that "the Panel base[d] ... its 'weighing and balancing' exercise on the wrong analysis it ... made of the alternatives". In sum, the European Communities argues that the Panel conducted a "superficial analysis" that is not a real weighing and balancing of the different factors and alternatives, because it did not balance "its arguments about the measure and the alternatives with the absolute trade-restrictiveness of the import ban and with a real evaluation of the contribution of the import ban to the objective pursued."

177. Brazil counters that the Panel correctly weighed and balanced the relevant factors and proposed alternatives in its necessity analysis. Brazil argues that the Panel expressly recognized that the Import Ban is highly trade restrictive, but properly weighed and balanced this factor against the other relevant factors. In relation to contribution, Brazil considers that Article XX(b) of the GATT 1994 does not require quantification, and that, in any event, the Import Ban's contribution to the reduction of imports of retreaded tyres is "substantial". Brazil adds that, because imports of retreaded tyres by definition increase the amount of waste tyres in Brazil, the contribution of the Import Ban to the reduction of risks arising from waste tyres to the maximum extent possible is "both direct and certain".

178. We begin our analysis by recalling that, in order to determine whether a measure is "necessary" within the meaning of Article XX(b) of the GATT 1994, a panel must consider the
relevant factors, particularly the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure's objective, and its trade restrictiveness. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective. This comparison should be carried out in the light of the importance of the interests or values at stake.\textsuperscript{562} It is through this process that a panel determines whether a measure is necessary.\textsuperscript{563}

179. In this case, the Panel identified the objective of the Import Ban as being the reduction of the exposure to risks arising from the accumulation of waste tyres. It assessed the importance of the interests underlying this objective. It found that risks of dengue fever and malaria arise from the accumulation of waste tyres and that the objective of protecting human life and health against such diseases "is both vital and important in the highest degree".\textsuperscript{564} The Panel noted that the objective of the Import Ban also relates to the protection of the environment, a value that it considered—correctly, in our view—important.\textsuperscript{565} Then, the Panel analyzed the trade restrictiveness of the Import Ban and its contribution to the achievement of its objective. It appears from the Panel's reasoning that it considered that, in the light of the importance of the interests protected by the objective of the Import Ban, the contribution of the Import Ban to the achievement of its objective outweighs its trade restrictiveness. This finding of the Panel does not appear erroneous to us.\textsuperscript{566}

180. The Panel then proceeded to examine the alternatives to the Import Ban proposed by the European Communities. The Panel explained that some of them could not be viewed as alternatives to the Import Ban because they were complementary to it and were already included in Brazil's comprehensive policy.\textsuperscript{567} Next, the Panel compared the other alternatives proposed by the European Communities—landfilling, stockpiling, incineration, and material recycling—with the Import Ban, taking into consideration the specific risks associated with these proposed alternatives. The Panel concluded from this comparative assessment that none of the proposed options was a reasonably available alternative to the Import Ban.

181. The European Communities argues that the Panel failed to make a proper collective assessment of all the proposed alternatives, a contention that does not stand for the following reasons. First, the Panel did refer to its collective examination of these alternatives in concluding that "none of these, either individually or collectively, would be such that the risks arising from waste tyres in Brazil would be safely eliminated, as is intended by the current import ban."\textsuperscript{568} Secondly, as noted by the Panel and discussed above, some of the proposed alternatives are not real substitutes for the Import Ban since they complement each other as part of Brazil's comprehensive policy.\textsuperscript{569} Finally, having found that other proposed alternatives were not reasonably available or carried their own risks, these alternatives would not have weighed differently in a collective assessment of alternatives.

182. In sum, the Panel's conclusion that the Import Ban is necessary was the result of a process involving, first, the examination of the contribution of the Import Ban to the achievement of its

\textsuperscript{563}Ibid.
\textsuperscript{564}Panel Report, para. 7.210. (footnote omitted)
\textsuperscript{565}Ibid., para. 7.112.
\textsuperscript{566}Supra, paras. 0-0.
\textsuperscript{567}For example, measures to encourage domestic retreading and improve the retreadability of domestic used tyres, a better implementation of the import ban on used tyres, and a better implementation of existing collection and disposal schemes. See also Panel Report, paras. 7.169, 7.171, and 7.178.
\textsuperscript{568}Ibid., para. 7.214. (emphasis added)
\textsuperscript{569}Panel Report, para. 7.213.
objective against its trade restrictiveness in the light of the interests at stake, and, secondly, the comparison of the possible alternatives, including associated risks, with the Import Ban. The analytical process followed by the Panel is consistent with the approach previously defined by the Appellate Body.\(^\text{570}\) The weighing and balancing is a holistic operation that involves putting all the variables of the equation together and evaluating them in relation to each other after having examined them individually, in order to reach an overall judgement. We therefore do not share the European Communities' view that the Panel did not "actually" weigh and balance the relevant factors\(^\text{571}\), or that the Panel made a methodological error in comparing the alternative options proposed by the European Communities with the Import Ban.

183. In the light of all these considerations, we are of the view that the Panel did not err in the manner it conducted its analysis under Article XX(b) of the GATT 1994 as to whether the Import Ban was "necessary to protect human, animal or plant life or health".

[...]

C. General Conclusion on the Necessity Analysis under Article XX(b) of the GATT 1994

210. At this stage, it may be useful to recapitulate our views on the issue of whether the Import Ban is necessary within the meaning of Article XX(b) of the GATT 1994. This issue illustrates the tensions that may exist between, on the one hand, international trade and, on the other hand, public health and environmental concerns arising from the handling of waste generated by a product at the end of its useful life. In this respect, the fundamental principle is the right that WTO Members have to determine the level of protection that they consider appropriate in a given context. Another key element of the analysis of the necessity of a measure under Article XX(b) is the contribution it brings to the achievement of its objective. A contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue. To be characterized as necessary, a measure does not have to be indispensable. However, its contribution to the achievement of the objective must be material, not merely marginal or insignificant, especially if the measure at issue is as trade restrictive as an import ban. Thus, the contribution of the measure has to be weighed against its trade restrictiveness, taking into account the importance of the interests or the values underlying the objective pursued by it. As a key component of a comprehensive policy aiming to reduce the risks arising from the accumulation of waste tyres, the Import Ban produces such a material contribution to the realization of its objective. Like the Panel, we consider that this contribution is sufficient to conclude that the Import Ban is necessary, in the absence of reasonably available alternatives.

211. The European Communities proposed a series of alternatives to the Import Ban. Whereas the Import Ban is a preventive non-generation measure, most of the proposed alternatives are waste management and disposal measures that are remedial in character. We consider that measures to encourage domestic retreading or to improve the retreadability of tyres, a better enforcement of the import ban on used tyres, and a better implementation of existing collection and disposal schemes, are complementary to the Import Ban; indeed, they constitute mutually supportive elements of a comprehensive policy to deal with waste tyres. Therefore, these measures cannot be considered real alternatives to the Import Ban. As regards landfilling, stockpiling, co-incineration of waste tyres, and material recycling, these remedial methods carry their own risks or, because of the costs involved, are capable of disposing of only a limited amount of waste tyres. The Import Ban also provides an important contribution by reducing the accumulation of waste tyres, and in this respect is more effective in achieving its objective than the alternatives proposed by the European Communities.

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\(^{\text{571}}\) European Communities' appellant's submission, para. 285.
number of waste tyres. The Panel did not err in concluding that the proposed measures or practices are not reasonably available alternatives.

212. Accordingly, having already found that the Panel did not breach its duty under Article 11 of the DSU, and in the light of the above considerations, we uphold the Panel's finding, in paragraph 7.215 of the Panel Report, that the Import Ban can be considered "necessary to protect human, animal or plant life or health."

VI. The Panel's Interpretation and Application of the Chapeau of Article XX of the GATT 1994

A. The MERCOSUR Exemption and the Chapeau of Article XX of the GATT 1994

213. After finding that the Import Ban was provisionally justified under Article XX(b) of the GATT 1994\textsuperscript{572}, the Panel examined whether the application of the Import Ban by Brazil satisfied the requirements of the chapeau of Article XX.

214. The chapeau of Article XX of the GATT 1994 reads:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement ... of measures [of the type specified in the subsequent paragraphs of Article XX].

215. The focus of the chapeau, by its express terms, is on the application of a measure already found to be inconsistent with an obligation of the GATT 1994 but falling within one of the paragraphs of Article XX.\textsuperscript{573} The chapeau's requirements are two-fold. First, a measure provisionally justified under one of the paragraphs of Article XX must not be applied in a manner that would constitute "arbitrary or unjustifiable discrimination" between countries where the same conditions prevail. Secondly, this measure must not be applied in a manner that would constitute "a disguised restriction on international trade". Through these requirements, the chapeau serves to ensure that Members' rights to avail themselves of exceptions are exercised in good faith to protect interests considered legitimate under Article XX, not as a means to circumvent one Member's obligations towards other WTO Members.\textsuperscript{574}

216. Having determined that the exemption from the Import Ban of remoulded tyres originating in MERCOSUR countries resulted in discrimination in the application of the Import Ban, the Panel examined whether this discrimination was arbitrary or unjustifiable. The Panel concluded that, as of the time of its examination, the operation of the MERCOSUR exemption had not resulted in the Import Ban being applied in a manner that would constitute "arbitrary or unjustifiable discrimination", within the meaning of the chapeau of Article XX.\textsuperscript{575} The Panel also found that the MERCOSUR exemption had not been shown "to date" to result in the Import Ban being applied in a manner that would constitute "a disguised restriction on international trade",

\textsuperscript{572}Panel Report, para. 7.215.
\textsuperscript{575}Panel Report, para. 7.289.
within the meaning of the chapeau of Article XX. The European Communities appeals these findings of the Panel.

1. The MERCOSUR Exemption and Arbitrary or Unjustifiable Discrimination

217. Regarding the issue of whether the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that would constitute "arbitrary or unjustifiable discrimination" between countries where the same conditions prevail, the Panel noted, first, that the health impact of remoulded tyres imported from MERCOSUR countries and their European counterparts can be expected to be comparable. The Panel also observed that it was only after a MERCOSUR tribunal found Brazil's ban on the importation of remoulded tyres to constitute a new restriction on trade prohibited under MERCOSUR that Brazil exempted remoulded tyres originating in MERCOSUR countries from the application of the Import Ban. For the Panel, the MERCOSUR exemption "does not seem to be motivated by capricious or unpredictable reasons [as it] was adopted further to a ruling within the framework of MERCOSUR, which has binding legal effects for Brazil, as a party to MERCOSUR." The Panel added that the discrimination arising from the MERCOSUR exemption was not "a priori unreasonable", because this discrimination arose in the context of an agreement of a type expressly recognized under Article XXIV of the GATT 1994 that "inherently provides for preferential treatment in favour of its members, thus leading to discrimination between those members and other countries."

218. The European Communities argued before the Panel that Brazil was at least partially responsible for the ruling that resulted in the MERCOSUR exemption because it did not defend itself in the MERCOSUR proceedings on grounds related to human health and safety. The Panel was not persuaded by this submission. Indeed, the Panel considered it would not be appropriate for it "to assess in detail the choice of arguments by Brazil in the MERCOSUR proceedings or to second-guess the outcome of the case in light of Brazil's litigation strategy in those proceedings."

219. For the Panel, the MERCOSUR ruling provided a reasonable basis to enact the MERCOSUR exemption, with the implication that the resulting discrimination is not arbitrary. The Panel indicated, however, that it was not suggesting that "the invocation of any international agreement would be sufficient under any circumstances, in order to justify the existence of discrimination in the application of a measure under the chapeau of Article XX."

