



HUMANE SOCIETY INTERNATIONAL

September 28, 2007

Dispute Settlement Body
World Trade Organization
Centre William Rappard
Rue de Lausanne 154
CH-1211 Geneva 21, Switzerland

Honorable Members:

With reference to the legal authority of the Appellate Body to accept and consider any information it considers pertinent and useful from a relevant source in the settlement of a dispute, and with reference to the *Understanding on Rules and Procedures Governing the Settlement of Disputes*, as interpreted by the Appellate Body in *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R at paras. 36-42 (adopted June 7, 2000), Humane Society International, a non-party to the dispute, respectfully submits this *amicus curiae* brief to the Appellate Body in the matter of *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332.

Humane Society International (HSI) operates as the international arm of The Humane Society of the United States (HSUS). Founded in 1954, The HSUS is the largest animal protection organization in the United States, and in conjunction with HSI, maintains a constituency of over 10 million. As the international arm of The HSUS, HSI works to promote the protection of all animals around the world by participating in programmatic activities in developing countries, advocating for the effective enforcement of international environmental treaties, and furthering humane and sustainable international trade policy.

HSI actively participates in discussions of international trade policy at the World Trade Organization addressing such issues as equitable development, humane and sustainable agriculture, environmental conservation, and wildlife and habitat protection. In addition, as a member of the Trade and Environment Policy Advisory Committee in the United States, HSI advises the United States Trade Representative and the U.S. Environmental Protection Agency on international trade policy. Locally, HSI implements a number of trade capacity building and technical assistance programs in developing WTO Member countries to support sustainable economic development, including humane agricultural practices and habitat protection policies.

In this dispute, HSI supports the panel's interpretation of Article XX(b) and requests the Appellate Body to uphold the panel's findings in paragraphs 7.35-7.90, 7.92-7.216. HSI does not agree, however, with the panel's findings in paragraph 7.91 regarding the sufficiency of the evidence supporting the existence of a risk to animal life or health from certain mosquito-borne diseases. As a result, HSI believes the panel has failed to make an objective assessment of the facts before it with respect to this latter issue under Article 11 of the Dispute Settlement Understanding.

HSI respectfully requests the Appellate Body to find the information contained in this submission to be pertinent and useful, and to consider the enclosed *amicus curiae* submission in its deliberations and recommendations in *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Patricia A. Forkan", with a long horizontal flourish extending to the right.

Patricia A. Forkan
President, Humane Society International

Proof of Service

The undersigned hereby certifies that copies of the attached submission have been served upon the Parties to this dispute on this 26th day of September, 2007, by Federal Express International First:

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Sarah Stewart

**BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY**

Brazil – Measures Affecting Imports of Retreaded Tyres
(WT/DS332)

Written Submission of Non-Party Amicus Curiae

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28 September 2007

CASES CITED IN THIS SUBMISSION

Short Title	Full Case Title and Citation
<i>Dominican Republic – Import and Sale of Cigarettes</i>	Appellate Body Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/AB/R, adopted 19 May 2005
<i>EC - Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001
<i>EC – Asbestos</i>	Panel Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/R and Add.1, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS135/AB/R
<i>EC – Biotech</i>	Panel Report, <i>European Communities – Approval and Marketing of Biotech Products</i> , WT/DS291/R, WT/DS292/R, WT/DS293/R, 29 September 2006
<i>EC – Hormones</i>	Appellate Body Report, <i>European Communities - Hormones</i> , WT/DS26/AB/R and WT/DS48/AB/R, adopted 16 January 1998
<i>U.S. - Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996
<i>U.S. – Gasoline</i>	Panel Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/R, adopted 20 May 1996, as modified by the Appellate Body Report, WT/DS2/AB/R
<i>U.S. – Hot Rolled Lead and Bismuth Carbon Steel Products</i>	Appellate Body Report, <i>United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom</i> , WT/DS138/AB/R, adopted June 7, 2000
<i>U.S. – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005
<i>U.S. - Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998

