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**AMICUS CURIAE BRIEF TO THE APPELLATE BODY
IN BRAZIL – MEASURES AFFECTING IMPORTS OF RETREADED TYRES**

11 October 2007

IMPORTANCE OF THE CASE

1. The disposal of tyre waste is a worldwide health and environmental problem, and both the European Communities and Brazil are trying to minimize the impact of tyre waste on their environment and the health of their people. Retreading tyres in order to extend their usable life is one way of contributing to diminishing the tyre disposal problem. Trade in retreaded tyres, however, generally increases the health and environment problems in the importing State, as retreaded tyres cannot be retreaded again and have a shorter life-span. Given the serious implications of tyre waste for the propagation of mosquitoes and associated diseases like malaria and dengue fever, and given the difficulties of safely disposing of the hazardous and persistent chemicals in tyres, countries should retain the ability of banning entry of short-life retreaded tyres that threaten their environment and the health of their people.
2. The Panel concluded that Brazil's import prohibition is necessary within the meaning of Article XX(b). To reach this determination, the Panel analyzed, *inter alia*, the risks associated with tyre waste, the measure's capabilities to address such risks, and potential alternatives to the import prohibition. The Panel's analysis is anchored in WTO text and jurisprudence, and it follows accepted methodologies of treaty interpretation. In the end, the Panel's reasoning and holding make an important contribution to reconciling what at times are competing interests in trade and the environment.

THE PANEL DID NOT COMMIT LEGAL ERROR IN ESTABLISHING FACTS

3. The Appellate Body has set a high standard for a violation of DSU Article 11, requiring the existence of "an egregious error that calls into question the good faith

of a panel.”¹ The *Brazil-Tyres* Panel report’s reasoned and detailed analysis is well-anchored in evidence, and we know of no allegation of bad faith on the part of the panel or its members.² It thus appears that the Panel exercised its authority as the trier of fact well within the bounds of Article 11 of the Dispute Settlement Understanding (DSU).

4. We believe that factual issues cannot be re-argued under the guise of DSU Article 11, including issues such as: the existence of risk, the capability of the measure to address that risk, and the determination of the level of protection. Also, as examined further below, the Panel’s findings on these three issues are consonant with the appropriate interpretation of Article XX(b).

THE PANEL’S INTERPRETATION OF ARTICLE XX FOLLOWS ACCEPTED METHODS OF TREATY INTERPRETATION AND WTO JURISPRUDENCE

5. The Appellate Body has elaborated on the distinction between a measure’s design and application in several cases, including *US-Gasoline* and *US-Shrimp*.³ The Appellate Body has further stressed that scrutiny of a measure under the chapeau of Article XX should focus on the actual application of a measure, and that this should occur only after an analysis of one of the article’s paragraphs. The Panel followed this approach in evaluating whether Brazil’s import prohibition is in conformity with Article XX.
6. There is a clear rationale for the two-tier analysis of Article XX adopted by the Appellate Body. In order to determine whether a measure has been abused or misused in its application, it is indispensable to know *what* is applied, *i.e.*, the measure as designed.⁴ Thus, the provisional justification of Article XX(b) focuses on design, and this provisional justification may only be confirmed after inquiring on the measure’s actual application, as required by the chapeau of Article XX.

UNDER ARTICLE XX(B) THE PANEL PROPERLY ASCERTAINED THE EXISTENCE OF A RISK AND THE LEVEL OF PROTECTION

i. Risk to Health and the Environment

7. A determination of whether a measure is necessary for the protection of human, animal, or plant life or health under Article XX(b) presupposes a determination of

¹ Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, ¶ 133. [hereinafter *EC-Hormones*].

² We note in this regard that we have had access only to Brazil’s Appellee Submission, because the EC’s memorial is secret. Our knowledge of the EC’s arguments is thus imperfect.

³ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, ¶ 116. [hereinafter *US-Shrimp*]

⁴ *US-Shrimp*, ¶ 120. See also, Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R.

risk. In other words, if there were no risk, then a measure could not be considered necessary under Article XX(b).