576 Ibid., paras. 7.354 and 7.355.
577 Panel Report, para. 7.270.
578 Ibid., para. 7.271.
579 Ibid., para. 7.272.
580 Ibid., para. 7.273.
581 Article 50(d) of the Treaty of Montevideo provides for an exception similar to Article XX(b) of the GATT 1994. (See infra, footnote 613)
582 Panel Report, para. 7.276 and footnote 1451 thereto.
583 Ibid., para. 7.281.
584 Panel Report, para. 7.283. The Panel also considered that it was not contrary to the terms of Article XXIV:8(a) of the GATT 1994—which specifically excludes measures taken under Article XX from the requirement to liberalize "substantially all the trade" within a customs union—to take into account, as it did, "the fact that the MERCOSUR exemption was adopted as a result of Brazil's obligations under MERCOSUR." (Ibid., para. 7.284)
585 Ibid., para. 7.286.
exemption would constitute a means of unjustifiable discrimination.\textsuperscript{\textsuperscript{586}} However, as of the time of the Panel's examination, "volumes of imports of retreaded tyres under the exemption appear not to have been significant."\textsuperscript{\textsuperscript{587}} The Panel concluded that the MERCOSUR exemption has not resulted in the Import Ban being applied in a manner that would constitute arbitrary or unjustifiable discrimination.\textsuperscript{\textsuperscript{588}}

220. The European Communities claims that the Panel erred in its interpretation and application of the term "arbitrary or unjustifiable discrimination" in the chapeau of Article XX of the GATT 1994, and in finding that the MERCOSUR exemption does not constitute such discrimination. According to the European Communities, whether a measure involves arbitrary or unjustifiable discrimination can only be determined by taking into account the objective of the measure at issue, in this case, the protection of life and health from risks arising from mosquito-borne diseases and tyre fires. A measure will not be arbitrary if it "appears as reasonable, predictable and foreseeable"\textsuperscript{\textsuperscript{589}} in the light of this objective. It follows, according to the European Communities, that the Panel erred in finding that the MERCOSUR exemption did not constitute arbitrary discrimination because it was introduced in response to a ruling of a MERCOSUR arbitral tribunal. The MERCOSUR exemption does not further but may undermine the stated objective of the measure. For this reason, it must be regarded as "unreasonable, contradictory, and thus arbitrary"\textsuperscript{\textsuperscript{590}}. For the European Communities, allowing a Member's obligations under other international agreements to render discrimination consistent with the chapeau of Article XX would seriously undermine the effectiveness of the chapeau. The European Communities adds that, in any event, the MERCOSUR tribunal did not oblige Brazil to discriminate between its MERCOSUR partners and other WTO Members, and that Brazil could have implemented the ruling by lifting the Import Ban for all third countries.\textsuperscript{\textsuperscript{591}}

221. With respect to the Panel's finding that unjustifiable discrimination could arise if imports under the MERCOSUR exemption were to take place in such amounts that the achievement of the objective of the Import Ban would be significantly undermined\textsuperscript{\textsuperscript{592}}, the European Communities argues that the Panel applied a test that has no basis in the text of Article XX and no support in the case law of the Appellate Body or of previous panels. The European Communities also notes that "the level of imports in a given year may be subject to strong fluctuations, and for this reason ... is entirely inadequate for the purposes of assessing the compatibility of a measure with Article XX"\textsuperscript{\textsuperscript{593}}.

222. Brazil, for its part, supports the Panel's finding that the MERCOSUR exemption does not result in the Import Ban being applied in a manner that constitutes "arbitrary discrimination", contrary to the chapeau of Article XX. In addition, Brazil disputes the European Communities' argument that what constitutes "arbitrary discrimination" must be determined only in relation to the objective of the Import Ban. According to Brazil, the specific contents of the measure, including its policy objectives, must be examined under the exceptions listed in the paragraphs of Article XX. The chapeau of Article XX requires panels to examine whether the measure at issue is applied reasonably, in a manner that does not result in an abusive exercise of a Member's right.

\textsuperscript{\textsuperscript{586}Ibid., para. 7.287.}
\textsuperscript{\textsuperscript{587}Ibid., para. 7.288. The Panel noted that imports of retreaded tyres under the MERCOSUR exemption had increased tenfold since 2002, from 200 to 2,000 tons per year by 2004. For the Panel, "[t]hat figure remains much lower than the 14,000 tons per year imported from the European Communities alone prior to the imposition of the import ban." \textit{(Ibid. (referring to European Communities' first written submission to the Panel, para. 80))}
\textsuperscript{\textsuperscript{588}Ibid., para. 7.289.}
\textsuperscript{\textsuperscript{589}European Communities' appellant's submission, para. 321.}
\textsuperscript{\textsuperscript{590}Ibid., para. 323.}
\textsuperscript{\textsuperscript{591}European Communities' appellant's submission, para. 332.}
\textsuperscript{\textsuperscript{592}Panel Report, para. 7.287.}
\textsuperscript{\textsuperscript{593}European Communities' appellant's submission, para. 340.}
to pursue its policy objectives. Brazil adds, for the sake of argument, that the Panel in any event considered the objective of the Import Ban when it determined that, at the time of its examination, volumes of imports of retreaded tyres under the MERCOSUR exemption did not significantly undermine the objective of the Import Ban. Furthermore, according to Brazil, the Panel was correct in finding that the ruling of the MERCOSUR tribunal provided a rational basis for the adoption of the MERCOSUR exemption.

223. For Brazil, the operation of the MERCOSUR exemption has not resulted in the Import Ban being applied in a manner that would constitute "unjustifiable discrimination". The Panel determined how Brazil's policy objective of reducing to the maximum extent possible unnecessary generation of tyre waste was being affected by imports of retreaded tyres under the MERCOSUR exemption. The level of imports and their effect on the objective of the Import Ban were relevant, in particular, because the chapeau of Article XX focuses on the application of the measure at issue.

224. We begin our analysis by recalling that the function of the chapeau is the prevention of abuse of the exceptions specified in the paragraphs of Article XX.\footnote{Appellate Body Report, \textit{US – Gasoline}, p. 22, DSR 1996:I, 3, at 21.} In \textit{US – Shrimp}, the Appellate Body stated that "[t]he chapeau of Article XX is, in fact, but one expression of the principle of good faith."\footnote{Appellate Body Report, \textit{US – Shrimp}, para. 158.} The Appellate Body added that "[o]ne application of this general principle, the application widely known as the doctrine of \textit{abus de droit}, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right 'impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably."\footnote{\textit{Ibid.} (quoting B. Cheng, \textit{General Principles of Law as applied by International Courts and Tribunals} (Stevens and Sons, Ltd., 1953), chap. 4, at 125).} Accordingly, the task of interpreting and applying the chapeau is "the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement."\footnote{\textit{Ibid.}, para. 159.} The location of this line of equilibrium may move "as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ."\footnote{\textit{Ibid.}}

225. Analyzing whether discrimination is arbitrary or unjustifiable usually involves an analysis that relates primarily to the cause or the rationale of the discrimination. Thus, we observe that, in \textit{US – Gasoline}, the Appellate Body assessed the two explanations provided by the United States for the discrimination resulting from the application of the baseline establishment rules at issue.\footnote{The \textit{US – Gasoline} case involved a programme aiming to ensure that pollution from gasoline combustion did not exceed 1990 levels. Baselines for the year 1990 were set as a means for determining compliance with the programme requirements. These baselines could be either individual or statutory, depending on the nature of the entity concerned. Whereas individual baselines were available to domestic refiners, they were not to foreign refiners. The first explanation provided by the United States for such discrimination was the impracticability of verification and enforcement of individual baselines for foreign refiners. (Appellate Body Report, \textit{US – Gasoline}, pp. 25-26, DSR 1996:I, 3, at 23-24) Secondly, the United States explained that imposing the statutory baseline requirement on domestic refiners as well was not an option, because it was not feasible to require domestic refiners to incur the physical and financial costs and burdens entailed by immediate compliance with a statutory baseline. (\textit{Ibid.}, p. 28, DSR 1996:I, 3, at 26-27)} As it found them unsatisfactory, the Appellate Body concluded that the application of the baseline establishment rules resulted in arbitrary or unjustifiable discrimination.\footnote{\textit{Ibid.}, p. 29, DSR 1996:I, 3, at 27.} In \textit{US – Shrimp}, the Appellate Body relied on a number of factors in finding
that the measure at issue resulted in arbitrary or unjustifiable discrimination. The assessment of these factors by the Appellate Body was part of an analysis that was directed at the cause, or the rationale, of the discrimination. 601 US – Shrimp (Article 21.5 – Malaysia) concerned measures taken by the United States to implement recommendations and rulings of the DSB in US – Shrimp. The Appellate Body's analysis of these measures under the chapeau of Article XX focused on whether discrimination that might result from the application of those measures had a legitimate cause or rationale in the light of the objectives listed in the paragraphs of Article XX. 602

226. The Appellate Body Reports in US – Gasoline, US – Shrimp, and US – Shrimp (Article 21.5 – Malaysia) show that the analysis of whether the application of a measure results in arbitrary or unjustifiable discrimination should focus on the cause of the discrimination, or the rationale put forward to explain its existence. In this case, Brazil explained that it introduced the MERCOSUR exemption to comply with a ruling issued by a MERCOSUR arbitral tribunal. This ruling arose in the context of a challenge initiated by Uruguay against Brazil's import ban on remoulded tyres, on the grounds that it constituted a new restriction on trade prohibited under MERCOSUR. The MERCOSUR arbitral tribunal found Brazil's restrictions on the importation of remoulded tyres to be a violation of its obligations under MERCOSUR. These facts are undisputed.

227. We have to assess whether this explanation provided by Brazil is acceptable as a justification for discrimination between MERCOSUR countries and non-MERCOSUR countries in relation to retreaded tyres. In doing so, we are mindful of the function of the chapeau of Article XX, which is to prevent abuse of the exceptions specified in the paragraphs of that provision. 603 In our view, there is such an abuse, and, therefore, there is arbitrary or unjustifiable discrimination when a measure provisionally justified under a paragraph of Article XX is applied in a discriminatory manner "between countries where the same conditions prevail", and when the reasons given for this discrimination bear no rational connection to the objective falling within the purview of a paragraph of Article XX, or would go against that objective. The assessment of whether discrimination is arbitrary or unjustifiable should be made in the light of the objective of the measure. We note, for example, that one of the bases on which the Appellate Body relied in US – Shrimp for concluding that the operation of the measure at issue resulted in unjustifiable discrimination was that one particular aspect of the application of the measure (the measure implied that, in certain circumstances, shrimp caught abroad using methods identical to those employed in the United States would be excluded from the United States market) 604 was

601 These factors were: (i) the discrimination that resulted from a "rigid and unbending requirement" (Appellate Body Report, US – Shrimp, para. 177; see also para. 163) that countries exporting shrimp into the United States adopt a regulatory programme that is essentially the same as the United States' programme; (ii) the discrimination that resulted from the failure to take into account different conditions that may occur in the territories of other WTO Members, in particular, specific policies and measures other than those applied by the United States that might have been adopted by an exporting country for the protection and conservation of sea turtles (ibid., paras. 163 and 164); (iii) the discrimination that resulted from the application of the measure was "difficult to reconcile with the declared policy objective of protecting and conserving sea turtles" (ibid., para. 165), because, in some circumstances, shrimp caught abroad using methods identical to those employed in the United States would be excluded from the United States market; and (iv) the discrimination that resulted from the fact that, while the United States negotiated seriously with some WTO Members exporting shrimp into the United States for the purpose of concluding international agreements for the protection and conservation of sea turtles, it did not do so with other WTO Members (ibid., paras. 166 and 172).

602 Thus, the Appellate Body endorsed the panel's conclusion that conditioning market access on the adoption of a regulatory programme for the protection and conservation of sea turtles comparable in effectiveness—as opposed to the adoption of "essentially the same" regulatory programme—"allows for sufficient flexibility in the application of the measure so as to avoid 'arbitrary or unjustifiable discrimination". (Appellate Body Report, US – Shrimp (Article 21.5 – Malaysia), para. 144) The Appellate Body also considered that the measures adopted by the United States permitted a degree of flexibility that would enable the United States to consider the particular conditions prevailing in Malaysia, notably because it provides that, in making certification determinations, the United States authorities "shall also take fully into account other measures the harvesting nation undertakes to protect sea turtles". (Ibid., para. 147)


"difficult to reconcile with the declared objective of protecting and conserving sea turtles." Accordingly, we have difficulty understanding how discrimination might be viewed as complying with the chapeau of Article XX when the alleged rationale for discriminating does not relate to the pursuit of or would go against the objective that was provisionally found to justify a measure under a paragraph of Article XX.

228. In this case, the discrimination between MERCOSUR countries and other WTO Members in the application of the Import Ban was introduced as a consequence of a ruling by a MERCOSUR tribunal. The tribunal found against Brazil because the restriction on imports of remoulded tyres was inconsistent with the prohibition of new trade restrictions under MERCOSUR law. In our view, the ruling issued by the MERCOSUR arbitral tribunal is not an acceptable rationale for the discrimination, because it bears no relationship to the legitimate objective pursued by the Import Ban that falls within the purview of Article XX(b), and even goes against this objective, to however small a degree. Accordingly, we are of the view that the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination.

229. The Panel considered that the MERCOSUR exemption resulted in discrimination between MERCOSUR countries and other WTO Members, but that this discrimination would be "unjustifiable" only if imports of retreaded tyres entering into Brazil "were to take place in such amounts that the achievement of the objective of the measure at issue would be significantly undermined". The Panel's interpretation implies that the determination of whether discrimination is unjustifiable depends on the quantitative impact of this discrimination on the achievement of the objective of the measure at issue. As we indicated above, analyzing whether discrimination is "unjustifiable" will usually involve an analysis that relates primarily to the cause or the rationale of the discrimination. By contrast, the Panel's interpretation of the term "unjustifiable" does not depend on the cause or rationale of the discrimination but, rather, is focused exclusively on the assessment of the effects of the discrimination. The Panel's approach has no support in the text of Article XX and appears to us inconsistent with the manner the Appellate Body has interpreted and applied the concept of "arbitrary or unjustifiable discrimination" in previous cases.

230. Having said that, we recognize that in certain cases the effects of the discrimination may be a relevant factor, among others, for determining whether the cause or rationale of the discrimination is acceptable or defensible and, ultimately, whether the discrimination is justifiable. The effects of discrimination might be relevant, depending on the circumstances of the case, because, as we indicated above, the chapeau of Article XX deals with the manner of application of the measure at issue. Taking into account as a relevant factor, among others, the effects of the discrimination for determining whether the rationale of the discrimination is acceptable is, however, fundamentally different from the Panel's approach, which focused exclusively on the relationship between the effects of the discrimination and its justifiable or unjustifiable character.

