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## **BRAZIL – CERTAIN MEASURES CONCERNING TAXATION AND CHARGES**

AB-2017-7  
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*Reports of the Appellate Body*

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**ABBREVIATIONS USED IN THESE REPORTS**

<b>Abbreviation</b>	<b>Description</b>
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
CIDE	Contribution of Intervention in the Economic Domain
COFINS	Contribution to Social Security Financing
COFINS-Importation	Contribution to Social Security Financing applicable to Imports of Goods or Services
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
ECAs	economic complementation agreements
ECA No. 2	Economic Complementation Agreement No. 2 between Brazil and Uruguay
ECA No. 14	Economic Complementation Agreement No. 14 between Argentina and Brazil
ECA No. 55	Economic Complementation Agreement No. 55 between MERCOSUR and Mexico
Enabling Clause	Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries, Decision of 28 November 1979
European Union's panel request	Request for the Establishment of a Panel by the European Union, WT/DS472/5
GATT 1994	General Agreement on Tariffs and Trade 1994
GSP	Generalized System of Preferences
ICT	Information and Communication Technology
ICT products	Information and Communication Technology, Automation and Related Goods
ICT programme	tax treatment established under the Informatics, PADIS, PATVD, and Digital Inclusion programmes
INMETRO	National Institute of Metrology, Quality and Technology
INOVAR-AUTO programme	programme of Incentive to the Technological Innovation and Densification of the Automotive Supply Chain
IPI tax	Tax on Industrialised Products
Japan's panel request	Request for the Establishment of a Panel by Japan, WT/DS497/3
LAIA	Latin American Integration Association
MDIC	Ministry of Development, Industry and Trade
MERCOSUR	Mercado Común del Sur (Southern Common Market)
MFN	most-favoured nation
NTMs	non-tariff measures
PADIS programme	programme of Incentives for the Semiconductors Sector
PASEP	Civil Service Asset Formation Programme
PATVD	Programme of Support to the Technological Development of the Industry of Digital TV Equipment
PEC programme	regime for Predominantly Exporting Companies
PIS	Social Integration Programme
PIS/PASEP	Social Integration Programme/Civil Service Asset Formation Programme
PIS/PASEP-Importation	Social Integration and Civil Service Asset Formation Programmes contribution applicable to Imports of Foreign Goods or Services
PPB	Basic Productive Process
PTA	preferential trade arrangement
R&D	research and development
RECAP programme	Special Regime for the Purchase of Capital Goods for Exporting Enterprises
REIMCOMP	Special Regime to Incentive Computers for Educational Use
RETAERO	Special Regime for the Brazilian Aerospace Industry
RTA	regional trade agreement
S&D	special and differential treatment
SCM Agreement	Agreement on Subsidies and Countervailing Measures
TRIMs Agreement	Agreement on Trade-Related Investment Measures
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
Working Procedures	Working Procedures for Appellate Review
WTO	World Trade Organization

**PANEL EXHIBITS CITED IN THESE REPORTS**

<b>Exhibit No.</b>	<b>Short Title (if any)</b>	<b>Full Case Title and Citation</b>
BRA-93	1980 Treaty of Montevideo	Treaty of Montevideo, concluded at Montevideo on 12 August 1980
BRA-100	Law 10,637/2002	Law 10,637 of 30 December 2002
BRA-114		Communication from LAIA to the Chair of the Trade and Development Committee of the WTO, 19 May 2016 (original version)

