****** CHECK AGAINST DELIVERY ******

***BRAZIL – MEASURES AFFECTING IMPORTS OF RETREADED TYRES***

**(AB-2007-4 / DS332)**

**THIRD PARTICIPANT ORAL STATEMENT OF THE UNITED STATES OF AMERICA**

October 15, 2007

Mr. Chairman, members of the Division:

1. On behalf of the United States, I would like to thank you for this opportunity to present the views of the United States at this hearing. We will limit our comments in this oral statement to a few points concerning issues raised by Brazil's Appellee Submission.

2. *First*, as the Division knows, we have supported the EC's point that the Panel, as part of its analysis of whether Brazil's measure was "necessary," should have considered the fact that retreaded tires continue to be imported into Brazil as a result of the Mercosur exemption.[1] Brazil's appellee submission does nothing to rebut that point. Brazil merely asserts, without support, that "measures such as the Mercosur exemption are extraneous to the ban and are properly examined under the Article XX chapeau analysis."[2] However, in the first place, the Mercosur exemption is contained in the same sentence of the same paragraph of the very measure – Portaria SECEX 14/2004 – that the Panel found in breach of GATT 1994 Article XI. Brazil, like the Panel, fails to explain the basis on which paragraph 40 of Portaria 14/2004 may be treated as containing two distinct measures, one "extraneous" to the other. Indeed, there

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[1] U.S. Third Participant Submission, paras. 4-5.

[2] Brazil Appellee Submission, para. 111.

appears no basis on the record of this proceeding to do so. In the second place, Brazil offers no explanation for how the Panel's analysis of the "necessity" of the import ban (as opposed to its analysis of the chapeau) could be an objective assessment of the facts, if that analysis ignored (rather than considering) the importation of tires expressly exempted from the ban.

3. *Second*, Brazil's appellee submission does not reconcile the contradictions inherent in the Panel's analysis of the Mercosur exemption for purposes of the chapeau to Article XX. Brazil acknowledges the Panel's findings with respect to the chapeau depend on the Panel's conclusion that Mercosur was a "type of agreement . . .expressly recognized in Article XXIV,"[3] and Brazil's analysis likewise appears to depend upon this assumption.[4] However, Brazil does not address the point that the Panel could not have reached this conclusion without first "mak[ing] [a] determination as to whether MERCOSUR meets the requirements of Article XXIV in respect of customs unions."[5] While it may be the case that, as Brazil argues, a measure that does not meet the requirements of Article XXIV may nonetheless meet the requirements of the chapeau to Article XX, the panel report contains little analysis to support the conclusion that the Mercosur exemption does in fact do so, other than its improper reliance on the "express recognition" allegedly given to such agreements in Article XXIV.

4. *Third*, the United States would like to offer two observations regarding CAMEX Resolution No. 38, the new quantitative restriction on Mercosur imports, which Brazil cites in defense of the Panel's conclusion that the exemption resulted in "insignificant" imports and

[3] Panel Report, para. 7.273.

[4] Brazil Appellee Submission, para. 233.

[5] Panel Report, para. 7.273.

therefore was not inconsistent with the chapeau. First, the document submitted by Brazil dates from August 2007, after the panel report was issued, and as such constitutes new evidence that was not before the Panel. Article 17.6 of the DSU provides that "[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel." Thus, it precludes the Appellate Body from accepting new evidence.[6] Second, even setting aside the fact that neither the Panel nor Brazil has explained why the volume of tires previously imported from Mercosur is "insignificant" (and Brazil's observation that they are 1/7th of that previously imported from the EC begs that question),[7] the mere fact that Brazil has now decided to cap imports from Mercosur at a previous year's levels would in any case not resolve the fundamental errors in the Panel's analysis. The Panel analyzed this issue in terms of whether the Mercosur exemption "undermined" the measure's objective.[8] However, under the chapeau, the Panel is obliged to evaluate whether "arbitrary or unjustifiable discrimination" or a "disguised restriction on international trade" exist, not simply whether the discrimination "undermines" the objective of the measure. The Panel failed to do so, and thus the United States agrees with the EC that the Panel's findings on this issue cannot be sustained.

5. This concludes the U.S. oral statement. Thank you for your attention.

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[6] DSU Art. 17.6; *Chile – Agricultural Products (AB)*, paras. 12-13.

[7] Brazil Appellee Submission, para. 231.

[8] *See, e.g.*, Panel Report, para. 7.354.