605Ibid.
606Panel Report, para. 7.287.
607See supra, paras. 0 and 0. We also observe that the Panel's approach was based on a logic that is different in nature from that followed by the Appellate Body when it addressed the national treatment principle under Article III:4 of the GATT 1994 in Japan – Alcoholic Beverages II. In that case, the Appellate Body stated that Article III aims to ensure "equality of competitive conditions for imported products in relation to domestic products." (Appellate Body Report, Japan – Alcoholic Beverages II, p. 16, DSR 1996:1, 97, at 109) The Appellate Body added that "it is irrelevant that 'the trade effects' of the [measure at issue], as reflected in the volumes of imports, are insignificant or even non-existent". (Ibid., at 110) For the Appellate Body, "Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products." (Ibid. (footnote omitted))
608Supra, para. 0.
231. We also note that the Panel found that the discrimination resulting from the MERCOSUR exemption is not arbitrary. The Panel explained that this discrimination cannot be said to be "capricious" or "random" because it was adopted further to a ruling within the framework of MERCOSUR.  

232. Like the Panel, we believe that Brazil's decision to act in order to comply with the MERCOSUR ruling cannot be viewed as "capricious" or "random". Acts implementing a decision of a judicial or quasi-judicial body—such as the MERCOSUR arbitral tribunal—can hardly be characterized as a decision that is "capricious" or "random". However, discrimination can result from a rational decision or behaviour, and still be "arbitrary or unjustifiable", because it is explained by a rationale that bears no relationship to the objective of a measure provisionally justified under one of the paragraphs of Article XX, or goes against that objective.

233. Accordingly, we find that the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination. Furthermore, we reverse the Panel's finding, in paragraph 7.287 of the Panel Report, that, under the chapeau of Article XX of the GATT 1994, discrimination would be unjustifiable only if imports of retreaded tyres entering into Brazil "were to take place in such amounts that the achievement of the objective of the measure at issue would be significantly undermined". We therefore reverse the Panel's findings, in paragraphs 7.288 and 7.289 of the Panel Report, that the MERCOSUR exemption has not resulted in unjustifiable discrimination. We also reverse the Panel's findings, in paragraphs 7.281 and 7.289 of the Panel Report, that, to the extent that the MERCOSUR exemption is not the result of "capricious" or "random" action, the Import Ban is not applied in a manner that would constitute arbitrary discrimination.

234. This being said, we observe, like the Panel, that, before 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. 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.

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609Panel Report, para. 7.281.
610Ibid., para. 7.272.
611See supra paras. 0 and 0.
612Panel Report, paras. 7.275 and 7.276.
613Treaty 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;

614See Panel Report, para. 7.275.
615In addition, we note that Article XXIV:8(a) of the GATT 1994 exempts, where necessary, measures permitted under Article XX from the obligation to eliminate "duties and other restrictive regulations of commerce" with respect to "substantially all the trade" within a customs union. Therefore, if we assume, for the sake of argument, that MERCOSUR is consistent with Article XXIV and that the Import Ban meets the requirements of Article XX, this measure, where necessary, could be exempted by virtue of Article XXIV:8(a) from the obligation to eliminate other restrictive regulations of commerce within a customs union.
2. The MERCOSUR Exemption and Disguised Restriction on International Trade

235. The European Communities also challenges the Panel's conclusion that the MERCOSUR exemption had not been shown to date to result in the Import Ban being applied in a manner that would constitute "a disguised restriction on international trade". 616

236. When examining whether the Import Ban was applied in a manner that constitutes a disguised restriction on international trade, the Panel was not persuaded by the European Communities' contention that Brazil adopted the prohibition on the importation of retreaded tyres as "a disguise to conceal the pursuit of trade-restrictive objectives". 617 The Panel recalled that Brazil bans both used and retreaded tyre imports; for the Panel, such an approach "is consistent with Brazil's declared objective of reducing to the greatest extent possible the unnecessary accumulation of short-lifespan tyres", and "in principle deprives Brazilian retreaders of the opportunity to source casings from abroad". 619

237. The Panel went on to examine more specifically the European Communities' argument that "the MERCOSUR exemption results in the application of the measure in a manner that constitutes a disguised restriction on international trade, as it alters trade flows in a manner that benefits, in addition to Brazilian retreaders, retreaders from other MERCOSUR countries." 620 The Panel recalled that, under this exemption, "it is quite possible for retreaders from MERCOSUR countries benefiting from the exemption to source casings from abroad (for example from the European Communities), retread them locally, and then export the retreaded tyres to Brazil under the MERCOSUR exemption." 621 The Panel referred to the reasoning that it had developed with respect to arbitrary or unjustifiable discrimination and considered that, if imports from MERCOSUR countries were to occur in significant amounts, the Import Ban would be applied in a manner that constitutes a disguised restriction on international trade. 622 The Panel was however of the view that, as of the time of its examination, "the volume of imports of remoulded tyres that has actually taken place under the MERCOSUR exemption has not been significant." 623

238. On appeal, the European Communities does not challenge the Panel's conclusion that the Import Ban was adopted with the intention of protecting public health and the environment. Its appeal is, instead, limited to the specific findings made by the Panel in relation to the MERCOSUR exemption 624 and the imports of used tyres through court injunctions. 625 For the European Communities, the Panel addressed this question with a reasoning almost identical to that it had developed in respect of the existence of arbitrary or unjustifiable discrimination. 626 Therefore, the European Communities reasons, if the Panel's approach concerning arbitrary or unjustifiable discrimination is not endorsed by the Appellate Body, the Panel's finding that the MERCOSUR exemption has not been shown to date to result in a disguised restriction on

616Panel Report, para. 7.355.
618Ibid., para. 7.343.
619Ibid., para. 7.352. (footnote omitted)
620Ibid., para. 7.350.
621Ibid., para. 7.352. (footnote omitted)
622Ibid., para. 7.353.
623Ibid., para. 7.354. (footnote omitted) See also supra, footnote 587.
625Ibid., paras. 7.347-7.349 and 7.355. We examine this aspect of the European Communities' appeal in Section VI.B.2 of this Report.
626European Communities' appellant's submission, para. 366.
international trade should also be reversed. In response to questioning at the oral hearing, the European Communities confirmed that its claim in this regard is based on the same arguments it put forward in relation to arbitrary or unjustifiable discrimination.

239. We agree with the European Communities' observation that the reasoning developed by the Panel to reach the challenged conclusion was the same as that made in respect of arbitrary or unjustifiable discrimination. Indeed, the Panel conditioned a finding of a disguised restriction on international trade on the existence of significant imports of retreaded tyres that would undermine the achievement of the objective of the Import Ban. We explained above why we believe that the Panel erred in finding that the MERCOSUR exemption would result in arbitrary or unjustifiable discrimination only if the imports of retreaded tyres from MERCOSUR countries were to take place in such amounts that the achievement of the objective of the Import Ban would be significantly undermined. As the Panel's conclusion that the MERCOSUR exemption has not resulted in a disguised restriction on international trade was based on an interpretation that we have reversed, this finding cannot stand. Therefore, we also reverse the Panel's findings, in paragraphs 7.354 and 7.355 of the Panel Report, that "the MERCOSUR exemption ... has not been shown to date to result in the [Import Ban] being applied in a manner that would constitute ... a disguised restriction on international trade."

B. Imports of Used Tyres through Court Injunctions and the Chapeau of Article XX of the GATT 1994

1. Imports of Used Tyres through Court Injunctions and Arbitrary or Unjustifiable Discrimination

240. The European Communities submits that the Panel erred in its analysis of the imports of used tyres through court injunctions under the chapeau of Article XX of the GATT 1994. We begin our analysis with the requirement in the chapeau of Article XX that the measure at issue not be applied in a manner that would result in "arbitrary or unjustifiable discrimination".

241. The Panel determined that the imports of used tyres through court injunctions resulted in discrimination in favour of domestic retreaders. This is because these imports enabled retreaded tyres to be produced in Brazil from imported casings, while retreaded tyres produced abroad using the same casings could not be imported. Having done so, the Panel went on to examine whether this discrimination is arbitrary or unjustifiable.

242. The Panel noted that the importation of used tyres into Brazil is prohibited, and that "used tyres have been imported into Brazil in recent years only as a result of injunctions granted by Brazilian courts in specific cases." The Panel found that the discrimination resulting from the imports of used tyres through court injunctions was not the consequence of a "capricious" or "random" action, and that, to this extent, the Import Ban was not applied in a manner that would constitute arbitrary discrimination.

627 Ibid., paras. 367 and 368.
628 Supra, Section VI.A.1.
629 Panel Report, para. 7.243.
630 Ibid., para. 7.292. (footnote omitted) The Panel also observed that Brazil has challenged these injunctions "with a certain degree of success". (Ibid.) For the Panel, the imports of used tyres were "the result of successful court challenges", and found their basis "in the customs authorities' need to give effect to judicial orders". (Ibid.) The Panel added that nothing in the evidence suggested that the decisions of the Brazilian courts granting those injunctions were capricious or unpredictable, nor does "the decision of the Brazilian administrative authorities to comply with the preliminary injunctions ... seem irrational or unpredictable". (Ibid., para. 7.293)
631 Ibid., para. 7.294.
243. The Panel recalled, however, that the contribution of the Import Ban to the achievement of its objective "is premised on imports of used tyres being prohibited". 632 For the Panel, the granting of injunctions allowing used tyres to be imported "runs directly counter to this premise, as it effectively allows the very used tyres that are prevented from entering into Brazil after retreading to be imported before retreading." 633 The Panel examined the volumes of imports of used tyres that have taken place under the court injunctions. For the Panel, the amounts of imports of used tyres that have actually taken place under the court injunctions were significant. 634 Accordingly, the Panel found that, "since used tyre imports have been taking place under the court injunctions in such amounts that the achievement of Brazil's declared objective is being significantly undermined, the measure at issue is being applied in a manner that constitutes a means of unjustifiable discrimination." 635

244. For the European Communities, the Panel erred in finding that the imports of used tyres through court injunctions do not result in arbitrary discrimination, given that "[w]hat is arbitrary must be decided in the light of the stated objectives of the measure". 636 Because, from the point of view of the protection of human life or health, there is no difference between, on the one hand, a retreaded tyre produced in the European Communities and, on the other hand, a retreaded tyre produced in Brazil from a casing imported from the European Communities, prohibiting imported retreaded tyres while allowing the importation of used tyres through court injunctions must be regarded as constituting arbitrary discrimination. 637 Furthermore, the European Communities maintains that, as regards the issue of whether court injunctions constitute unjustifiable discrimination, the Panel adopted the same erroneous quantitative approach as it did when discussing the MERCOSUR exemption. 638 The European Communities adds that the Panel's approach engenders uncertainty for the implementation of the Panel Report, because the Panel did not identify "the threshold below which the imports of used tyres would no longer be significant". 639

245. Brazil submits that the Panel did not err in the analytical approach it adopted to determine whether imports of used tyres under court injunctions resulted in the Import Ban being applied in a manner that constituted "arbitrary or unjustifiable discrimination" under the chapeau of Article XX. For Brazil, it was appropriate for the Panel to consider the level of imports of used tyres in its determination. Brazil thus dismisses the European Communities' argument that the Panel's approach engenders uncertainty for the implementation of the Panel Report, and stresses that the monitoring of a WTO Member's compliance is an integral part of the dispute settlement system.

246. As we explained above, the analysis of whether the application of a measure results in arbitrary or unjustifiable discrimination should focus on the cause or rationale given for the discrimination. 640 For Brazil, the fact that Brazilian retreaders are able to use imported casings is the result of the decisions of the Brazilian administrative authorities to comply with court injunctions. 641 We observe that this explanation bears no relationship to the objective of the

632 Ibid., para. 7.295.
633 Ibid. (original emphasis)
634 Panel Report, paras. 7.297 and 7.303. In particular, the Panel noted that, in 2005, Brazil imported approximately 10.5 million used tyres, compared to 1.4 million in 2000, the year in which the ban on imports of used and retreaded tyres was first enacted (Portaria SECEX 8/2000). The Panel also observed that the total number of retreaded tyres imported annually to Brazil, from all sources, was 2-3 million prior to the Import Ban. Thus, according to the Panel, in 2005, the imports of used tyres were approximately three times the amount of retreaded and used tyres combined that were imported annually prior to the Import Ban. (Ibid., paras. 7.301 and 7.302) 635 Ibid., para. 7.306.
636 European Communities' appellant's submission, para. 357.
637 Ibid.
638 Ibid., para. 360.
639 Ibid., para. 363.
640 Supra, Section VI.A.1.
641 See Panel Report, paras. 7.292 and 7.293; see also Brazil's appellee's submission, para. 245.
Import Ban—reducing exposure to the risks arising from the accumulation of waste tyres to the maximum extent possible. The imports of used tyres through court injunctions even go against the objective pursued by the Import Ban. As we indicated above, there is arbitrary or unjustifiable discrimination, within the meaning of the chapeau of Article XX, when a Member seeks to justify the discrimination resulting from the application of its measure by a rationale that bears no relationship to the accomplishment of the objective that falls within the purview of one of the paragraphs of Article XX, or goes against this objective. Accordingly, we find that the imports of used tyres through court injunctions have resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination.