1. Our Interest

1. Humane Society International (HSI) operates as the international arm of The Humane Society of the United States (HSUS). Founded in 1954, The HSUS is the largest animal protection organization in the United States, and in conjunction with HSI, maintains a constituency of over 10 million. As the international arm of The HSUS, HSI works to promote the protection of all animals around the world by participating in programmatic activities in developing countries, advocating for the effective enforcement of international environmental treaties, and furthering humane and sustainable international trade policy.
2. HSI actively participates in discussions of international trade policy at the World Trade Organization (WTO) addressing such issues as equitable development, humane and sustainable agriculture, environmental conservation, and wildlife and habitat protection. In addition, as a member of the Trade and Environment Policy Advisory Committee (TEPAC) in the United States, HSI advises the United States Trade Representative (USTR) and the U.S. Environmental Protection Agency (EPA) on international trade policy. Locally, HSI implements a number of trade capacity building and technical assistance programs in developing WTO Member countries to support sustainable economic development including humane agricultural practices and habitat protection policies.
3. The dispute before the Appellate Body involves Brazil's imposition of import restrictions on retreaded tyres, which the European Communities (EC) challenged as inconsistent with Article XI:1 of GATT 1994.¹ The accumulation of these tyres, which have a shorter lifespan than new tyres, contributes to growing stockpiles of waste tyres in Brazil that generate risks to human and animal life or health.² Severe health conditions and even death can befall both humans and animals as a result of tyre fires and mosquito-borne diseases that are linked to the accumulation of waste tyres. On this basis, the panel found Brazil's import restrictions justifiable under Article XX(b), which excepts restrictions that would normally be inconsistent with a Member's GATT obligations if such restrictions are "necessary to protect human, animal or plant life or health."³
4. HSI's interest in this appeal, and the legal arguments contained herein, arise out of the organization's concern that the WTO Agreements operate effectively and in a manner allowing Members to take measures, as appropriate and consistent with WTO obligations or justified under WTO Agreement provisions, to prevent, reduce, and/or eliminate practices that jeopardize animal life or health. As an animal welfare organization, public participant, and trade policy advocate, HSI is hopeful that the views contained in this

¹ *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R at paras. 2.1, 2.5, 7.34 (June 11, 2007).

² *Brazil – Tyres*, WT/DS332/R at paras. 7.130, 7.83, 7.93.

³ *Brazil – Tyres*, WT/DS332/R at para. 7.44 ("As noted above, Article XX(b) allows WTO Members to introduce a measure necessary to protect "human, animal or plant life or health.")

submission will be “pertinent and useful” to the Appellate Body’s deliberations and recommendations in this dispute.⁴

5. HSI respectfully requests that the Appellate Body accept this *amicus* submission by and through its legal authority, as interpreted and expressed in *U.S. –Hot-Rolled Lead and Bismuth Carbon Steel Products*.

2. Overview of Dispute

6. On June 20, 2005, the EC requested consultations with Brazil concerning Brazil’s import restrictions on retreaded tyres that affected the EC’s exports of these products to Brazil.⁵ Consultations failed to resolve the matter. On November 17, 2005, the EC requested the establishment of a panel.⁶ On January 20, 2006, the Dispute Settlement Body established a panel pursuant to such request.⁷
7. In brief, the EC claimed, *inter alia*, that Brazil’s measures restricting the importation of retreaded tyres violated several fundamental rules of GATT 1994 including the prohibition on the use of quantitative restrictions on imports, and that the measures could not be justified on the grounds that they contributed to Brazil’s protection of the environment and public health.⁸ Brazil responded that its import ban on retreaded tyres is justified by Article XX(b) of the GATT because it is a measure necessary to protect human, animal and plant life or health.⁹
8. HSI submitted an *amicus curiae* submission to the panel asserting that Brazil’s import restrictions on retreaded tyres were provisionally justified under Article XX(b), since such measures were necessary to ensure the non-generation and accumulation of waste tyres that adversely effect animal and plant life or health.¹⁰ In support, HSI provided detailed scientific information regarding the deleterious effects waste tyres can have on animal populations in Brazil.¹¹ HSI did not comment on the legality or consistency of Brazil’s measures with the Article XX chapeau.¹²

⁴ *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R at para. 42 (adopted June 7, 2000) (“We are of the opinion that we have the legal authority under the DSU to accept and consider *amicus curiae* briefs in an appeal in which we find it pertinent and useful to do so.”)

⁵ WT/DS332/1 (June 23, 2005).

⁶ WT/DSB/M/200, para. 35.

⁷ WT/DS332/5 (March 17, 2006) and WT/DSB/M/203, p. 13.

⁸ *Brazil –Tyres*, WT/DS332/R at para. 3.1(a); WT/DSB/M/200, para. 35; WT/DS332/4.

⁹ *Brazil –Tyres*, WT/DS332/R at para. 3.3(a).

¹⁰ HSI Submission at 4.