8. In determining the existence of a risk, a certain degree of deference to regulators is required in order to safeguard the policy space necessary for a government to effectively protect its population. This policy space is critical, for example, for the ability of governments to discharge its human rights obligations to secure the highest attainable standard of physical and mental health.
9. As the Panel has done, risk must be ascertained as it exists in reality, despite the existence of risk management standards. Before the Panel, the EC argued that only incorrectly managed tyres pose a risk.⁵ In its approach to this issue, the Panel looked at reality, finding guidance in the Appellate Body's *EC-Hormones* decision, which focused on "risk in human societies as they actually exist".⁶ The Panel found that the evidence on the record suggested that, in reality, waste tyres do get abandoned and do accumulate and that risks associated with accumulated waste tyres exist in Brazil.⁷ In this regard, the Panel's approach to risk as it exists in the real world allowed it to avoid the snare of elaborating theoretical hypotheses that have no connection with reality.
10. This is not to say that technical risk management standards are not relevant. On the contrary, they may guide the design of measures and provide criteria to evaluate whether a restriction to trade results in arbitrary discrimination. Technical risk management standards, however, also suffer from limitations that reduce their ability to resolve health and environmental problems. First, technical risk management standards require institutional and normative capacities which are often lacking in developing countries. Second, developing countries face significant difficulties in participating in the processes whereby international technical risk management standards are formulated, on account of lack of financial resources or technical expertise. Third, technical risk management standards may not be appropriate for the particular environmental conditions of every WTO Member. Fourth, and in the particular context of the instant case, no particular management measure is completely safe and in any event alternative management measures cannot fully substitute for non-generation measures, i.e., measures that avoid the generation of tyre waste in the first place. Thus, the better approach to ascertaining risks is not by reference to risk management standards, but by reference to the actual reality on the ground.

⁵ Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, ¶ 7.54. [hereinafter *Brazil – Retreaded Tyres*]

⁶ Appellate Body Report, *EC- Hormones*, ¶ 187.

⁷ Panel Report, *Brazil – Retreaded Tyres*, ¶ 7.67

ii. Level of Protection

11. The Appellate Body in the Australia-Salmon case (a dispute under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures, referred to as the “SPS Agreement”, which elaborates Article XX(b)), noted that: “The determination of the appropriate level of protection, ... is a *prerogative* of the Member concerned and not of a panel or of the Appellate Body.”⁸ (italics in original)
12. The *Brazil - Retreaded Tyres* Panel found that the level of protection chosen by Brazil is the reduction of the risks associated with waste tyre accumulation to the maximum extent possible. This finding is wholly consonant with Brazil’s policy objectives and the measure’s design, and with the Appellate Body’s view that the appropriate level of protection is a prerogative of the Member concerned.
13. This level of protection cannot be second-guessed by the panel or disputing parties. No particular risks, including risks associated with the disposal of tyre waste, can be excluded from the scope of risks covered pursuant to Brazil’s chosen level of protection, as it is up to each WTO Member alone to set its own level of protection. In the present case, disposal is at the heart of the health and environmental risks resulting from the import of retreads.
14. Finally, excluding disposal from the analysis of risk and the level of protection ignores the life-cycle approach to environmental policy, which is central to the proper elucidation of this case. As noted in an *amicus curiae* brief submitted by an NGO coalition to the Panel in July 2006, life-cycle analysis looks at all the environmental impacts of a product, including its production, marketing, and disposal.⁹ Life-cycle analysis requires a holistic approach to tyres, which enables proper determination of the environmental and public health problems associated with tyres, including with the disposal of tyres, one of the key steps in the life of the product. Consideration of this key dimension of retreaded tyres, namely disposal, allowed the Panel to properly apply GATT Article XX.

⁸ Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, ¶199. [hereinafter *Australia – Salmon*].