247. The Panel approached the question of whether the imports of used tyres through court injunctions result in unjustifiable discrimination in the same manner as it did with the MERCOSUR exemption. We explained above why we are of the view that this quantitative approach—according to which discrimination would be characterized as unjustifiable only if imports under the MERCOSUR exemption take place in such amounts that the achievement of the objective of the measure at issue would be "significantly undermined"—is flawed. Accordingly, we reverse the Panel's findings, in paragraphs 7.296 and 7.306 of the Panel Report, that the imports of used tyres through court injunctions have resulted in the Import Ban being applied in a manner that constitutes unjustifiable discrimination only to the extent that such imports have taken place in volumes that significantly undermine the achievement of the objective of the Import Ban. Furthermore, for the same reasons as those explained in paragraph 0, we reverse the Panel's finding, in paragraph 7.294 of the Panel Report, that the imports of used tyres under court injunctions have not resulted in arbitrary discrimination to the extent that such imports are not the result of "capricious" or "random" action.

2. Imports of Used Tyres and Disguised Restriction on International Trade

248. The Panel found that, "since imports of used tyres take place in significant amounts under court injunctions to the benefit of the domestic retreading industry, the [Import Ban] is being applied in a manner that constitutes a disguised restriction on international trade." The Panel reasoned that the restriction on international trade inherent in the Import Ban has operated to the benefit of domestic retreaders, because "[t]he granting of court injunctions for the importation of used tyres has ... in effect meant that ... domestic retreaders have been able to continue to benefit from the importation of used tyres as material for their own activity in significant amounts, while their competitors from non-MERCOSUR countries have been kept out of the Brazilian market."

249. The European Communities submits that the Panel erred in finding that the imports of used tyres through court injunctions would have resulted in the Import Ban being applied in a manner that constitutes a disguised restriction on international trade only to the extent that these imports are taking place in such quantities that they significantly undermine the objective of the Import Ban. The European Communities refers to the arguments it made regarding the existence of arbitrary or unjustifiable discrimination, and reiterates its view that the Panel's
reliance on import volumes for the purpose of determining compatibility with the chapeau of Article XX of the GATT 1994 is erroneous.647

250. Brazil argues that the Panel correctly considered the volume of imports of used tyres as part of its determination that the Import Ban was being applied in a manner that constituted a disguised restriction on international trade, and refers to the arguments that it made before the Panel in support of this position.

251. The reasoning elaborated by the Panel to reach the challenged finding was the same as that it developed in respect of "arbitrary or unjustifiable discrimination". Indeed, the Panel conditioned a finding of a disguised restriction on international trade on the existence of imports of used tyres in amounts that would significantly undermine the achievement of the objective of the Import Ban. We explained above why we consider this reasoning of the Panel erroneous. As the challenged finding results from the same reasoning that we have found to be erroneous and have rejected, this finding of the Panel cannot stand. Accordingly, we reverse the Panel's finding, in paragraph 7.349 of the Panel Report, that the imports of used tyres through court injunctions have resulted in the Import Ban being applied in a manner that constitutes a disguised restriction on international trade only to the extent that these imports are taking place in such quantities that they significantly undermine the objective of the Import Ban.

252. We found that the MERCOSUR exemption and the imports of used tyres under court injunctions have resulted in the Import Ban being applied in a manner that is inconsistent with the chapeau of Article XX of the GATT 1994. In the light of these findings, we uphold, albeit for different reasons, the Panel's findings, in paragraphs 7.357 and 8.1(a)(i) and (ii) of the Panel Report, that the Import Ban, found by the Panel to be inconsistent with Article XI:1 of the GATT 1994, is not justified under Article XX of the GATT 1994.

VII. The European Communities' Claims that the MERCOSUR Exemption Is Inconsistent with Article I:1 and Article XIII:1 of the GATT 1994

253. Before the Panel, the European Communities made separate claims regarding the MERCOSUR exemption, namely, that the MERCOSUR exemption was inconsistent with Article I:1 and Article XIII:1 of the GATT 1994. Brazil did not contest that the MERCOSUR exemption was prima facie inconsistent with Articles I:1 and XIII:1, but claimed that it was justified under Articles XX(d) and XXIV of the GATT 1994.

254. After noting that the MERCOSUR exemption and the Import Ban have the same legal basis, namely, Article 40 of Portaria SECEX 14/2004 648, the Panel emphasized that, under Article 11 of the DSU, "it was required to address only those issues that are necessary for the resolution of the matter between the parties."649 The Panel recalled its earlier findings that the Import Ban was inconsistent with Article XI:1 and not justified under Article XX(b). It then decided to exercise judicial economy in respect of the European Communities' separate claims that the MERCOSUR exemption was inconsistent with Article I:1 and Article XIII:1, and not justified under Articles XX(d) or Article XXIV of the GATT 1994. According to the Panel, the MERCOSUR exemption derives from and exists only in relation to the Import Ban. The Panel reasoned that, as it had already found that the Import Ban was inconsistent with the requirements

647European Communities' appellant's submission, para. 367.
648See Panel Report, para. 7.453.
of the GATT 1994, it was unnecessary to examine the European Communities' separate claims regarding the MERCOSUR exemption.650

255. On appeal, the European Communities requests that we reverse the Panel's decision to exercise judicial economy in relation to its separate claims regarding the MERCOSUR exemption. The European Communities also requests us to complete the legal analysis and find that the MERCOSUR exemption is inconsistent with Articles I:1 and XIII:1, and not justified under Article XX(d) or Article XXIV of the GATT 1994. This request, however, is conditioned upon our upholding the Panel's finding that the MERCOSUR exemption does not result in the Import Ban being applied inconsistently with the requirements of the chapeau of Article XX.

256. As we have found that the MERCOSUR exemption results in the Import Ban being applied inconsistently with the chapeau of Article XX, the condition on which the European Communities' request is predicated has not been fulfilled. It is therefore not necessary for us to rule on the European Communities' conditional appeal. Accordingly, we do not examine the European Communities' conditional appeal and make no finding in relation to its separate claims that the MERCOSUR exemption is inconsistent with Article I:1 and Article XIII:1 of the GATT 1994, and not justified under Article XX(d) or Article XXIV of the GATT 1994.

257. Having said that, we observe that it might have been appropriate for the Panel to address the European Communities' separate claims that the MERCOSUR exemption was inconsistent with Article I:1 and Article XIII:1. We have previously indicated that the principle of judicial economy "allows a panel to refrain from making multiple findings that the same measure is inconsistent with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute"651, and it seems that the Panel assumed this to be the case in the present dispute. However, the Panel found that the MERCOSUR exemption resulted in the Import Ban being applied consistently with the requirements of the chapeau of Article XX. In view of this finding, we must acknowledge that we have difficulty seeing how the Panel could have been justified in not addressing the separate claims of inconsistency under Article I:1 and Article XIII:1 directed at the MERCOSUR exemption. We emphasize that panels must be mindful, when applying the principle of judicial economy, that the aim of the dispute settlement mechanism under Article 3.7 of the DSU is to secure a positive solution to the dispute. Therefore, a panel's discretion to decline to rule on different claims of inconsistency adduced in relation to the same measure is limited by its duty to make findings that will allow the DSB to make sufficiently precise recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members.'652

VIII. Findings and Conclusions

258. For the reasons set out in this Report, the Appellate Body:

(a) with respect to the analysis of the necessity of the Import Ban under Article XX(b) of the GATT 1994:

(i) upholds the Panel's finding, in paragraph 7.215 of the Panel Report, that the Import Ban can be considered "necessary" within the meaning of Article XX(b) and is thus provisionally justified under that provision; and

650Ibid., para. 7.455.
652Appellate Body Report, Australia – Salmon, para. 223.
(ii) finds that the Panel did not breach its duty under Article 11 of the DSU to make an objective assessment of the facts;

(b) with respect to the analysis under the chapeau of Article XX of the GATT 1994:

(i) reverses the Panel's findings, in paragraphs 7.287, 7.354, and 7.355 of the Panel Report, that the MERCOSUR exemption would result in the Import Ban being applied in a manner that constitutes unjustifiable discrimination and a disguised restriction on international trade only to the extent that it results in volumes of imports of retreaded tyres that would significantly undermine the achievement of the objective of the Import Ban;

(ii) reverses the Panel's findings, in paragraphs 7.281 and 7.289 of the Panel Report, that the MERCOSUR exemption has not resulted in arbitrary discrimination; also reverses the Panel's findings, in paragraphs 7.288 and 7.289 of the Panel Report, that the MERCOSUR exemption has not resulted in unjustifiable discrimination; and finds, instead, that the MERCOSUR exemption 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;

(iii) reverses the Panel's findings, in paragraphs 7.296, 7.306, 7.349, and 7.355 of the Panel Report, that the imports of used tyres under court injunctions have resulted in the Import Ban being applied in a manner that constitutes unjustifiable discrimination and a disguised restriction on international trade only to the extent that such imports have taken place in volumes that significantly undermine the achievement of the objective of the Import Ban;

(iv) reverses the Panel's finding, in paragraph 7.294 of the Panel Report, that the imports of used tyres under court injunctions have not resulted in arbitrary discrimination; and finds, instead, that the imports of used tyres under court injunctions have 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; and

(c) with respect to Article XX of the GATT 1994, upholds, albeit for different reasons, the Panel's findings, in paragraphs 7.357 and 8.1(a)(i) and (ii) of the Panel Report, that the Import Ban is not justified under Article XX of the GATT 1994; and

(d) with respect to the European Communities' claims that the MERCOSUR exemption is inconsistent with Article I:1 and Article XIII:1 of the GATT 1994, finds that the condition on which the European Communities' appeal is predicated is not satisfied, and therefore does not consider it.

259. The Appellate Body recommends that the DSB request Brazil to bring its measure, found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the GATT 1994, into conformity with its obligations under that Agreement.
Annex

The following paragraphs are the paragraphs from the Appellate Body report that contain the arguments of the Participants and the United States that relate to the European Communities’ conditional appeal concerning the Panel’s decision to exercise judicial economy with respect to the claim that the MERCOSUR exemption is inconsistent with Articles I:1 and XIII:1 of the GATT 1994.

II. Arguments of the Participants and the Third Participants

A. Claims of Error by the European Communities -- Appellant

[...]

3. Conditional Appeal

44. Should the Appellate Body not find, as requested by the European Communities, that the MERCOSUR exemption results in the Import Ban being applied inconsistently with the chapeau of Article XX, then the European Communities conditionally appeals the Panel's decision to exercise judicial economy with respect to its separate claims that the MERCOSUR exemption is inconsistent with Articles I:1 and XIII:1 of the GATT 1994. In such circumstances, the European Communities requests the Appellate Body to reverse the Panel's decision to exercise judicial economy with respect to these claims and to complete the legal analysis and find that the MERCOSUR exemption is inconsistent with Articles I:1 and XIII:1, and not justified under Articles XX(d) and XXIV of the GATT 1994.

(a) The Panel's Exercise of Judicial Economy

45. The European Communities submits that, in declining to rule on the European Communities' claims under Articles I.1 and XIII:1 of the GATT 1994, the Panel exercised "false judicial economy" and did not provide a positive resolution to the dispute as required by Articles 3.3, 3.4, and 3.7 of the DSU. In the light of the Panel's finding that the Import Ban was inconsistent with the chapeau of Article XX only to the extent that imports of used tyres were occurring in amounts that significantly undermined the objective of the Import Ban, Brazil was under no obligation to remove the MERCOSUR exemption per se. Therefore, the Panel should have addressed the European Communities' claims that the MERCOSUR exemption per se is incompatible with Articles I:1 and XIII:1.

(b) Completing the Legal Analysis

46. The European Communities submits that there are sufficient factual findings of the Panel and uncontested facts on record for the Appellate Body to complete the legal analysis and find

653European Communities' appellant's submission, para. 375.
that the MERCOSUR exemption is incompatible with Articles I:1 and XIII:1, and is not justified under Articles XX(d) and XXIV of the GATT 1994. The European Communities recalls that Brazil did not contest that the MERCOSUR exemption constitutes a violation of Articles I:1 and XIII:1. Therefore, the only question to be addressed by the Appellate Body is whether this measure can be justified under Articles XX(d) and XXIV.

(c) The MERCOSUR Exemption and Article XXIV of the GATT 1994

47. The European Communities argues that the MERCOSUR exemption is not justified under Article XXIV of the GATT 1994, because it does not satisfy the two conditions identified by the Appellate Body in its Report in Turkey – Textiles. First, Brazil failed to demonstrate that MERCOSUR complies with the conditions of Article XXIV:8(a) and 5(a) of the GATT 1994. As explained extensively in the European Communities' submissions to the Panel, Brazil failed to demonstrate that MERCOSUR has achieved a liberalization of "substantially all" the trade within MERCOSUR, as required by Article XXIV:8(a)(i). The European Communities contends that trade in the automotive and sugar sectors has not been entirely liberalized within MERCOSUR, and highlights that "the automotive sector alone accounts for approximately 29%" of trade within MERCOSUR. In addition, according to the European Communities, exceptions to MERCOSUR's common external tariff "currently concern up to 10% of the tariff lines" applicable to external trade, and individual MERCOSUR countries "maintain export duties and 'other regulations of commerce' on trade with third countries that are not common to all Mercosur countries."