¹¹ HSI’s *Amicus Curiae* Submission was incorporated into the record as Brazilian Exhibit 98. In brief, HSI asserted that “these dangers include the release of toxic emissions into the air, soil and water as a result of both the open and controlled burning of tyres. These toxins pose very serious health risks to animal populations including cancer, immunological, neurological, and reproductive disorders, and can contribute to further depletion of their natural habitat. In addition, waste tyres placed in landfills or stockpiles provide excellent breeding grounds for disease-carrying pests that can infect animal populations with a number of debilitating and

9. The panel issued its final report on June 12, 2007.¹³

3. Summary of the Panel's Findings¹⁴

10. The panel found that the accumulation of waste tyres presents risks to human, animal and plant life or health in relation to toxic emissions caused by fires and by mosquito-borne diseases.¹⁵

11. The panel then found that the policy underlying Brazil's ban, namely, the prevention of accumulation of waste tyres that have adverse effects on human, animal, and plant life or health, falls within the range of policies covered by Article XX(b).¹⁶

12. Next, the panel considered whether Brazil's import ban was "necessary" to protect human, animal, or plant life or health, employing a three-factor test identified by the Appellate Body in prior disputes, namely: (1) "the relative importance of the interests or values furthered by the challenged measure;" (2) the contribution of the measure to the realization of the ends pursued by it;" and (3) "the restrictive impact of the measure on international commerce."¹⁷

13. First, the panel found that the protection of human and animal health and life are important interests.¹⁸

14. Second, the panel examined various factual exhibits provided by the parties, and concluded that Brazil's measure is capable of contributing to a reduction in waste tyres.¹⁹

deadly diseases. Finally, the international distribution of used tyres poses significant risks to Brazil's biodiversity through the transport of invasive species." HSI Submission at 1. Further details regarding the dangers of waste tyre disposal on animal populations were provided throughout HSI's Submission.

¹² HSI Submission at 1.

¹³ *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R (June 11, 2007).

¹⁴ As noted, HSI's submission is limited to the panel's assessment of Article XX(b). Thus, HSI does not include a summary of the panel's findings with regard to other issues.

¹⁵ *Brazil – Tyres*, WT/DS332/R at paras. 7.83, 7.93. With regard to animals, the panel found there was insufficient evidence that mosquito-borne diseases other than dengue, such as yellow fever, present a risk to animals as a result of an accumulation of waste tyres. *Id.* at paras. 7.91, 7.92.

¹⁶ *Brazil – Tyres*, WT/DS332/R at paras. 7.99, 7.100, 7.102. The panel also found that measures designed to reduce generation of waste tyres are a "generally recognized means of addressing waste management issues." *Id.* at para. 7.100. According to the panel, "{m}easures 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." *Id.* at para. 7.98.

¹⁷ *Brazil – Tyres*, WT/DS332/R at paras. 7.104. The panel noted that its analysis of these three factors involves the actual measure itself, not its application. *Id.* at para. 7.107.

¹⁸ *Brazil – Tyres*, WT/DS332/R at para. 7.108-7.112. The panel explained that each Member has the right to determine the level of protection of health appropriate in a given situation. *Id.* at para. 7.108. Brazil's "chosen level of protection is the reduction of risks of waste tyre accumulation to the maximum extent possible." *Id.*

¹⁹ *Brazil – Tyres*, WT/DS332/R at para. 7.142. The EC argued that the import ban does not contribute to a reduction in 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 – Tyres*, WT/DS332/R at para. 7.125. The panel considered these arguments in light of the evidence

The panel also examined whether the measure contributed to a reduction of the risks to human and animal life and health. Having found evidence that the accumulation of waste tyres leads to risks to human and animal life and health, the panel concluded a reduction in this accumulation “can reasonably be expected to constitute a step towards the reduction” of these risks.²⁰

15. Third, the panel observed that because Brazil’s import ban “aims to halt” the entry of retreaded tyres from Europe into Brazil, it is “as trade-restrictive” as a measure can be.²¹ However, the panel explained that in certain instances, a highly-trade restrictive measure may be justifiable to achieve an objective, particularly in the absence of reasonably available alternatives.²²
16. Having reviewed the three factors above, the panel considered whether a WTO-consistent measure (or a less WTO-inconsistent) measure was “reasonably available” and could achieve the same end.²³ The panel explained that “reasonably available” means an alternative measure must not be theoretical (the Member must be capable of taking it), it must not be unduly burdensome, and must preserve the ability of the Member to achieve its desired level of protection.²⁴
17. The panel found that none of the alternatives suggested by the EC “would be such that the risks arising from waste tyres in Brazil would be safely eliminated, as is intended under the current ban.”²⁵ The panel concluded that Brazil sufficiently demonstrated that the alternative measures proposed by the EC were not “reasonably available” alternatives that would achieve the same objectives as the import ban.²⁶
18. Accordingly, the panel found Brazil’s import ban was “necessary” and justified under Article XX(b).²⁷

presented, and found that Brazilian domestic used tyres are suitable for re-treading, “at least some domestic tyres are being retreaded in Brazil,” Brazil has taken a number of measures to encourage further domestic retreading, and Brazil has the production capacity to retread domestic used tyres. *Id.* at paras. 7.135-7.141.

