health goal through nondiscriminatory taxes that were consistent with GATT rules.

(3) On the question of the burden of proof rules in respect of reasonable alternatives, the Appellate Body noted in *US Gambling*, which is excerpted in Chapter 19:

> 310. [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". * * *
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> 311. 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" within the terms of Article XIV(a) of the GATS.

In *Gambling*, the Appellate Body also clarified the scope of reasonable availability by noting that "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." WT/DS285/AB/R, para. 308. Does this suggest that poorer countries may have more leeway in invoking Article XX than others?

(4) In Brazil—Measures Affecting Imports of Retreaded Tires, WT/DS332/AB/R, adopted December 17, 2007, Brazil invoked Article XX(b) to justify its ban on imports of retreaded tires. In considering the necessity of the ban, the Appellate Body concluded:

> 210. [I]t 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 tires, 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 tires, a better enforcement of the import ban on used tires, 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 tires. Therefore, these measures cannot be considered real alternatives to the Import Ban. As regards landfilling, stockpiling, co-incineration of waste tires, and material recycling, these remedial methods carry their own risks or, because of the costs involved, are capable of disposing of only a limited number of waste tires. The Panel did not err in concluding that the proposed measures or practices are not reasonably available alternatives.

Does the Appellate Body's summary strike the right balance in evaluating the Import Ban compared to the alternatives? Do you agree with the distinction it drew between preventative and remedial measures? How would you contrast its overall approach in *Tires* (health risk) with its approaches in *Asbestos* (severe health risk) and in the following case—*Korea Beef* (consumer deception risk)?

SECTION 13.3 ARTICLE XX(D)—ENFORCEMENT MEASURES

Article XX(d) provides an exception to GATT rules for measures "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 following case examines the criteria for establishing this exception.

ifiable discrimination" and a "disguised restriction on international trade."

There was no explanation of why these two shortcomings constituted a disguised restriction on international trade in addition to being discriminatory. The lack of consultations or negotiations with foreign governments was a major factor in the *Shrimp* case. Where else in this chapter has a failure to consider the excessive costs imposed on imports (as opposed to domestic products) been a factor in determining the applicability of Article XX?

(4) In Brazil—Measures Affecting Imports of Retreaded Tires, WT/DS332/AB/R, adopted December 17, 2007, Brazil invoked Article XX(b) to justify its ban on imports of retreaded tires. However, as a result of a MERCOSUR dispute settlement ruling, Brazil did not apply the ban to other MERCOSUR countries, raising the question of whether the ban satisfied the nondiscrimination requirements of the chapeau. The Appellate Body analyzed the issue as follows:

> 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 tires 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 found that such imports had not been significant.] 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.
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> 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 * * * 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.

It is not clear why Brazil did not raise the MERCOSUR equivalent of Article XX in the MERCOSUR dispute settlement proceedings.