48. The European Communities adds that Brazil failed to demonstrate that MERCOSUR complies with the requirement in Article XXIV:5(a) of the GATT 1994 that duties and other restrictive regulations of commerce are not to be on the whole more restrictive than the general incidence of these measures prior to the creation of MERCOSUR, in particular, as regards non-tariff measures. Indeed, emphasizes the European Communities, the measure at issue in this dispute illustrates that MERCOSUR countries continue to adopt such non-tariff measures.

49. Secondly, the European Communities maintains that Brazil has not shown that the MERCOSUR exemption was necessary for the formation of MERCOSUR. Nothing in the reasoning of the Appellate Body Report inTurkey – Textiles suggests that this condition would not apply to cases such as this one where a restriction is first imposed on all goods, and then subsequently removed only for goods originating in the customs union. Moreover, the European Communities considers that "Article XXIV would be turned into an almost limitless exception, which would allow parties to a customs union to take any measure derogating from WTO obligations" if WTO Members were not required to demonstrate that the measure was necessary for the formation of the customs union in question.

50. The European Communities submits that the MERCOSUR exemption was not necessary for the formation of MERCOSUR. Article XXIV:8(a)(i) explicitly exempts measures consistent with Article XX from the requirement to eliminate barriers to trade with respect to substantially all the trade between the constituent members of a customs union. For this reason, it follows that

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654 European Communities' appellant's submission, para. 381 (referring to Appellate Body Report, Turkey – Textiles, para. 58).
655 Ibid., para. 383.
656 Ibid.
657 Ibid., para. 384 (referring to Committee on Trade and Development, "Examination of the Southern Common Market (MERCOSUR) Agreement", WT/COMTD/1/Add.17, 9 June 2006 (Exhibit EC-121 submitted by the European Communities to the Panel), p. 2).
658 Ibid.
659 European Communities' appellant's submission, para. 392.
Article XX cannot be invoked in order to justify the selective elimination of such trade barriers only with respect to trade within the customs union or free trade area. Nor can the MERCOSUR exemption be characterized as necessary for the formation of MERCOSUR because it was adopted several years after the conclusion of MERCOSUR.

(d) The MERCOSUR Exemption and Article XX(d) of the GATT 1994

51. The European Communities submits that the MERCOSUR exemption is also not justified under Article XX(d) of the GATT 1994. The Appellate Body found, in Mexico – Taxes on Soft Drinks, that the term "laws and regulations" in Article XX(d) covered "rules that form part of the domestic legal system of a WTO Member, including rules deriving from international agreements that have been incorporated into the domestic legal system of a WTO Member". However, Brazil has not demonstrated that the obligation to comply with rulings of the MERCOSUR arbitral tribunals has been incorporated into the Brazilian legal system. The European Communities suggests further that the term "securing compliance" in Article XX(d) does not mean simply "complying". Instead, "securing compliance" refers to enforcement measures where compliance is achieved by persons other than the entity "securing" the compliance. Thus, Article XX(d) does not cover Brazil's adoption of the MERCOSUR exemption. Furthermore, the MERCOSUR exemption is not "necessary" within the meaning of Article XX(d) because Brazil could have complied with the ruling of the MERCOSUR arbitral tribunal by lifting the Import Ban with respect to all third countries, rather than only its MERCOSUR partners. Finally, the European Communities submits that the MERCOSUR exemption does not fulfil the requirements of the chapeau of Article XX, because it constitutes unjustifiable and arbitrary discrimination between countries where the same conditions prevail, in particular, given that, by virtue of it, Brazil allows the imports of retreaded tyres from MERCOSUR countries even when those tyres are made from used tyres originating in the European Communities.

B. Arguments of Brazil – Appellee

[...]

3. The European Communities' Conditional Appeal

(a) The Panel's Exercise of Judicial Economy

74. Brazil considers that the Panel was justified in deciding to exercise judicial economy with respect to the European Communities' separate claims that the MERCOSUR exemption was inconsistent with Articles I:1 and XIII:1 and not justified under Articles XX(d) and XXIV of the GATT 1994. In the light of the Panel's finding that the Import Ban was inconsistent with Article XI:1 of the GATT 1994, a separate finding in relation to an exemption to the Import Ban was not necessary to secure a positive resolution of the dispute. The MERCOSUR exemption could not exist in the absence of the Import Ban, which had previously been found to be inconsistent with the GATT 1994. The allegedly limited basis for the Panel's finding of inconsistency under Article XI:1 is not relevant, because Article 3.7 of the DSU "does not distinguish between different degrees of solutions". Brazil also distinguishes the facts of this case from those in EC – Export Subsidies on Sugar, on the basis that "the remedies under the GATT and the DSU for a violation of Article XI (found by the Panel) are no different from the

661Ibid., para. 268. (original emphasis)
remedies for a violation of Article XIII or I." Furthermore, the very condition on which the European Communities appeals the Panel's exercise of judicial economy contradicts its contention that separate rulings under Article I:1 and Article XIII:1 were necessary. According to Brazil, by conditioning its appeal on a finding by the Appellate Body that the MERCOSUR exemption does not result in the Import Ban being applied inconsistently with Article XX, the European Communities is implicitly recognizing that a finding that the Import Ban is not justified under Article XX renders unnecessary findings on its separate claims under Articles I:1 and XIII:1.

(b) Completing the Legal Analysis

75. In the event the Appellate Body were to reverse the Panel's decision to exercise judicial economy, Brazil submits that the Appellate Body does not have a sufficient basis on which to complete the analysis of the European Communities' claims that the MERCOSUR exemption is inconsistent with Articles I:1 and XIII:1, and with respect to Brazil's related defences under Articles XXIV and XX(d) of the GATT 1994. There are neither undisputed facts nor factual findings by the Panel concerning the consistency of MERCOSUR with Article XXIV:5(a) and 8(a) of the GATT 1994 or the justification of the MERCOSUR exemption under Article XX(d). Brazil specifically contests, as it did before the Panel, assertions made by the European Communities regarding intra-MERCOSUR liberalization of the automotive and sugar sectors, as well as with respect to alleged exceptions to the common external tariff. In addition, the European Communities' claims under Articles XIII:1 and I:1, and Brazil's related defence under Article XXIV, are not suitable for completion of the analysis, because they are not closely related to the provisions examined by the Panel, and because they involve novel legal issues that have not been explored in depth by the parties. Brazil cites as examples of such unexplored issues the questions of what constitutes "substantially all the trade" under Article XXIV:8(a)(i) and what constitutes "substantially the same duties and other regulations of commerce" under Article XXIV:8(a)(ii).

(c) The MERCOSUR Exemption and Article XXIV of the GATT 1994

76. In the event the Appellate Body considers it can complete the analysis with respect to the separate claims made by the European Communities in relation to the MERCOSUR exemption, Brazil submits that this measure is justified under Article XXIV of the GATT 1994.

77. Brazil argues that it submitted sufficient evidence before the Panel to make a prima facie case that MERCOSUR meets the requirements of Article XXIV:5(a) and 8(a). In particular, Brazil submitted the results of calculations made by the Secretariat for MERCOSUR and the WTO Secretariat showing that the duties and other regulations of commerce applied at the time of MERCOSUR's formation (1995), and in 2006, were not "on the whole" higher or more restrictive than those applied prior to its formation. Brazil further suggests there is evidence on record demonstrating that "substantially all the trade" between constituent members of MERCOSUR has been liberalized, and that MERCOSUR countries maintain substantially the same duties and other regulations of commerce on trade vis-à-vis third countries, thus complying with the requirements of Article XXIV:8(a). Brazil notes in this regard that, before the Panel, it incorporated by reference all of the documents submitted by MERCOSUR members to the Committee on Regional Trade Agreements (the "CRTA").

662Ibid., para. 269.
78. Brazil contends that the European Communities has failed to rebut Brazil's *prima facie*
demonstration that MERCOSUR is consistent with the requirements of Article XXIV:5 and 8. The fact that the CRTA and the Committee on Trade and Development did not reach the conclusion that MERCOSUR is in compliance with Article XXIV does not suggest that MERCOSUR is inconsistent with Article XXIV, in particular, because Members' measures are presumed WTO-consistent until sufficient evidence is presented to prove the contrary, and because the CRTA has only once concluded that a regional trade agreement was compatible with the GATT 1994.

79. In addition, Brazil maintains that the European Communities failed to substantiate its claims that MERCOSUR was inconsistent with Article XXIV. Although the European Communities asserts that the automotive and sugar sectors within MERCOSUR have not been fully liberalized, this is contradicted by the evidence it submitted to the Panel. According to Brazil, evidence before the Panel demonstrated that "the automotive sector has been the subject of continuing and progressive liberalization [and that] bilateral agreements between Mercosur members have already led, in practice, to duty-free trade in almost 100 percent of the commerce in the auto sector."663 Brazil suggests further that the sugar sector alone cannot prevent compliance with the requirement under Article XXIV:8(a)(i) that "substantially all the trade" between the constituent territories be liberalized, because it "accounts for less than 0.001 percent of the total [trade]."664 As regards the European Communities' assertion that there are exceptions to MERCOSUR's common external tariff, Brazil submits that the evidence on record demonstrates that MERCOSUR "applies a common external tariff to products in over 90 percent of the tariff lines and has a specific timetable in place to cover the remaining categories of products by 2008."665 Brazil also rejects the European Communities' assertion that MERCOSUR does not meet the requirement under Article XXIV:5(a) that non-tariff barriers on trade with third countries not be "on the whole ... more restrictive."666 noting that the only example provided by the European Communities is the Import Ban itself. According to Brazil, a single measure cannot constitute sufficient evidence to show that MERCOSUR does not meet the requirements of Article XXIV:5(a).

80. Moreover, Brazil contends that the Appellate Body's decision in *Turkey – Textiles* cannot be read as requiring Brazil to demonstrate that the MERCOSUR exemption was introduced upon the formation of a customs union, and that its formation would have been prevented if it were not allowed to introduce such a measure. The analytical approach adopted by the Appellate Body in *Turkey – Textiles* should not be applied in the present dispute, because the MERCOSUR exemption does not impose new restrictions against third countries but, rather, eliminates restrictive regulations between the parties to the customs union.667 Furthermore, Brazil contends that a Member should not be allowed to demonstrate the necessity of its measure *only* as of the time a customs union is formed, because such customs unions and the integration of their members evolve and deepen over time.

81. Brazil also rejects the European Communities' argument that the fact that the text of Article XXIV:8(a)(i) exempts Article XX measures from the requirement to eliminate duties and

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663Brazil's appellee's submission, para. 295 (referring to Panel Report, para. 4.391; and WT/COMTD/1/Add.17, *supra* footnote 657, p. 3).
666*Ibid.*, para. 297. (emphasis added by Brazil)
667For Brazil, *US – Line Pipe* is a more apposite case in the factual context of this dispute. (See Brazil appellee's submission, para. 301 (referring to Panel Report, *US – Line Pipe*, paras. 7.147 and 7.148))
other restrictive regulations of commerce demonstrates that the MERCOSUR exemption was not necessary for the formation of MERCOSUR. Such an interpretation would require the members of the customs union to exempt Article XX measures from internal liberalization, "lest they are later challenged by third countries for discrimination and not permitted to invoke Article XXIV to justify those measures." 668 Moreover, the Appellate Body has explained that "the terms of [Article XXIV:8(a)(i)] offer 'some flexibility' to the constituent members of a customs union when liberalizing their internal trade" 669 This flexibility in Article XXIV permits Brazil to eliminate the Import Ban in respect of MERCOSUR countries while maintaining it in respect of non-MERCOSUR countries. Brazil also emphasizes that the MERCOSUR exemption was not introduced pursuant to its obligations under Article XXIV:8(a)(i), but was rather the result of its unsuccessful attempt to defend the Import Ban before a MERCOSUR arbitral tribunal.

(d) The MERCOSUR Exemption and Article XX(d) of the GATT 1994

82. Should the Appellate Body decide to complete the analysis of the European Communities' claims under Articles I:1 and XIII:1 of the GATT 1994, Brazil submits that it should find the MERCOSUR exemption to be justified under Article XX(d) of the GATT 1994.

83. Brazil submits that the Panel correctly interpreted and applied the term "to secure compliance" in Article XX(d), in contrast to the European Communities' interpretation that a state "secures compliance" within the meaning of Article XX(d) only when it enforces rules or regulations as regards other actors, and not when it secures its own compliance with the laws or regulations of its domestic legal system. Moreover, the Appellate Body's interpretation of Article XX(d) in Mexico – Taxes on Soft Drinks made no such distinction. Rather, the Appellate Body's interpretation of the text of Article XX(d) makes clear that domestic laws or regulations that ensure compliance by a state with its obligations are within the scope of that provision. Brazil also contends that it has incorporated the obligation to comply with rulings of MERCOSUR tribunals into its domestic law, and that evidence to that effect exists in the record.

84. Lastly, Brazil contends that the MERCOSUR exemption is "necessary" within the meaning of Article XX(d). Brazil argues that it could not have complied with the ruling of the MERCOSUR tribunal by simply exempting all third countries from the Import Ban, as the European Communities suggests it should have done, because this would have forced Brazil to abandon its policy objective of reducing unnecessary generation of tyre waste to the maximum extent possible.