²⁰ *Brazil –Tyres*, WT/DS332/R at para. 7.146.

²¹ *Brazil –Tyres*, WT/DS332/R at para. 7.114.

²² *Brazil –Tyres*, WT/DS332/R at para. 7.151, 7.211.

²³ *Brazil –Tyres*, WT/DS332/R at para. 7.149. Recalling the Appellate Body’s findings in *Dominican Republic – Import and Sale of Cigarettes*, the panel undertook a weighing and balancing process of the three factors outlined above. *Id.* at para. 7.150.

²⁴ *Brazil –Tyres*, WT/DS332/R at paras. 7.158 (*citing* the Appellate Body in *US-Gambling*).

²⁵ *Brazil –Tyres*, WT/DS332/R at para. 7.214. Indeed, the panel found that Brazil already implements some of these measures.

²⁶ *Brazil –Tyres*, WT/DS332/R at para. 7.215. For example, the EC argued that instead of an import ban, Brazil could promote the retreading of passenger car tyres in Brazil. *Id.* at para. 7.160. Brazil demonstrated that it already has programs in place regarding this very alternative, but that such programs, while less trade restrictive than the import ban, would not lead to a “reduction in the number of waste tyres additionally generated by ‘imported short-lifespan’ retreaded tyres.” *Id.* at paras. 7.166-7.169. In the panel’s view, this alternative is complementary to, rather than substitutable with, the import ban. *Id.* at para. 7.169.

²⁷ *Brazil –Tyres*, WT/DS332/R at para. 7.216.

4. The EC's Appeal

19. On September 4, 2007, the EC notified its appeal under Article 16.4 and Article 17 of the DSU, and under Rule 20(1) of the Working Procedures for Appellate Review.²⁸ The EC appealed a number of the panel's findings under Article XX(b) and under the article XX chapeau.²⁹

5. Legal Issues

20. HSI generally agrees with the panel's analysis under Article XX(b) and its conclusion that Brazil's import restrictions are provisionally justified as "necessary" to protect human and animal life or health.³⁰ HSI disagrees, however, with the panel's findings regarding the sufficiency of the evidence to support the link between the accumulation of waste tyres and the spread of mosquito-borne diseases other than dengue to animals. On this latter issue, HSI believes the panel has failed to make an objective assessment of the evidence pursuant to Article 11 of the Dispute Settlement Body. A discussion of these issues is presented in more detail below.

5.1 The Panel Correctly Interpreted Article XX(b)

21. Based on the facts provided by the Parties, the panel correctly determined that the accumulation of waste tyres creates a risk to animal life or health by way of toxic emissions caused by fires and by dengue, a mosquito-borne disease.³¹ HSI addresses specific aspects of the panel's assessment of the evidence before it regarding the risks to animal life and health in a subsequent section in this submission.
22. Although Brazil's measure covers retreaded tyres rather than waste tyres, the panel correctly found that the measure at issue bears a relationship to "risks arising from accumulation of waste tyres."³² In other words, the accumulation of retreaded tyres leads to increased volumes of waste tyres, which in turn present hazardous risks to human and animal life or health. Indeed, WTO jurisprudence clarifies that a measure need not be directly related to the risk it purports to reduce or eliminate, as observed by the panel:

For example, the type of risks found to exist within the meaning of Article XX(b) in *US – Gasoline* was health risks that did not, strictly speaking, directly relate to gasoline itself (i.e. the product targeted by the measure) but rather to air pollution caused by the consumption of gasoline. We also note that, in its Report on *EC – Approval and Marketing of Biotech Products*, the Panel states that "there is nothing in

²⁸ WT/DS332/9.

²⁹ WT/DS332/9. HSI notes that it does not have access to the EC's actual appeal submission and HSI is unaware of its public dissemination. Therefore, HSI's submission is limited to issues raised in the panel's report.

³⁰ HSI's analysis principally concentrates on the panel's findings with regard to animal life or health. HSI's views of the panel's findings under Article XX(b) encompass both human and animal life or health in some instances where the issues cannot be, or would improperly be, separately examined.

³¹ *Brazil – Tyres*, WT/DS332/R at paras. 7.91, 7.92.

