Brazil – Measures Affecting Imports of Retreaded Tyres

(WT/DS332)

Third Party Submission of the United States

June 19, 2006

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I. INTRODUCTION

1. The United States welcomes this opportunity to provide its views on certain issues raised in the first submissions of the parties regarding Brazil's measures with respect to imported retreaded tires. The United States also looks forward to participating in the third party session of the first substantive meeting of the Panel in this dispute.

II. ARGUMENT

A. Legal Analysis of Article XX(b)

2. While the United States does not express a view in this submission as to whether the particular facts of this case would support the conclusion that Brazil's measures are justified under Article XX(b) of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), several statements by the parties regarding the legal requirements for establishing an Article XX(b) defense merit comment.

3. As both parties appear to agree, in evaluating whether Brazil has established that the import ban is covered by Article XX(b), the Panel must first determine whether the measure is "necessary to protect human, animal or plant life or health," and then assess whether it satisfies the terms of the chapeau to Article XX.

4. With respect to establishing whether a measure is "necessary", the Appellate Body has described the word "necessary" as "normally denot[ing] something 'that cannot be disposed with or done without, requisite, essential, needful.'"[1] While "necessary…'is not limited to that which is 'indispensible' or 'of absolute necessity' or inevitable'," the Appellate Body has stated that a "'necessary measure" is "located significantly closer to the pole of 'indispensible' than to the

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[1] Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R – WT/DS169/AB/R ("*Korea – Beef*"), adopted 10 January 2001, paras. 160-61.

opposite pole of simply 'making a contribution to'."[2] To evaluate whether a measure meets this requirement, the Appellate Body has used a weighing and balancing approach, taking into account a number of different factors, including the impact on trade of the measure being challenged, the importance of the interests or values pursued, and whether there exists a reasonably available alternative that is consistent with a Member's WTO obligations.[3]

5. In applying this analysis to the measure at issue, Brazil makes several arguments that do not accord with a proper interpretation of Article XX(b). First, Brazil argues that the impact of the import ban is "balanced by disposal obligations on domestic producers."[4] Whether or not true, the statement that domestic producers may be required to comply with other costly obligations is irrelevant to establishing whether or not maintaining the challenged measure is "necessary" within the meaning of GATT 1994 Article XX(b).

6. Second, in discussing whether an alternate measure is "reasonably available," Brazil appears to misstate the burden of proof. Article XX(b) is an affirmative defense;[5] as the party invoking that provision, Brazil has the burden of demonstrating that the import ban is "necessary." In examining a parallel provision under the *General Agreement on Trade in Services* in *US – Gambling*, the Appellate Body stated that "it is not the responding party's

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[2] Appellate Body Report, *Korea – Beef*, paras. 160-61.

[3] The United States notes that in their submissions, both Brazil and the EC appear to suggest that where a measure causes particular impacts or is intended to achieve particular objectives, that fact is dispositive of whether the measure is "necessary." As a legal matter, the United States does not, for example, agree that simply because, as Brazil claims, the import ban is designed to achieve the policy goal of protecting human life or health, "it must be accepted" that the ban is "necessary" or that because, as the EC argues, the measure challenged is a "total import ban," it is "impossible to consider" it necessary. *First Written Submission of Brazil*, 8 June 2006 ("Brazil First Submission"), para. 101; *First Written Submission by the European Communities*, 27 April 2006 ("EC First Submission"), para. 115.

[4] Brazil First Submission, para. 110.

[5] E.g., Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R ("*US – Shirts and Blouses*"), adopted 23 May 1997, p. 14 (noting that Article XX is "in the nature of [an] affirmative defence[]" and that "[i]t is only reasonable that the burden of establishing such a defence should rest on the party asserting it").

burden to show, in the first instance, that there are no reasonably available alternatives to achieve its objectives," but that "[i]f … 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 the proposed alternative is not, in fact, 'reasonably available'."[6] Similarly, in *Korea – Beef*, the Appellate Body upheld the panel's examination of alternatives and finding that it was up to the responding party, Korea, to demonstrate that the alternatives were not reasonably available.[7]

7. Contrary to the reasoning in *Korea – Beef and US – Gambling*, Brazil states that "[t]he EC … has the burden of demonstrating that there is an alternative measure that is reasonably available to Brazil."[8] However, Brazil retains the burden of demonstrating "necessity," including the unavailability of alternatives described by the EC. The EC's description of alternative measures in its submission was sufficient such that the burden of demonstrating that the measures identified by the EC are not "reasonably available" lies with Brazil.