668Ibid., para. 307.
669Ibid., para. 308 (quoting Appellate Body Report, Turkey – Textiles, para. 48).
C. Arguments of the Third Participants

[...]  

6. United States  

[...]  

116. Finally, should the Appellate Body reach the European Communities' conditional appeal and decide to rule on the European Communities' separate claims that the MERCOSUR exemption is inconsistent with Articles I:1 and XIII:1 of the GATT 1994, the United States submits that Brazil may not rely on Article XXIV of the GATT 1994 as a defence. MERCOSUR has not been notified under Article XXIV as a customs union, as required by Article XXIV:7 of the GATT 1994. According to the United States, failure to notify a customs union under Article XXIV:7 does not merely render a customs union inconsistent with that paragraph; rather, pursuant to paragraph 1 of the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 (the "Understanding on Article XXIV of the GATT 1994"), such a customs union is not consistent with Article XXIV as a whole. Members that opt not to subject their customs union to the procedures set out in Article XXIV and the Understanding on Article XXIV of the GATT 1994 or its interpretation are not entitled to invoke that provision as a defence. Moreover, the United States notes that MERCOSUR countries notified MERCOSUR pursuant to paragraph 4(a) of the GATT 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (the "Enabling Clause") rather than under Article XXIV:7(a) of the GATT 1994. The United States argues that regional arrangements as defined under Articles 1, 2, and 3 of the Enabling Clause have different characteristics and are subject to different obligations than customs unions and free trade areas covered by Article XXIV.  

670L/4903, 28 November 1979, BISD 26S/203.

Article XX (d) ("necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement")

Editorial note: The footnote numbering in this document does not correspond to the footnote numbering in the AB report.

Appellate Body Report, Mexico – Tax Measures on Soft Drinks and Other Beverages, WT/DS308/AB/R, 6 March 2006

(…)

14. Mexico asserts that the Panel erred in finding that the measures at issue are not designed "to secure compliance" within the meaning of Article XX(d). According to Mexico, this finding is based on an erroneous interpretation of the terms "to secure compliance" as involving enforcement action within a domestic legal system. Mexico argues that there is no basis to exclude action taken to enforce international treaty obligations from the scope of Article XX(d). Mexico adds that, in the broader context of international law, countermeasures are measures aimed at securing compliance with international obligations.

(…)

59. Mexico argued before the Panel that its "measures are 'necessary to secure compliance' by the United States with the United States' obligations under the NAFTA, an international agreement that is a law not inconsistent with the provisions of the GATT 1994."671 The United States responded that "the NAFTA is not a 'law or regulation,' and Mexico's taxes are not 'necessary to secure compliance.'"672

(…)

69. (…) The terms "laws or regulations" are generally used to refer to domestic laws or regulations. As Mexico and the United States note, previous GATT and WTO disputes in which Article XX(d) has been invoked as a defence have involved domestic measures.673 Neither disputes that the expression "laws or regulations" encompasses the rules adopted by a WTO Member's legislative or executive branches of government. We agree with the United States that one does not immediately think about international law when confronted with the term "laws" in the plural.674 Domestic legislative or regulatory acts sometimes may be intended to implement an international agreement. In such situations, the origin of the rule is international, but the implementing instrument is a domestic law or regulation.675 In our view, the terms "laws or

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671 Panel Report, para. 8.162 (referring to Mexico's first written submission to the Panel, paras. 117-118 and 125).
672 Ibid., para. 8.163.
673 United States' appellee's submission, footnote 62 to para. 39; Mexico's response to questioning at the oral hearing.
674 Panel Report, footnote 419 to para. 8.193; United States' appellee's submission, para. 31.
675 In some WTO Members, certain international rules may have direct effect within their domestic legal systems without requiring implementing legislation. In such circumstances, these rules also become part of the domestic law of that Member.
"laws or regulations" refer to rules that form part of the domestic legal system of a WTO Member. Thus, the "laws or regulations" with which the Member invoking Article XX(d) may seek to secure compliance do not include obligations of another WTO Member under an international agreement.

70. The illustrative list of "laws or regulations" provided in Article XX(d) supports the conclusion that these terms refer to rules that form part of the domestic legal system of a WTO Member. This list includes "[laws or regulations] relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices". These matters are typically the subject of domestic laws or regulations, even though some of these matters may also be the subject of international agreements. The matters listed as examples in Article XX(d) involve the regulation by a government of activity undertaken by a variety of economic actors (e.g., private firms and State enterprises), as well as by government agencies. For example, matters "relating to customs enforcement" will generally involve rights and obligations that apply to importers or exporters, and matters relating to "the protection of patents, trademarks and copyrights" will usually regulate the use of these rights by the intellectual property right holders and other private actors. Thus, the illustrative list reinforces the notion that the terms "laws or regulations" refer to rules that form part of the domestic legal system of a WTO Member and do not extend to the international obligations of another WTO Member.

71. Our understanding of the terms "laws or regulations" is consistent with the context of Article XX(d). As the United States points out, other provisions of the covered agreements refer expressly to "international obligations" or "international agreements". For example, paragraph (h) of Article XX refers to "obligations under any intergovernmental commodity agreement". The express language of paragraph (h) would seem to contradict Mexico's suggestion that international agreements are implicitly included in the terms "laws or regulations".

676 The European Communities notes that:

"[i]t is entirely possible that international agreements may be incorporated into the domestic legal order in such a way that they can be invoked as against individuals, and enforce[d] against them. If this is the case, the international agreement, albeit international in origin, may be regarded as having become an integral part of the domestic legal order of such Member, and thus a law or regulation within the meaning of Article XX (d) [of the] GATT [1994]."

(European Communities' third participant's submission, para. 41)

677 The participants agree that the list in Article XX(d) is not exhaustive. (See Mexico's response to Question 67 posed by the Panel after the second Panel meeting; Panel Report, p. C-61; United States' response to Question 31 posed by the Panel after the first Panel meeting; Panel Report, p. C-42; and United States' response to Question 67 posed by the Panel after the second Panel meeting; Panel Report, pp. C-79-C-80)

678 European Communities' third participant's submission, para. 38.

679 The United States also points out that the terms "laws or regulations" are qualified by the requirement that they not be "inconsistent" with the GATT 1994. The United States explains that the word "inconsistent" appears elsewhere in the GATT 1994 in connection with domestic measures. In contrast, when referring to treaty obligations, the WTO agrees use the word "conflict". (United States' appellee's submission, para. 33) In our view, this distinction supports the position that the terms "laws or regulations" refer to the rules that are part of the domestic legal system of a WTO Member, including international rules that have been incorporated or have direct effect in a particular domestic legal system.

680 United States' appellee's submission, para. 34.
The United States and China also draw our attention to Article X:1 of the GATT 1994, which refers to "[l]aws, regulations, judicial decisions and administrative rulings" and to "[a]greements affecting international trade policy which are in force between a government … of any Member and the government … of any other Member”. Thus, a distinction is drawn in the same provision between "laws [and] regulations" and "international agreements". Such a distinction would have been unnecessary if, as Mexico argues, the terms "laws" and "regulations" were to encompass international agreements that have not been incorporated, or do not have direct effect in, the domestic legal system of the respective WTO Member. Thus, Articles X:1 and XX(h) of the GATT 1994 do not lend support to interpreting the terms "laws or regulations" in Article XX(d) as including the international obligations of a Member other than that invoking the provision.

681 If an international commodity agreement contains GATT-inconsistent provisions, Article XX(h) would still serve the purpose of justifying such an agreement, even if it could not be justified under Article XX(d).
682 United States' appellee's submission, para. 35; China's third participant's submission, para. 21.
683 The Panel noted that there are examples of international "regulations" within the WTO agreements themselves. The Panel cited, as examples, Article VI of the Marrakesh Agreement Establishing the World Trade Organization that refers to "regulations" to be adopted by the Ministerial Conference, and Article VII that refers to "financial regulations" to be adopted by the General Council and to the "regulations" of the GATT 1947. (Panel Report, footnotes 423 and 424 to para. 8.195) Article XXIV of the GATT 1994 also uses the term "regulations" when referring to rules applied by free trade areas or customs unions. Nevertheless, we agree with Japan that, in these instances, the context makes it clear that the regulations are international in character. (Japan's third participant's submission, paras. 17-19)
216. The first two sentences of paragraph 5.1 of China's Accession Protocol provide:

Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement, China shall progressively liberalize the availability and scope of the right to trade, so that, within three years after accession, all enterprises in China shall have the right to trade in all goods throughout the customs territory of China, except for those goods listed in Annex 2A which continue to be subject to state trading in accordance with this Protocol. Such right to trade shall be the right to import and export goods.

222. We read the phrase "in a manner consistent with the WTO Agreement" as referring to the WTO Agreement as a whole, including its Annexes. We note, in this respect, that we see the "right to regulate", in the abstract, as an inherent power enjoyed by a Member's government, rather than a right bestowed by international treaties such as the WTO Agreement. With respect to trade, the WTO Agreement and its Annexes instead operate to, among other things, discipline the exercise of each Member's inherent power to regulate by requiring WTO Members to comply with the obligations that they have assumed thereunder. When what is being regulated is trade, then the reference in the introductory clause to "consistent with the WTO Agreement" constrains the exercise of that regulatory power such that China's regulatory measures must be shown to conform to WTO disciplines.

223. We observe, in this regard, that WTO Members' regulatory requirements may be WTO-consistent in one of two ways. First, they may simply not contravene any WTO obligation. Secondly, even if they contravene a WTO obligation, they may be justified under an applicable exception. The reference to "a manner consistent with the WTO Agreement" seems to us to encompass both types of WTO-consistency. Thus, we read the phrase "right to regulate trade in a manner consistent with the WTO Agreement" as a reference to: (i) rights that the covered agreements affirmatively recognize as accruing to WTO Members, namely, the power of Members to take specific types of regulatory measures in respect of trade in goods
when those measures satisfy prescribed WTO disciplines and meet specified criteria; and (ii) certain rights to take regulatory action that derogates from obligations under the WTO Agreement—that is, to relevant exceptions.

(...)

226. We recall, in this respect, our understanding of the relationship between the introductory clause and the remainder of the first sentence of paragraph 5.1. Under paragraph 5.1, China undertakes a commitment in respect of traders, in the form of a commitment to grant to all enterprises in China the right to import and export goods. At the same time, this commitment, or obligation, is made subject to, and may not detrimentally affect, China's right to regulate trade in a manner consistent with the WTO Agreement. We see the obligations assumed by China in respect of trading rights, which relate to traders, and the obligations imposed on all WTO Members in respect of their regulation of trade in goods, as closely intertwined. (...)

229. China's power to regulate trade in goods is disciplined by the obligations set out in Annex 1A of the WTO Agreement. In our view, the introductory clause of paragraph 5.1 cannot be interpreted in a way that would allow a complainant to deny China access to a defence merely by asserting a claim under paragraph 5.1 and by refraining from asserting a claim under other provisions of the covered agreements relating to trade in goods that apply to the same or closely linked measures, and which set out obligations that are closely linked to China's trading rights commitments. Rather, whether China may, in the absence of a specific claim of inconsistency with the GATT 1994, justify its measure under Article XX of the GATT 1994 must in each case depend on the relationship between the measure found to be inconsistent with China's trading rights commitments, on the one hand, and China's regulation of trade in goods, on the other hand.

230. All of the above suggests to us that the introductory clause of paragraph 5.1 should be interpreted as follows. Any exercise of China's right to regulate trade will

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684In this dispute, the United States challenged a variety of provisions within various Chinese measures as inconsistent with paragraph 5.1 of China's Accession Protocol. All of the provisions challenged by the United States regulate the right to import the products at issue into China. The United States did not raise claims under any other provisions of the covered agreements, notably under Article III:4 or Article XI:1 of the GATT 1994, with respect to these provisions. As explained, supra, the United States did, however, raise a number of claims under Article III:4 in respect of the distribution of the relevant products. With respect to one provision—Article 16 of the Film Enterprise Rule—the United States raised claims that China had acted inconsistently with both Article III:4 of the GATT 1994 and its trading rights commitments. That provision relates to both the importation of films for theatrical release, in its first sentence, and the distribution of films for theatrical release, in its second sentence. Ultimately, the Panel found that the United States had not made out its claim under Article III:4 of the GATT 1994 regarding films for theatrical release. (Panel Report, para. 7.1699) The United States further claimed that the provisions relating to the distribution of the relevant products that it alleged to be inconsistent with Article III:4 were also inconsistent with China's obligations under the third sentence of paragraph 5.1 of China's Accession Protocol, which refers to China's obligation to accord to imported goods national treatment under Article III of the GATT 1994, especially paragraph 4 thereof. In respect of such claims, the Panel either exercised judicial economy or found that the United States had not made out its claim. (Ibid., paras. 7.1709 and 7.1710)
be protected under the introductory clause of paragraph 5.1 only if it is consistent with the *WTO Agreement*. This will be the case when China's measures regulating trade are of a type that the *WTO Agreement* recognizes that Members may take when they satisfy prescribed disciplines and meet specified conditions. Yet, these are not the only types of WTO-consistent measures that may be protected under the introductory clause of paragraph 5.1. Whether a measure regulating those who may engage in the import and export of goods falls within the scope of China's right to regulate trade may also depend on whether the measure has a clearly discernable, objective link to the regulation of trade in the goods at issue. In considering whether such a link is discernable, it may be relevant whether the measure regulating who may engage in trade is clearly and intrinsically related to the objective of regulating the *goods* that are traded. In addition, such a link may often be discerned from the fact that the measure in question regulates the right to import and export particular *goods*. This is because the regulation of who may import and export specific goods will normally be objectively related to, and will often form part of, the regulation of trade in those goods. Whether the necessary objective link exists in a specific case needs to be established through careful scrutiny of the nature, design, structure, and function of the measure, often in conjunction with an examination of the regulatory context within which it is situated. When such a link exists, then China may seek to show that, because its measure complies with the conditions of a GATT 1994 exception, the measure represents an exercise of China's power to regulate trade in a manner consistent with the *WTO Agreement* and, as such, may not be impaired by China's trading rights commitments.