³² *Brazil – Tyres*, WT/DS332/R at paras. 7.50.

the text of Annex A(1) [to the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)] to suggest that the product subject to an SPS measure – in this case, a GM plant to be released into the environment – need itself be the pest which gives rise to the risks from which the measure seeks to protect." (Panel Report on *EC – Approval and Marketing of Biotech Products*, para. 7.258.)

23. In determining whether the policy objective of Brazil's import restrictions address the risk to *inter alia* animal life or health, the panel properly recalled the panel's finding 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."³³ HSI agrees with the panel that measures designed to "avoid the generation of further risk, thereby contributing to the reduction of exposure to the risk" are exactly the type of measures envisioned under Article XX(b).³⁴ Here, as the panel found, Brazil's import ban falls squarely within the range of policies covered by Article XX(b). Namely, Brazil's import ban on retreaded tyres, which seeks to prevent the accumulation of waste tyres, is directly tied to its objective of protecting humans and animals from the multitude of negative consequences flowing from the accumulation of waste tyres.³⁵
24. In HSI's view, the panel properly analyzed whether Brazil's import restrictions were "necessary" based on prior WTO jurisprudence as well as the facts in this case.³⁶ To this end, HSI agrees with the three-factor test and subsequent analysis of alternative measures employed by the panel and upheld in prior disputes.³⁷
25. With regard to the first factor, importance of the objective pursued, the panel made several key findings. First, the panel explained that environmental protection, which includes the preservation of animal life and health, is recognized as an important and legitimate goal of national and international policy by the signatories to the WTO Agreement, and has been acknowledged as such by the Appellate Body in the *Shrimp/Turtle* dispute.³⁸ HSI cannot underscore enough the significance of recognizing animal protection as a legitimate objective in justifying otherwise WTO-inconsistent measures. Second, the panel correctly explained that WTO Members have a right to determine the level of protection necessary to achieve their objectives.³⁹ This is important, as failure to embrace this concept would undermine national sovereignty and contradict fundamental principles underpinning the WTO Agreements.

³³ *Brazil –Tyres*, WT/DS332/R at para. 7.98 (citing Panel Report on *EC – Asbestos*, para. 8.186)(emphasis added).

³⁴ *Brazil –Tyres*, WT/DS332/R at para. 7.98.

³⁵ *Brazil –Tyres*, WT/DS332/R at para. 7.100.

³⁶ *Brazil –Tyres*, WT/DS332/R at para. 7.104.

³⁷ *Brazil –Tyres*, WT/DS332/R at para. 7.104.

³⁸ *Brazil –Tyres*, WT/DS332/R at para. 7.112.

³⁹ *Brazil –Tyres*, WT/DS332/R at para. 7.108.

26. As to the second factor, contribution of the measure to the objective, the panel correctly rejected the EC's argument that quantification of the impact from the import ban is necessary to a contribution analysis.⁴⁰ Drawing on guidance from the Appellate Body in *EC-Asbestos*, the panel found that while quantification is one way of demonstrating a measure's contribution to an objective, it is not the only means of doing so.⁴¹ Indeed, requiring quantification as the sole basis for demonstrating "contribution" imposes an incredibly high burden on the party invoking the Article XX(b) exception.⁴² In this regard, HSI agrees with the panel that the assessment in this dispute properly involves the "capacity of the chosen measure to contribute to the realization of the objective."⁴³ This assessment, unlike that proposed by the EC, allows the panel to consider the contribution of the measure in both quantitative and qualitative terms. HSI is of the view that using this framework, the panel properly concluded that Brazil's import measure is capable of contributing to the reduction of waste tyres, which in turn, contributes to a reduction of the risks to human and animal life or health arising from the accumulation of such tyres.⁴⁴
27. Of particular significance to HSI is the panel's reasoning that the measure at issue need not "entirely eliminate the risk" to life or health, nor must the impact of the measure "manifest itself very rapidly" after enactment.⁴⁵ According to the panel, the measure must "constitute a step towards the reduction" of the risk, in this case, to the reduction of waste tyres.⁴⁶ HSI agrees with this standard. If the standard were instead that a Member must demonstrate complete elimination of the risk, or immediate manifestation of its effects, Article XX(b) is stripped of its meaning and purpose. For example, if such a strict standard were imposed, Members would be dissuaded from imposing import restrictions, regardless of their necessity to protect human or animal life or health. Such inaction will no doubt lead to serious consequences for humans and animals alike.
28. Regarding the third factor, trade-restrictiveness of the measure, HSI believes that while an import ban may constitute the most restrictive trade measure available, it may be the only viable option in certain circumstances where human and animal life or health are concerned – such as when there are no viable alternatives that could achieve the same level of protection. Indeed, the panel in this dispute agreed, and found that while the import ban is "particularly restrictive of trade" it is "also capable of contributing to the objective pursued," which in this case involves the protection of important interests, including animal life or health.⁴⁷

⁴⁰ *Brazil –Tyres*, WT/DS332/R at para. 7.116-7.118.