8. Third, Brazil suggests that the alternative reasonably available measure must be "less trade-restrictive."[9] There is no basis in the text of Article XX(b) for this requirement. In this regard, it is worth noting that the concept of less trade restrictive measures arises in two WTO agreements only: the *Agreement on the Application of Sanitary and Phytosanitary Measures* and the *Agreement on Technical Barriers to Trade*. Incorporating such a requirement into Article XX(b) of the GATT 1994 would "add to" or "diminish" the rights and obligations of Members

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[6] Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R ("*US – Gambling*"), adopted 20 April 2005, paras. 309-311.

[7] Appellate Body Report, *Korea – Beef*, paras. 172-173.

[8] Brazil First Submission, para. 117.

[9] Id., para. 116.

under the covered agreements, contrary to Articles 3.2 and 19.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes.* Rather, as the Appellate Body has explained, the trade impact of the challenged measure is one element that may be useful in determining whether the measure is "necessary."[10]

B. Brazil's Reliance on Article XXIV of the GATT 1994 is Misplaced

9. In its submission, Brazil does not dispute that the application of import restrictions to tires from Members that are not parties to Mercosur is inconsistent with Article I:1 and Article XIII of the GATT 1994. Rather, it argues that the exemption of Mercosur parties from its import ban on retreaded tires is authorized under GATT 1994 Article XXIV:5,[11] which provides that "the provisions of [the GATT 1994] shall not prevent … the formation of a customs union or of a free-trade area."

10. However, the United States submits that Brazil's reliance on Article XXIV is misplaced: Mercosur has not been notified under GATT 1994 Article XXIV as a customs union within the meaning of that provision, as required by GATT 1994 Article XXIV:7. The Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, which is an integral part of the GATT 1994,[12] makes clear that satisfaction of the notification requirement contained in Article XXIV:7(a) is a prerequisite to demonstrating that a regional arrangement is a customs union or free-trade area consistent with Article XXIV. As Members agreed in Article 1 of the Understanding, "Customs unions, free-trade areas, and interim agreements leading to the formation of a customs union or free-trade area, to be consistent with

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[10] Appellate Body Report, *Korea – Beef*, para. 164.
[11] Brazil First Submission, para. 163 *et seq*.
[12] See GATT 1994 para. 1(c)(iv).

Article XXIV, must satisfy, *inter alia*, the provisions of paragraphs 5, 6, 7 and 8 of that Article." Absent notification, Brazil cannot demonstrate that Mercosur in fact so complies. Brazil's limited analysis of Mercosur's compatibility with Article XXIV:5 is plainly insufficient to support its claim that Mercosur "complies with the requirements of Article XXIV" as a whole.[13]

11. Rather than notifying the arrangement under Article XXIV, Mercosur parties notified the Mercosur treaty instruments pursuant to paragraph 4(a) of the Ministerial Decision of 28 November 1979 regarding "Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries" (the "Enabling Clause").[14] In notifying the agreement pursuant to paragraph 4(a) of the Enabling Clause rather than GATT 1994 Article XXIV:7(a), Mercosur parties identified the agreement as an "action to induce an arrangement" described in paragraphs 1, 2, and 3 of the Enabling Clause. Regional arrangements as defined in these provisions have different characteristics and are subject to different obligations than customs unions and free-trade areas described in Article XXIV.[15] Brazil has not asserted that the measures in question, if inconsistent with either or both GATT 1994 Articles I and XIII, could be justified by the Enabling Clause.[16]

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[13] Brazil First Submission, para. 169.

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

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

[16] The United States expresses no view at this time as to whether the Mercosur arrangement meets the requirements of the Enabling Clause.

III. CONCLUSION

12. The United States thanks the Panel for providing an opportunity to comment on the issues at stake in this proceeding, and hopes that its comments will prove to be useful.