(...)

234. The Panel found that China had not demonstrated that any of the provisions that China sought to justify are "necessary to protect public morals" within the meaning of Article XX(a) of the GATT 1994. On appeal, China challenges this conclusion. More specifically, China contends that the Panel erred in finding: (i) that the State-ownership requirement in Article 42(2) of the *Publications Regulation* makes no material contribution to the protection of public morals in China; (ii) that the provisions excluding foreign-invested enterprises from engaging in the importation of the relevant products make no material contribution to the protection of public morals in China; (iii) that the restrictive effect of the provisions on "those wishing to engage in importing" is relevant for assessing the necessity of such provisions under Article XX(a); and (iv) that at least one of the alternative measures proposed by the United States (that is, giving the Chinese Government sole responsibility for conducting content review) was an alternative "reasonably available" to China. In addition, China requests the Appellate Body to complete the analysis and find its measures to be "necessary" to protect public morals within the meaning of Article XX(a) and consistent with the chapeau of Article XX of the GATT 1994.

(...)
277. We now turn to China's allegation that the Panel failed to make an objective assessment of the matter before it as required by Article 11 of the DSU because it failed to address China's argument that professionals performing content review must be familiar with Chinese values and public morals, and capable of efficiently communicating with and understanding the authorities. We note that China's argument is reflected in the Panel's summary of China's arguments, as well as in the Panel's analysis of the "necessity" of the State-ownership requirement. As explained above, in analyzing China's defence of the State-ownership requirement, the Panel was not convinced that enterprises with private investment would be unable to attract qualified personnel or unable to obtain the expertise needed to conduct content review properly. In our view, such reasoning—with which we agree—applies equally to the arguments made by China in defence of its provisions excluding foreign invested enterprises from engaging in importation. The mere fact that an entity involves some foreign investment does not necessarily imply that content review would be carried out by professionals who are not familiar with Chinese values and public morals, or incapable of efficiently communicating with and understanding the authorities. In fact, those carrying out these functions could be the same individuals, with the same qualifications and capabilities, irrespective of the ownership of the equity of the import entity. Thus, China did not establish that the exclusion of foreign-invested enterprises from engaging in the importation of the relevant products contributes to the protection of public morals in China. We see no indication that the Panel did not reasonably consider China's claim or otherwise failed to make an objective assessment of the matter.

278. We therefore find that the Panel did not err, in paragraphs 7.865 and 7.868 of the Panel Report, in its finding regarding the contribution made by the provisions excluding foreign-invested enterprises from engaging in the importation of the relevant products and we reject China's claim that the Panel failed to make an objective assessment of the matter before it in violation of Article 11 of the DSU.

(...)
294. In reaching its finding regarding the contribution made by the State plan requirement to the protection of public morals in China, the Panel simply stated that limiting the number of import entities "can make a material contribution" to the protection of public morals in China. Yet, the Panel neither addressed quantitative projections nor provided qualitative reasoning based on evidence before it to support that finding. The Panel Report contains no discussion of how or to what extent the State plan requirement can or does make a contribution. For these reasons, we disagree with the Panel's finding that China had met its burden of proof regarding the contribution of the State plan requirement to the protection of public morals in China.

(...)

299. We have found that the Panel erred in finding that the State plan requirement is apt to make a material contribution to the protection of public morals in China and can be characterized as "necessary", in the absence of reasonably available alternatives, to protect public morals in China.

(...)

324. In reviewing the Panel's analysis of whether content review under the sole responsibility of the Chinese Government is an alternative measure reasonably available to China, we note first that the Panel articulated the proper approach to its analysis. The Panel first scrutinized the alternative measure proposed by the United States and compared it to the existing measures in terms of contribution to the protection of public morals in China and restrictive impact. The Panel then assessed whether China had demonstrated that the proposed alternative measure is not reasonably available because it would impose an undue financial and administrative burden on China. The Panel's analysis makes clear that the Panel considered that the burden of establishing that the alternative is not reasonably available rested on China and, indeed, China does not contend otherwise on appeal.

325. In our view, the Panel did not ignore the fact that the proposal put forward by the United States would require changes to the current system, and that these could entail additional costs for China. To the contrary, the Panel noted China's argument that implementing the United States' proposal "would impose an undue burden", create the risk of "undue delays", and demand "substantial resources" given the large quantities of imports involved and the time-sensitive nature of newspapers and periodicals. The Panel expressly recognized that the alternative might require China to allocate additional human and financial resources to content review authorities, in particular for content review of reading materials. This recognition was, however, tempered by additional observations that the Panel considered pertinent. Thus, the Panel observed that, for products other than reading materials (electronic publications, audiovisual products and films for theatrical release), the Chinese Government already makes the final content review decision under its current system. In addition, the Panel was not convinced that the cost to the Chinese Government would necessarily be higher under the alternative
proposed by the United States. Given that, at present, all import entities are wholly owned by the State, it was "not apparent" to the Panel that the cost to the Chinese Government of having non-incorporated offices of the Government of China conduct content review would necessarily be higher than the cost of having incorporated State-owned enterprises conduct such review. The Panel observed that, in any event, China had not provided any data or estimate that would suggest that the cost to the Chinese Government would be unreasonably high or even prohibitive, and that Article 44 of the Publication Regulation already authorizes the Government to charge fees for providing a content review service, which could lessen any financial burden associated with the proposed alternative measure.

326. After having set out the above reasoning, the Panel determined that China had not "demonstrated that the alternative proposed by the United States would impose on China an undue burden, whether financial or otherwise" and that, accordingly, China had not "demonstrated that the alternative proposed by the United States is not 'reasonably available' to it."

327. We are not persuaded that the Panel erred in the above analysis. The Panel did not find that the proposed alternative measure involves no cost or burden to China. As the Appellate Body report in US – Gambling makes clear, an alternative measure should not be found not to be reasonably available merely because it involves some change or administrative cost. Changing an existing measure may involve cost and a Member cannot demonstrate that no reasonably available alternative exists merely by showing that no cheaper alternative exists. Rather, in order to establish that an alternative measure is not "reasonably available", the respondent must establish that the alternative measure would impose an undue burden on it, and it must support such an assertion with sufficient evidence.

(...)
measures found to be inconsistent with its trading rights commitments; and (vi) the Panel did not err in finding that at least one of the alternative measures proposed by the United States is an alternative "reasonably available" to China.
Optional Reading


Joel P. Trachtman


1. Abstract

The panel in the instant case found that the U.S. measure was unjustified within the meaning of the chapeau of art. XX, and therefore did not qualify for any exception from the prohibition of art. XI. Having addressed the chapeau of art. XX, the panel found that it did not need to address art. XX(b) or (g). The panel applied a novel requirement that the measure to be excepted under art. XX must not “undermine the multilateral trading system.”

The Appellate Body rejected the panel’s reasoning and engaged in its own analysis. the Appellate Body reached the same conclusion to the effect that the U.S. measure does not comply with the chapeau after analyzing the availability of an exception under art. XX(g). The Appellate Body interestingly established a balancing test for satisfaction of the requirements of the chapeau and proceeded to examine the U.S. measure using means-ends analysis and a least trade restrictive alternative test analysis. The Appellate Body also found that the U.S. measure contained actual discrimination (discrimination that is not simply the necessary result of the U.S. environmental program) in the way that it was applied.

In addition to the substantive issues, this case raised the issue of whether non-governmental organizations (NGOs) may submit briefs for consideration by the panel. The panel initially answered that since it had not asked for the information submitted by the NGOs in this case, it would not consider their briefs. The Appellate Body adopted a more flexible approach, holding that the panel has complete discretion to consider submissions, even if it has not requested them.

2. Facts

The “chapeau” and the relevant exceptions are as follows:

“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

(b) necessary to protect human, animal or plant life or health;

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. . . .”
The panel was convened to examine a prohibition imposed by the United States on the importation of certain shrimp and shrimp products under section 609 of Public Law 101-162 ("section 609") and associated regulations and judicial decisions. Section 609 prohibited importation to the U.S. of shrimp harvested with commercial fishing technology that may adversely affect sea turtles. It also provided an exception for shrimp imported from states certified thereunder. The relevant portion of this exception, applicable where sea turtles are otherwise threatened, permits certification if the exporting state adopts a regulatory program governing the incidental taking of sea turtles comparable to that of the U.S. and with an average incidental taking rate comparable to U.S. vessels. This regulatory program would require “turtle excluder devices” to be used by commercial shrimp trawling vessels operating in areas where turtles are likely to be found.

3. Analysis of the Panel Report

a. The Tuna-Dolphin Cases

This case presented an occasion for the Appellate Body to review the contentious trade and environment issues first addressed in 1991 and 1994 in the Tuna-Dolphin cases. In both Tuna-Dolphin panel decisions (each unadopted) the panels found the U.S. embargoes on foreign tuna to violate, inter alia, art. XI of GATT, and not to be exempted under art. XX of GATT. Both the 1991 and the 1994 panels had found that the U.S. measure, as a regulation of a process rather than a product, was not exclusively covered by art. III of GATT, and so was subject to the prohibition of embargoes under art. XI. The 1991 panel found that the U.S. measures did not qualify for an exemption under art. XX because that provision did not permit the protection of animals outside the territory of the state adopting the relevant measure. Furthermore, the U.S. measures were not “necessary” within the meaning of art. XX(b) insofar as the goal sought to be protected by the U.S. might have been addressed through multilateral negotiations. The 1994 panel left open the possibilities that art. XX could permit the protection of animals extraterritorially, but found that the U.S. measures did not qualify for art. XX because they were designed not directly to achieve environmental goals, but to coerce other governments into adopting specific environmental policies.

b. The Shrimp-Turtle Panel: Art. XX

The U.S. accepted that its measure violated art. XI of GATT, turning the debate to the availability of an exception under art. XX of GATT. The panel found that the U.S. measure was unjustified within the meaning of the chapeau of art. XX, and therefore did not qualify for any exception from the prohibition of art. XI. The panel considered art XX(b) and (g). The panel considered first the chapeau of article XX. The panel placed the burden of proof on the U.S., as the party asserting the affirmative defense of article XX.


Analyzing the chapeau, the panel first found that the countries that were certified and those that were not were “countries where the same conditions prevail,” and that therefore the U.S. measure was discriminatory. The panel did not even evaluate the U.S. position that different conditions prevail in these two types of countries: thus, the panel implicitly disregarded the regulatory categories established by section 609. The panel next turned to the question of whether this discrimination was arbitrary or unjustifiable. Specifically, the panel focused on the word “unjustifiable,” arguing that it must be interpreted in light of the purpose of the WTO Agreement as a whole. The panel found that the purpose of the chapeau is to prohibit abuse of art. XX, and, unfortunately, equates “abuse” with frustration of the purposes of the WTO Agreement. This approach might be acceptable if the purposes of the WTO Agreement were read to include subtleties like maintaining a degree of local regulatory autonomy. This is not the way that the panel read the purposes of the WTO Agreement. By selecting a limited “object and purpose,” the Panel predetermined that measures having an environmental object and purpose could not be justified under art. XX. The Panel stated that

While the WTO Preamble confirms that environmental considerations are important for the interpretation of the WTO Agreement, the central focus of that agreement remains the promotion of economic development through trade; and the provisions of GATT are essentially turned toward liberalization of access to markets on a nondiscriminatory basis.

The Panel concluded that derogations from other provisions of GATT are permissible under art. XX only so long as they “do not undermine the multilateral trading system.” As the U.S. argued in connection with its appeal, this uncompromising allegiance to the international trading system--this unidimensional teleological method of interpretation--contradicts the clear intent of art. XX. The panel went further, however, to hold that its examination of whether a measure undermines the multilateral trading system may look not only at the particular measure before the panel, but at the possibility of a proliferation of measures that in the aggregate might undermine the system. Again, this seems to exceed the clear meaning of art. XX.

Importantly, the panel shores up its holding by arguing, based on the Second Tuna Panel Report and the Belgian Family Allowances Report, that national measures that condition access to an import market on adoption by the exporting country of a prescribed regulatory scheme are not permitted under art. XX.