⁹ *Amicus Curiae* Brief, ACPO et. al., *Brazil – Measures Affecting Imports of Retreaded Tyres* WT/DS332, 03 July 2006, available at http://www.ciel.org/Tae/BrazilRetreadedTires_Amicus_7Jul06.html

UNDER ARTICLE XX(B) THE PANEL PROPERLY DETERMINED WHETHER THE MEASURE IS CAPABLE OF REDUCING THE RISKS RESULTING FROM THE IMPORTS OF RETREADED TYRES

i. The Degree of Quantification Demanded by the EC of a Measure's Reduction of Risk is Impracticable and Unnecessary

15. The kind of information underlying an environmental law varies by approach. For example, environmental laws need not follow a cost-benefit analysis, and for this and other reasons precise data on the measure's impact may be lacking. In this vein, many environmental laws focus on securing an ample margin of safety, without regard to monetary costs. Likewise, environmental laws may impose or support high levels of technology in order to force innovation and development, not knowing their exact impact, due to lack of experience with the new technology. These examples show that a WTO Member may have varying forms of information, in connection with its various health and environmental measures, and that the possibility of quantifying the impact of a measure on the overall objective varies accordingly.
16. Furthermore, environmental laws are often designed under conditions of uncertainty. Policy makers are often confronted with the pressing need to take effective action to avert, control, or mitigate health and environmental risks in situations where science is disputed or where the full scope of risk is unknown. The precautionary principle has been developed to aid policy makers in facing such difficult situations of inconclusive science, not in disregard of science, but in recognition of its limitations. In this regard, holistic and interconnected approaches may be called for threats that may slowly accumulate and involve diffuse impacts. Thus, regulators operating under conditions of uncertainty would not have all the information necessary to satisfy a "quantification" test to Article XX(b).

ii. The Distinction Between the Actual and Potential Contribution of a Measure to the Reduction of Risk is Unnecessary in an Article XX(b) Examination

17. In ascertaining risk and determining appropriate responses to address it, a prudent and reasonable regulator will take into account all evidence available regarding the existence of risk as well as the expected impact of a measure. Under this light, the distinction between actual and potential contribution of a measure to the reduction of risk appears somewhat artificial, because evidence available to the regulator will include both actual data as well as forecasts of expected results. Consequently, the focus of analysis in an Article XX(b) determination by a WTO Panel is not on quantifying the impacts of a measure, but on the evidence that reveals the existence of a risk as well as the expected outcomes of a particular policy-choice, *i.e.*, whether the measure is capable of reducing such risk.

iii. Analysis of the Contribution of the Measure to the Reduction of Risk Need Not Establish a Quantified Laboratory Formula

18. In order to determine whether a particular measure is capable of reducing risk, it is not necessary to arrive at laboratory formulas of mathematical probabilities regarding risk reduction. As Appellate Body noted in the *EC-Asbestos* case, risk may be evaluated either in quantitative or qualitative terms.¹⁰ It follows that any contribution to the reduction of risk can be also evaluated in quantitative or qualitative terms. And there are good reasons for this. As noted above, it may not always be possible to determine exactly the extent to which a particular measure will reduce risk. Likewise, the impact of a measure will be influenced by a myriad of factors other than design. Furthermore, the varying approaches to the design of a measure require varying types of information. Consequently, analysis of the evidence regarding the existence of risk, coupled with analysis of the linkages between the measure and such risk can be sufficient to determine whether a measure is capable of reducing the risk.

CONCLUSION

19. The Panel properly established the facts of the case, in conformity with its authority under the DSU. It found that imports of retreaded tyres presented a risk to health and the environment and that a ban on such imports reduced the risks of waste tyre accumulation to the maximum extent possible. These findings are wholly consonant with a life-cycle approach to health and environmental policy, which includes analysis on the impacts associated with the disposal of products. This approach is also consonant with the principle of prevention of environmental harm and its preference for non-generation of waste as a way to reduce risk. Finally, these findings are also in harmony with human rights law, which imposes upon States the obligation to adopt concrete steps towards the full realization of the right to the highest attainable standards of health, including steps to prevent, treat, and control epidemic and endemic diseases.

20. The EC, however, appears to attempt to reargue these facts on appeal, despite the authority of the Appellate Body to review issues of law.

¹⁰ Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos –Containing Products*, WT/DS135/AB/R, ¶167.