Exhibit No.	Short Title (if any)	Full Case Title and Citation
BRA-115		Communication from LAIA to the Chair of the Trade and Development Committee of the WTO, 19 May 2016 (translated version)
JE-7	Decree 5,906/2006	Decree 5,906 of 26 September 2006 (regulating Articles 4, 9, 11, and 16-A of Law 8,248 of 23 October 1991) (Informatics Law)
JE-8	Decree 6,759/2009	Decree 6,759 of 5 February 2009 governing the administration of customs activities and the inspection, control and taxation of foreign trade operations
JE-9	Decree 7,212/2010	Decree 7,212 of 15 June 2010 regulating the charging, inspection, collection and administration of the Industrial Goods Tax (IPI)
JE-31	Interministerial Implementing Order 93/2013	Interministerial Implementing Order ( <i>Portaria</i> ) 93 of 1 April 2013 establishing a Basic Production process for optical splice closures produced in Brazil
JE-32	Interministerial Implementing Order 103/2013	Interministerial Implementing Order ( <i>Portaria</i> ) 103 of 2 April 2013 on the Basic Production Process for products for speed alarms, tracking and control produced in Brazil
JE-71	Law 11,484/2007	Law 11,484, of 31 May 2007 providing for the incentives to the Digital TV equipment and electronic semiconductor components industries and on the intellectual property protection of integrated circuit topographies, establishing the Semiconductor Technological Development Support Program (PADIS) and Support Program for the Technological Development of the Digital TV Equipment Industry (PATVD)
JE-73	Decree 6,233/2007	Decree 6,233, of 11 October 2007 establishing the criteria for the purpose of accreditation to the Semiconductor Technological Development Support Program (PADIS), which grants income tax exemption and reduces PIS/PASEP, COFINS and IPI contributions to zero
JE-75	Decree 8,247/2014	Decree 8,247 of 23 May 2014, amending Decree 6,233/2007
JE-76	Regulatory Instruction RFB 852/2008	Regulatory Instruction RFB 852 of 13 June 2008 laying down procedures for qualification for the Programme for the Technological Development of the Semiconductor Industry (PADIS) by Secretary of the Federal Revenue Department of Brazil
JE-94	Law 10,637/2002	Law 10,637 of 30 December 2002
JE-95	Law 12,715/2012	Law 12,715 of 17 September 2012
JE-132	Decree 7,819/2012	Decree 7,819 of 3 October 2012 regulating Articles 40 to 44 of Law 12,715 of 17 September 2012, which contain provisions on the Incentive Scheme for Technological Innovation and Consolidation of the Automotive Supply Chain (INOVAR-AUTO) and Articles 5 and 6 of Law 12,546 of 14 December 2011, which contain provisions on a reduction of the Industrial Goods Tax, as the case dictates
JE-163 (rev)	Decree 350/1991	Decree 350 of 21 November 1991 on the Treaty for the Formation of a Common Market between the Republic of Argentina, the Federative Republic of Brazil, the Republic of Paraguay and the Oriental Republic of Uruguay (MERCOSUR)
JE-164 (rev)	Decree 4,458/2002	Decree 4,458 of 5 November 2002 on the Economic Complementation Agreement No. 55 between MERCOSUR and the United Mexican States
JE-165 (rev)	Decree 6,500/2008	Decree 6,500 of 2 July 2008 on the Economic Complementation Agreement No. 14 between the Republic of Argentina and the Federative Republic of Brazil
JE-181	Law 10,865/2004	Law 10,865 of 30 April 2004
JE-182	Law 11,196/2005	Law 11,196 of 21 November 2005 (RECAP)
JE-186		Exporters 2014 study on Brazilian exports – delays in refunds (original version)
JE-191	Normative Instruction RFB 948/2009	Normative Instruction ( <i>Instrução Normativa</i> ) RFB 948 of 15 June 2009
JE-193	Normative Instruction SRF 595/2005	Normative Instruction SRF 595 of 27 December 2005
JE-203 (rev)	Decree 6,518/2008	Decree 6,518 of 30 July 2008 providing for the implementation of the 68th Additional Protocol to Economic Complementation Agreement No. 2, signed between the Governments of the Federative Republic of Brazil and the Oriental Republic of Uruguay
JE-204 (rev)	Decree 7,658/2011	Decree 7,658 of 23 December 2011 laying down provisions concerning the implementation of the 69th Additional Protocol to Economic Complementation Agreement No. 2 signed by the Governments of the Federal Republic of Brazil and the Oriental Republic of Uruguay