The panel carefully distinguished this case dealing with unilateral measures by the importing state from possible cases where the importing state

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688 Panel Report, para. 7.33.
689 Panel Report, para. 7.40.
690 Panel Report, para. 7.42.
691 Panel Report, para. 7.44.
692 Adopted on 7 November 1952, B.I.S.D. 1S/59, para. 8.
acts pursuant to a multilateral environmental agreement. Although the panel’s distinction between these circumstances under WTO law is not clear, the panel effectively reserves judgment on this issue. It stated that the “negotiation of a multilateral agreement or action under multilaterally defined criteria is clearly a possible way to avoid threatening the multilateral trading system.” One wonders why this is so clear, given that multilateral environmental agreements might well be inconsistent with trade goals. The panel did not say whether compliance with a multilateral environmental agreement may support the availability of an exception under art. XX. The panel also wisely avoided holding, with the First Tuna Panel Report, and with the present Appellate Body decision, that the purported “extraterritorial” nature of the U.S. measure affects its validity under WTO law.

c. NGO Submissions

On the procedural issue of its consideration of NGO submissions, the panel declined to consider NGO submissions on the basis that while it may seek information from any relevant source under art. 13 of the Dispute Settlement Understanding (DSU), it had not requested this information. In response, the U.S., with the endorsement of the Panel, included certain portions of the NGO briefs in its own submissions.

4. Analysis of the Appellate Body Report

a. Rejection of Panel Reasoning and Conclusions under Art. XX

In its arguments to the Appellate Body, the U.S. argued that the panel had misinterpreted the chapeau of art. XX, thereby effectively “erasing” art. XX from the GATT in any case in which there is a “threat to the multilateral trading system.” Indeed, the Appellate Body criticized the panel for departing from the text of the GATT and for not examining the ordinary meaning of the text.

In pursuit of this approach, the Appellate Body recalled that in the Gasoline case, it had focused on the use of the reference to the manner in which the measure is applied, clarifying that the chapeau is not concerned with the nature of the measure itself. The nature of the measure itself is addressed in the subparagraphs of art. XX. The panel, on the other hand, evaluated whether the section 609 itself satisfied the criteria of the chapeau.

Furthermore, the Appellate Body stated that a teleological interpretation should consider the provision itself being interpreted, not the whole of the WTO Agreement:

Maintaining, rather than undermining, the multilateral trading system is necessarily a fundamental and pervasive premise underlying the WTO Agreement; but it is not a right

693 Panel Report, para. 7.55.
694 Panel Report, para. 7.8.
695 United States--Gasoline, Adopted 20 May 1996, WT/DS2/AB/R.
or an obligation, nor is it an interpretative rule which can be employed in the appraisal of a given measure under the chapeau of Article XX. 696

The Appellate Body recalled that in the Gasoline case, it had examined the object and purpose of the chapeau, finding that it is intended to prevent abuse of the exceptions listed in art. XX. The panel did not examine the question of whether section 609 was applied in a manner that is arbitrary or unjustifiable discrimination or a disguised restriction within the meaning of the chapeau. The Appellate Body further criticized the panel for examining compliance with the chapeau prior to determining compliance with any of the following exceptions. It is not possible to determine whether an exception is being abused without first determining whether the exception is otherwise available. 697

In fact, the Appellate Body completely rejected the panel’s line of reasoning: “conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX.”698 In an ideal setting, such a wholesale rejection of the panels’ reasoning and conclusion would be a basis for remand to the panel for further findings; in fact, lacking the power of remand, the Appellate Body heroically made its own findings. 699

697   Appellate Body Report, para. 120.
698   Appellate Body Report, para. 121.
699   “Having reversed the Panel’s legal conclusion . . . we believe that it is our duty and our responsibility to complete the legal analysis . . . ” Appellate Body Report, para. 123. This is a substantial departure from the approach taken by the Appellate Body in the Computers report, in which the Appellate Body rejected the panel’s reasoning, but then failed to continue to provide its own legal analysis. European Communities--Customs Classification of Certain Computer Equipment, adopted 22 June 1998, WT/DS62, 67, 68/AB/R.
b. Appellate Body Findings under Art. XX

In a ringing defense of living resources, the Appellate Body found that art. XX(g), referring to “exhaustible natural resources,” includes living resources such as sea turtles. Referring to the drafting history of art. XX(g), which involved discussions of mineral resources, the Appellate Body endorsed an organic approach to interpretation: the words “exhaustible natural resources” “must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.”

Interestingly, the Appellate Body looked to the inclusion of sea turtles on Appendix 1 (species threatened with extinction) of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”) for evidence of the endangered position of these animals.

Importantly, the Appellate Body specifically declined to rule on whether there is a territorial or jurisdictional limitation in art. XX(g)—whether the “extraterritorial” nature of the U.S. measure removed it from eligibility for an exception under that provision. It was able to do so because the sea turtles at issue are migratory, migrating to and from U.S. waters.

Continuing its analysis of the availability of an exception under art. XX(g), the Appellate Body examined whether section 609 “relates to” the conservation of exhaustible natural resources. This “relates to” requirement has been interpreted to require that the measure be “primarily aimed at” this goal. The Appellate Body applied a means-ends analysis, finding that the U.S. measure satisfies this test (despite the fact that it might be construed as aimed at changing exporting state policy, rather than at directly protecting turtles). The Appellate Body also found that the U.S. measure satisfies the third prong of art. XX(g): that it is made effective in conjunction with restrictions on domestic harvesting of shrimp.

The Appellate Body then turned to the chapeau. Here, the Appellate Body relied heavily on its analysis in the Gasoline case, to the effect that “the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned.”

By way of engaging in this balancing test, the Appellate Body first engaged in a means-ends analysis, finding the U.S. measure overbroad insofar as it requires foreign governments to adopt the same policies as those applied by the

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700 Appellate Body Report, para. 129.
701 Appellate Body Report, para. 133.
U.S. This approach fails to consider the different conditions that pertain in other members’ territories. Furthermore, the Appellate Body questioned whether domestic measures alone can be effective—suggesting that unilateral measures are not an effective means to the desired end. 703 Second, section 609 does not permit the import of shrimp caught using turtle excluder devices but originating in a state that is not certified. The Appellate Body found this approach a kind of discrimination. Third, the failure of the U.S. to engage in international negotiations weighed against the U.S. measure. The Appellate Body pointed out that while the U.S. signed the as yet unratified Inter-American Convention for the Protection and Conservation of Sea Turtles, that convention contains a requirement to respect art. XI of GATT. 704 Thus, part of this balancing test examined whether the measure at issue is the least trade restrictive device available. The existence of the Inter-American Convention demonstrates that a less restrictive device is available (at least in terms of its consensual origins, if not in terms of its potential to restrict trade). The Appellate Body also referred to the fact that consensual negotiations in the Inter-American Convention context “marked out the equilibrium line . . . .” Perhaps the Appellate Body felt the need to support its balancing test determination with this reference to a treaty-based determination.

Finally, the Appellate Body found real discrimination in the way that the U.S. (i) negotiated multilateral agreements and (ii) applied phase-in periods to different countries, and considered this discrimination “unjustifiable” within the meaning of the chapeau. The rigidity of section 609 including its failure to distinguish among countries in which different conditions prevail, as well as the lack of transparency of the certification process, makes this discrimination also “arbitrary” under the chapeau. 705 The Appellate Body imposed a requirement of due process in connection with the application of exceptions under art. XX. 706

ea. NGO Submissions

The Appellate Body found that the panel had been too inflexible in its approach to submissions from non-parties. “In the present context, authority to seek information is not properly equated with a prohibition on accepting information which has been submitted without having been requested by a panel. A panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, whether requested by a panel or not.” 707 On this basis, rather than on the basis actually used by the panel, the Appellate Body found that the panel properly considered the information provided by an NGO and appended by the U.S. to its submission.

Interestingly, there seems to be no remedy for the exclusion of the larger portion of the NGO submissions. Perhaps in the future, the Appellate Body will

703 Appellate Body Report, para. 168.
704 Appellate Body Report, para. 169.
705 Appellate Body Report, para. 177.
706 Appellate Body Report, paras. 182 and 183 (citing art. X of GATT).
develop a concept of “reversible error,” and “remand,” on the basis of which it may direct panels to reconsider particular information or issues.

5. Conclusions

The Appellate Body’s decision is careful and conservative, in addition to being politically sensitive. The Appellate Body, very importantly, held open the possibility that unilateral measures may be crafted in such a way, and developed in particular contexts, in which they might satisfy the requirements of art. XX. While the Appellate Body declined to reach a number of important issues, and did not explicitly accept that a multilateral environmental agreement would be a sound basis for an exception under art. XX, it welcomed environmental measures, and recommended those that are not unilateral.

As the WTO addresses the problem of the intersection between international environmental law and international trade law, it will be interesting to observe the extent to which the Appellate Body determines this intersection. For now, the Appellate Body has retained jurisdiction to address these relationships, and has formulated a balancing test that gives the Appellate Body itself wide flexibility in responding to these problems. In addition, it will be worth observing the extent to which the Appellate Body must transform itself from a “trade court” to a general international court in order to deal with intersections between trade values and other values.

This decision shows a measured, analytical approach to teleological interpretation, helping to develop the jurisprudential tools of international law. The Appellate Body recognizes that the unidimensional teleology of the panel is too blunt an instrument for accurate adjudication. The Appellate Body also refines its interpretative tools by rejecting a strict “original intent” interpretation of art. XX(g) in favor of a more dynamic interpretation to fit modern circumstances.

It may be worth pointing out a contradiction in the reasoning of the Appellate Body. The Appellate Body criticized the panel for failing to evaluate whether the specific exceptions of art. XX are available before analyzing the applicability of the chapeau. The Appellate Body argues that it is impossible to analyze compliance with the chapeau without knowing how the measure qualifies for an exception, and which exception. However, the Appellate Body never addresses the potential application of art. XX(b), confining itself to art. XX(g). Under the Appellate Body’s reasoning, this leaves open the possibility that if an exception were available under art. XX(b), a different analysis of the applicability of the chapeau might pertain.
WTO Appellate Body Rules on Dominican Republic Cigarette Imports
By Eliza Patterson

In early April 2005, the WTO Appellate Body (AB) issued a ruling in an appeal of a case brought by Honduras against measures taken by the Dominican Republic in connection with the importation and internal sale of cigarettes. One of the measures was a requirement that a tax stamp be affixed to all cigarettes. The importance of this case stems from its analysis of Article XX(d) of the GATT 1994. Article XX, entitled “General Exceptions,” allows WTO members to take 10 types of measures (listed in subparagraphs a-j) that would otherwise conflict with their WTO obligations, provided that specified conditions are met. Subparagraph (d) covers measures “necessary” to secure compliance with laws or regulations that are themselves consistent with the WTO. The Dominican Republic claimed its tax stamp requirement was covered by Article XX(d) because it was “necessary” to ensure compliance with tax and anti-cigarette smuggling laws.

Article XX is of growing importance. As global trade expands and economies become more open to imports and foreign competition, governments are looking increasingly to Article XX to justify trade-restricting measures. Consequently, the AB analysis of the Dominican Republic’s Article XX defense establishes an important precedent. It may be a troublesome one.

The AB confirmed the long-established rule that the determination of whether a government measure qualifies for Article XX protection is two-tiered. First it must be determined if the measure is of a type covered by one of the subparagraphs. If it is, it must then also be determined that it complies with the introductory paragraph’s non-discrimination requirement.

The key issue in determining whether the tax stamp requirement falls under subparagraph (d) was whether it was “necessary” within the meaning of that provision. The AB explained that this determination involves a process of weighing factors: the importance of the law to which the tax stamp relates; the contribution of the tax stamp to securing compliance with that law; the adverse trade impact of the tax stamp requirement; and whether a WTO-consistent measure is reasonably available to achieve the same end.

Following such an analysis, the AB upheld the earlier Panel ruling that that the tax stamp requirement was not “necessary” within the meaning of Article XX(d) because the tax stamp was of only limited effectiveness in preventing tax evasion. Moreover, it agreed with the Panel that a WTO-consistent measure was reasonably available.

This ruling raises concerns because it is based in part on a subjective judgment by the AB on a matter on which it arguably has less expertise than the government concerned has. The question as to whether a hypothetical WTO-consistent law would have a specified effect on tax avoidance in a particular country is not one on which members of an AB are likely to have expertise, since
they are not experts in either tax or the operation of the economy of the Dominican Republic.

The AB could have reached its finding (that the tax stamp requirement was not covered by Article XX (d)) by making an objective factual determination that the requirement had not been effective in preventing tax evasion. That approach would have obviated the objection that the WTO dispute settlement system has interfered in areas properly left to the judgment of sovereign governments.

In addition to deciding the Article XX issue, the AB addressed the question whether a requirement that importers and domestic producers of cigarettes post a bond to ensure payment of taxes violated the National Treatment obligation of GATT 1994, Article III:4. On this issue the AB provided a service by explaining Article III:4 in clear, unambiguous language as requiring that a government measure -- in this case the bond requirement -- must not give domestic products a competitive advantage in the market over imported like products. It determined that the bond requirement did not do so.

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Footnotes

[2]The alternative constructed by the Panel and agreed to by the AB was for the government to provide tax stamps to foreign exporters, so that those tax stamps could be affixed on cigarette packets in the course of their own production process, prior to importation.