⁴¹ *Brazil –Tyres*, WT/DS332/R at para. 7.118.

⁴² *EC-Asbestos*, Appellate Body Report, WT/DS135/AB/R at para. 167 (explaining that a risk can be "evaluated in quantitative or qualitative terms.")

⁴³ *Brazil –Tyres*, WT/DS332/R at para. 7.119.

⁴⁴ *Brazil –Tyres*, WT/DS332/R at para. 7.147.

⁴⁵ *Brazil –Tyres*, WT/DS332/R at para. 7.145.

⁴⁶ *Brazil –Tyres*, WT/DS332/R at para. 7.146.

⁴⁷ *Brazil –Tyres*, WT/DS332/R at para. 7.151, 7.211.

29. With respect to whether the measure at issue here is “necessary,” HSI agrees with the approach taken by the panel and its ultimate conclusion that Brazil’s import restrictions are “necessary” both in light of the three factors considered above, and the absence of any “reasonably available alternatives.”⁴⁸ With respect to the latter point, HSI strongly agrees with the panel that an alternative measure cannot be “reasonably available” if it does not achieve the same end as the challenged measure.⁴⁹ To this end, the Appellate Body in *U.S. – Gambling* indicated that a reasonably available alternative measure must be one that preserves a Member’s right to achieve its desired level of protection.⁵⁰ Moreover, in determining whether an alternative measure is reasonably available, the Appellate Body has stated that a balancing of the three factors considered above must be performed.⁵¹ Taken together, where, as here, vital interests such as the protection of human and animal life or health are at stake, and where the Member imposing the measure has sought to achieve the maximum protection possible, adoption of a less-trade restrictive alternative measure that leads to the detriment of - or even slight diminishment of - those vital interests simply cannot fairly be considered reasonable. Having found in this dispute that none of the alternatives proposed by the EC “could avoid the generation of the specific arising from imported retreaded tyres,” the panel properly concluded that Brazil’s import restrictions are “necessary” within the meaning of Article XX(b).⁵²
30. In sum, HSI agrees with the panel’s interpretation of Article XX(b) and its findings in this dispute that Brazil’s measure is provisionally justified. As explained above, HSI believes that from a policy perspective, a stricter interpretation of Article XX(b) would create insurmountable hurdles to Members’ ability to impose trade restrictions where appropriate and necessary to pursue legitimate objectives relating to the protection of human, animal, or plant life or health. Consequently, such an interpretation would render the exception under Article XX(b) meaningless (or at least diminish its purpose), and would have potentially grave consequences on human and animal life or health.

5.2 Sufficiency of Evidence in Article XX(b) Cases

31. In determining whether a risk to human or animal life or health exists in this case due to the accumulation of waste tyres, the panel made the following observations regarding its assessment of the evidence and the framework for its analysis:
- The panel is entitled to exercise its discretion to determine “that certain elements of evidence should be accorded more weight than other elements....”⁵³

⁴⁸ *Brazil – Tyres*, WT/DS332/R at para. 7.149-7.158, 7.209-7.216.

⁴⁹ *Brazil – Tyres*, WT/DS332/R at para. 7.172 (finding that measures that are not “substitutes” for the challenged measure, but rather are “complements” to the challenged measure, are not reasonably available alternatives.)

⁵⁰ *U.S. – Gambling*, WT/DS285/AB/R at para. 308.

⁵¹ *Brazil – Tyres*, WT/DS332/R at para. 7.150 (citing *Dominican Republic – Import and Sale of Cigarettes*).

⁵² *Brazil – Tyres*, WT/DS332/R at para. 7.212-7.216. “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 ban.” *Id.* at 7.214.

⁵³ *Brazil – Tyres*, WT/DS332/R at para. 7.51.