**CASES CITED IN THESE REPORTS**

<b>Short Title</b>	<b>Full Case Title and Citation</b>
<i>Argentina – Hides and Leather</i>	Panel Report, <i>Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather</i> , WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, p. 1779
<i>Australia – Automotive Leather II</i>	Panel Report, <i>Australia – Subsidies Provided to Producers and Exporters of Automotive Leather</i> , WT/DS126/R, adopted 16 June 1999, DSR 1999:III, p. 951
<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, p. 3327
<i>Brazil – Aircraft</i>	Appellate Body Report, <i>Brazil – Export Financing Programme for Aircraft</i> , WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, p. 1161
<i>Brazil – Aircraft</i>	Panel Report, <i>Brazil – Export Financing Programme for Aircraft</i> , WT/DS46/R, adopted 20 August 1999, as modified by Appellate Body Report WT/DS46/AB/R, DSR 1999:III, p. 1221
<i>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527
<i>Brazil – Taxation</i>	Panel Reports, <i>Brazil – Certain Measures Concerning Taxation and Charges</i> , WT/DS472/R, Add.1 and Corr.1 / WT/DS497/R, Add.1 and Corr.1, circulated to WTO Members 30 August 2017
<i>Canada – Aircraft</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, p. 1377
<i>Canada – Aircraft</i>	Panel Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/R, adopted 20 August 1999, upheld by Appellate Body Report WT/DS70/AB/R, DSR 1999:IV, p. 1443
<i>Canada – Aircraft (Article 21.5 – Brazil)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU</i> , WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, p. 4299
<i>Canada – Aircraft Credits and Guarantees</i>	Panel Report, <i>Canada – Export Credits and Loan Guarantees for Regional Aircraft</i> , WT/DS222/R and Corr.1, adopted 19 February 2002, DSR 2002:III, p. 849
<i>Canada – Autos</i>	Appellate Body Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, p. 2985
<i>Canada – Autos</i>	Panel Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, p. 3043
<i>Canada – FIRA</i>	GATT Panel Report, <i>Canada – Administration of the Foreign Investment Review Act</i> , L/5504, adopted 7 February 1984, BISD 30S, p. 140
<i>Canada – Periodicals</i>	Appellate Body Report, <i>Canada – Certain Measures Concerning Periodicals</i> , WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, p. 449
<i>Canada – Renewable Energy / Canada – Feed-in Tariff Program</i>	Appellate Body Reports, <i>Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program</i> , WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013, DSR 2013:I, p. 7
<i>Chile – Alcoholic Beverages</i>	Appellate Body Report, <i>Chile – Taxes on Alcoholic Beverages</i> , WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000, DSR 2000:I, p. 281
<i>Chile – Price Band System (Article 21.3(c))</i>	Award of the Arbitrator, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS207/13, 17 March 2003, DSR 2003:III, p. 1237
<i>Chile – Price Band System (Article 21.5 – Argentina)</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS207/AB/RW, adopted 22 May 2007, DSR 2007:II, p. 513
<i>China – HP-SSST (Japan) / China – HP-SSST (EU)</i>	Appellate Body Reports, <i>China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union</i> , WT/DS454/AB/R and Add.1 / WT/DS460/AB/R and Add.1, adopted 28 October 2015, DSR 2015:IX, p. 4573

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<i>China – Publications and Audiovisual Products</i>	Appellate Body Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/AB/R, adopted 19 January 2010, DSR 2010:I, p. 3
<i>China – Rare Earths</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum</i> , WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014, DSR 2014:III, p. 805
<i>Colombia – Textiles</i>	Appellate Body Report, <i>Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear</i> , WT/DS461/AB/R and Add.1, adopted 22 June 2016, DSR 2016:III, p. 1131
<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, DSR 2005:XV, p. 7367
<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, DSR 2001:VII, p. 3243
<i>EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)</i>	Appellate Body Reports, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador</i> , WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr.1 / <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008, DSR 2008:XVIII, p. 7165
<i>EC – Bed Linen (Article 21.5 – India)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, p. 965
<i>EC – Chicken Cuts (Article 21.3(c))</i>	Award of the Arbitrator, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS269/13, WT/DS286/15, 20 February 2006
<i>EC – Export Subsidies on Sugar (Article 21.3(c))</i>	Award of the Arbitrator, <i>European Communities – Export Subsidies on Sugar – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS265/33, WT/DS266/33, WT/DS283/14, 28 October 2005, DSR 2005:XXIII, p. 11581
<i>EC – Fasteners (China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
<i>EC – Poultry</i>	Appellate Body Report, <i>European Communities – Measures Affecting the Importation of Certain Poultry Products</i> , WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, p. 2031
<i>EC – Sardines</i>	Appellate Body Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3359
<i>EC – Seal Products</i>	Appellate Body Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014, DSR 2014:I, p. 7
<i>EC – Selected Customs Matters</i>	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791
<i>EC – Tariff Preferences</i>	Appellate Body Report, <i>European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries</i> , WT/DS246/AB/R, adopted 20 April 2004, DSR 2004:III, p. 925
<i>EC – Tube or Pipe Fittings</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, p. 2613
<i>EC and certain member States – Large Civil Aircraft</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
<i>EC and certain member States – Large Civil Aircraft</i>	Panel Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/R, adopted 1 June 2011, as modified by Appellate Body Report WT/DS316/AB/R, DSR 2011:II, p. 685