- As noted by the Appellate Body in *EC-Asbestos*:

“a Member may also rely, in good faith, on scientific sources which, at that time, may represent a divergent, but qualified and respected, opinion. A Member is not obligated, in setting health policy, automatically to follow what, at a given time, may constitute a majority scientific opinion. Therefore, a panel need not, necessarily, reach a decision under Article XX(b) of the GATT 1994 on the basis of the “preponderant” weight of the evidence.”⁵⁴
- According to the Appellate Body in *EC-Hormones*, the “risk” 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.”⁵⁵
- Regarding the necessity of specific evidence of a risk, including assessments of the negative effects on human health, the panel found that detailed proof is not always required and that an examination of a combination of various pieces of circumstantial evidence may be sufficient.⁵⁶ In this regard, evidence of hazardous effects in other countries can support a claim that there is a risk in the Member country, even if there is no evidence of such effects in the Member’s territory.⁵⁷

32. In light of the above principles and framework, the panel analyzed the evidence in this case and determined that the accumulation of waste tyres poses risks to human and animal health by way of tyre fires, to human health by way of mosquito-borne diseases, and to animal health by way of “at least one mosquito-borne disease (dengue)...”⁵⁸

⁵⁴ *Brazil –Tyres*, WT/DS332/R at para. 7.51, n. 1081 (citing *EC-Asbestos*, WT/DS135/AB/R at para. 178).

⁵⁵ *Brazil –Tyres*, WT/DS332/R at para. 7.64 (citing *EC-Hormones*, WT/DS26/AB/R and WT/DS48/AB/R at para. 187).

⁵⁶ *Brazil –Tyres*, WT/DS332/R at para. 7.76. For example, in this case, the EC argued that Brazil did not meet its burden of proof concerning the risk of tyre fires to human health because it failed to provide specific information regarding this risk, and failed to include an assessment of the negative effects on human health. The panel rejected this argument, explaining that:

There may be situations in which such specific evidence would be required to demonstrate the existence of a risk. In this case, however, accepting the European Communities' argument would imply that a WTO Member can never prove the existence of health risks from a tyre fire until a tyre fire does in fact take place and the government of that country conducts its own assessment of the consequences of such a fire. The Panel does not consider that detailed proof of actual tyre fires and associated negative impact on health within the territory of Brazil is required in this case. This is because potential harmful effects caused by tyre fires on human health can be assessed on the basis of incidents that have occurred in other countries. The Panel is thus of the view that the incidence of such fires in Brazil, when considered in combination with evidence of the harmful impact of tyre fires on human health and the evidence of specific incidents of such fires in other countries, is sufficient in this case to prove the existence of potential health risks relating to tyre fires in Brazil. *Brazil –Tyres*, WT/DS332/R at para. 7.77 (citations omitted).

⁵⁷ *Brazil –Tyres*, WT/DS332/R at para. 7.88.

⁵⁸ *Brazil –Tyres*, WT/DS332/R at para. 7.93.

33. The panel further found that with regard to “yellow fever” in particular, as well as other mosquito-borne diseases, there was insufficient evidence “showing how each of these diseases affects animals, in particular in relation to the accumulation of waste tyres.”⁵⁹ HSI respectfully disagrees with this finding.
34. In this regard, HSI recalls the Appellate Body’s statement in *EC-Asbestos* that the evidence must “*tend to show*” that the alleged hazard “constitutes a risk to health rather than the opposite.”⁶⁰ This approach is largely consistent with the panel’s analysis in this dispute with regard to all of the evidence except that which supported the existence of threat to animal life and health from mosquito-borne diseases other than dengue.
35. Specifically, in rejecting HSI’s claims that animal health is at risk from other mosquito-borne diseases like malaria, yellow fever and West Nile virus, the panel found that HSI did not provide “sufficient explanation or evidence supporting this argument.”⁶¹ However, as the panel points out, HSI did provide evidence that “Brazil has previously suffered from infestations of a mosquito species called *Aedes albopictus* and that this mosquito species attacks livestock, amphibians, reptiles and birds, as well as humans.”⁶² In the panel’s view though, because HSI did not identify whether Brazil still suffers (or has the potential to suffer) from this mosquito species, and did not provide evidence that this species transmits yellow and dengue fever, Japanese encephalitis, and West Nile virus, it could not conclude this risk to animal life or health exists.⁶³
36. However, in making its claims in the panel submission, HSI cited a recent source from 2005 entitled *Worldwide Invasion of Vector Mosquitoes: Present European Distribution and Challenges for Spain*, which specifically states that *Aedes albopictus* was detected in Brazil in 1986.⁶⁴ *Aedes albopictus* or the Asian Tiger mosquito, the paper explains, is “an Asiatic mosquito species” that “started worldwide spreading in the 1970s thanks to maritime transportation of tires and other goods....”⁶⁵ Among the risks associated with this mosquito species are yellow fever, dengue, Japanese Encephalitis, and West Nile.⁶⁶ Most notably, the paper states that “*Aedes albopictus* is an aggressive, outdoor daytime biter that attacks humans, livestock, amphibians, reptiles and birds.”⁶⁷ Thus, the exact link the panel indicates is missing from HSI’s claims is in fact demonstrated clearly in this

⁵⁹ *Brazil –Tyres*, WT/DS332/R at para. 7.91, n. 1155-1157 (citing the “WHO, ‘Yellow Fever Fact Sheet’” at p. 2, and HSI’s submission at p. 8).

⁶⁰ See Appellate Body Report, *EC – Asbestos*, para. 157 (quoting from Panel Report, *EC – Asbestos*, para. 8.193) (emphasis in original).

⁶¹ *Brazil –Tyres*, WT/DS332/R at para. 7.91, n. 1157.

⁶² *Brazil –Tyres*, WT/DS332/R at para. 7.91, n. 1157 (original emphasis).

⁶³ *Brazil –Tyres*, WT/DS332/R at para. 7.91, n. 115.

⁶⁴ HSI Submission at 8, n. 46 citing Roger Eritja, *et al.*, *Worldwide Invasion of Vector Mosquitoes: Present European Distribution and Challenges for Spain*, *Biological Invasions*, 7(1): 87-97 (2005) [hereinafter Eritja, *et al.*].

⁶⁵ Eritja, *et al.* at 87-88 (emphasis added).

⁶⁶ Eritja, *et al.* at 93.

⁶⁷ Eritja, *et al.* at 88 (emphasis added).

source: the Asian Tiger mosquito has been found in Brazil as a result of trade in tires,⁶⁸ it spreads various mosquito-borne diseases, and is known to attack animals.⁶⁹

37. Further, HSI does not believe that the panel rightfully concluded that HSI was required to also document whether Brazil still suffers from, or has the potential to suffer from, the Asian Tiger Mosquito. As explained, with regard to other findings in this dispute, such as the link between tyre fires and animal health, the panel did not find it necessary that the negative impact even occur in Brazil in order to find the evidence sufficient. Certainly evidence of the documented presence of the Asian Tiger Mosquito in Brazil, a species known to breed from waste tyres and attack animals, is sufficient evidence that a risk exists.
38. Moreover, the 2005 paper that HSI refers to in its submission dealing with this issue suggests that increased worldwide trade in tires has increased the spread of invasive species like the Asian Tiger Mosquito.⁷⁰ Accordingly, while the paper does not contain recent documentations of the existence of this mosquito in Brazil, evidence of its spread to other South and Central American countries as recently as 2003 supports the conclusion that this species is a risk, or is at the very least, a potential risk, in Brazil.⁷¹
39. In sum, by rejecting the evidence submitted by HSI with regard to the risks to animal health from mosquito-borne diseases arising out of the accumulation of waste tyres, the panel's findings on this issue are at odds with other of its findings made in this dispute, and with the instruction from the Appellate Body in *EC-Asbestos* that the evidence must "*tend to show*" that the alleged hazard "constitutes a risk to health rather than the opposite."⁷² The panel has therefore failed to make an objective assessment of the matter before it in accordance with Article 11 of the DSU.

6. Conclusion

40. In conclusion, HSI supports the panel's interpretation of Article XX(b) and requests the Appellate Body to uphold the panel's findings in paragraphs 7.35-7.90, 7.92-7.216. HSI does not agree, however, with the panel's findings in paragraph 7.91 regarding the sufficiency of the evidence supporting the existence of a risk to animal life or health from certain mosquito-borne diseases. As a result, HSI believes the panel has failed to make an objective assessment of the facts before it with respect to this latter issue under Article 11 of the Dispute Settlement Understanding.

⁶⁸ In fact, an exhibit attached to the Brazilian submission, Exh. BRA-122, and incorporated into the panel's report, identifies a report that links *Aedes albopictus* propagation to the "interregional transport of used tyres." *Brazil – Tyres*, WT/DS332/R at para. 7.70, n. 1118.

⁶⁹ If the full report is not already before the Appellate Body, HSI will gladly provide it.

⁷⁰ *Eritja, et. al.* at 88.

⁷¹ *Eritja, et. al.* at 89 (explaining that the mosquito was detected in Bolivia in 1995, Argentina in 1998, and Nicaragua in 2003.)

⁷² See *EC – Asbestos*, WT/DS135/AB/R at para. 157 (quoting from the Panel Report in *EC – Asbestos*/WT/DS135/R at para. 8.193) (emphasis in original).

41. HSI respectfully requests the Appellate Body to find the information contained in this submission to be pertinent and useful, and to consider the enclosed *amicus curiae* submission in its deliberations and recommendations in *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332.

Respectfully submitted,

A handwritten signature in black ink that reads "Marta Prado". The signature is written in a cursive, flowing style.

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