Short Title	Full Case Title and Citation
<i>EC and certain member States – Large Civil Aircraft (Article 21.5 – US)</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS316/AB/RW and Add.1, adopted 28 May 2018
<i>EC and certain member States – Large Civil Aircraft (Article 21.5 – US)</i>	Panel Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS316/RW and Add.1, adopted 28 May 2018, as modified by Appellate Body Report WT/DS316/AB/RW
<i>Guatemala – Cement I</i>	Appellate Body Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i> , WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, p. 3767
<i>India – Agricultural Products</i>	Panel Report, <i>India – Measures Concerning the Importation of Certain Agricultural Products</i> , WT/DS430/R and Add.1, adopted 19 June 2015, as modified by Appellate Body Report WT/DS430/AB/R, DSR 2015:V, p. 2663
<i>Indonesia – Autos</i>	Panel Report, <i>Indonesia – Certain Measures Affecting the Automobile Industry</i> , WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, Corr.1 and Corr.2, adopted 23 July 1998, and Corr.3 and Corr.4, DSR 1998:VI, p. 2201
<i>Indonesia – Import Licensing Regimes</i>	Appellate Body Report, <i>Indonesia – Importation of Horticultural Products, Animals and Animal Products</i> , WT/DS477/AB/R, WT/DS478/AB/R, and Add.1, adopted 22 November 2017
<i>Italy – Agricultural Machinery</i>	GATT Panel Report, <i>Italian Discrimination Against Imported Agricultural Machinery</i> , L/833, adopted 23 October 1958, BISD 7S, p. 60
<i>Japan – Agricultural Products II</i>	Appellate Body Report, <i>Japan – Measures Affecting Agricultural Products</i> , WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, p. 277
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97
<i>Japan – Apples</i>	Appellate Body Report, <i>Japan – Measures Affecting the Importation of Apples</i> , WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, p. 4391
<i>Korea – Alcoholic Beverages</i>	Appellate Body Report, <i>Korea – Taxes on Alcoholic Beverages</i> , WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, p. 3
<i>Korea – Alcoholic Beverages (Article 21.3(c))</i>	Award of the Arbitrator, <i>Korea – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS75/16, WT/DS84/14, 4 June 1999, DSR 1999:II, p. 937
<i>Korea – Commercial Vessels</i>	Panel Report, <i>Korea – Measures Affecting Trade in Commercial Vessels</i> , WT/DS273/R, adopted 11 April 2005, DSR 2005:VII, p. 2749
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3
<i>Korea – Various Measures on Beef</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, p. 5
<i>Mexico – Corn Syrup (Article 21.5 – US)</i>	Appellate Body Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, p. 6675
<i>Mexico – Taxes on Soft Drinks</i>	Panel Report, <i>Mexico – Tax Measures on Soft Drinks and Other Beverages</i> , WT/DS308/R, adopted 24 March 2006, as modified by Appellate Body Report WT/DS308/AB/R, DSR 2006:I, p. 43
<i>Thailand – Cigarettes (Philippines)</i>	Appellate Body Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines</i> , WT/DS371/AB/R, adopted 15 July 2011, DSR 2011:IV, p. 2203
<i>US – Anti-Dumping Methodologies (China)</i>	Appellate Body Report, <i>United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China</i> , WT/DS471/AB/R and Add.1, adopted 22 May 2017
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779



Short Title	Full Case Title and Citation
<i>US – Carbon Steel (India)</i>	Appellate Body Report, <i>United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India</i> , WT/DS436/AB/R, adopted 19 December 2014, DSR 2014:V, p. 1727
<i>US – Certain EC Products</i>	Appellate Body Report, <i>United States – Import Measures on Certain Products from the European Communities</i> , WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, p. 373
<i>US – Countervailing Measures on Certain EC Products</i>	Appellate Body Report, <i>United States – Countervailing Measures Concerning Certain Products from the European Communities</i> , WT/DS212/AB/R, adopted 8 January 2003, DSR 2003:I, p. 5
<i>US – FSC</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations"</i> , WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, p. 1619
<i>US – FSC</i>	Panel Report, <i>United States – Tax Treatment for "Foreign Sales Corporations"</i> , WT/DS108/R, adopted 20 March 2000, as modified by Appellate Body Report WT/DS108/AB/R, DSR 2000:IV, p. 1675
<i>US – FSC (Article 21.5 – EC)</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, p. 55
<i>US – FSC (Article 21.5 – EC)</i>	Panel Report, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/RW, adopted 29 January 2002, as modified by Appellate Body Report WT/DS108/AB/RW, DSR 2002:I, p. 119
<i>US – 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, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475)
<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
<i>US – Large Civil Aircraft (2<sup>nd</sup> complaint)</i>	Appellate Body Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> , WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7
<i>US – Large Civil Aircraft (2<sup>nd</sup> complaint)</i>	Panel Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> , WT/DS353/R, adopted 23 March 2012, as modified by Appellate Body Report WT/DS353/AB/R, DSR 2012:II, p. 649
<i>US – Malt Beverages</i>	GATT Panel Report, <i>United States – Measures Affecting Alcoholic and Malt Beverages</i> , DS23/R, adopted 19 June 1992, BISD 39S, p. 206
<i>US – Offset Act (Byrd Amendment)</i>	Panel Report, <i>United States – Continued Dumping and Subsidy Offset Act of 2000</i> , WT/DS217/R, WT/DS234/R, adopted 27 January 2003, as modified by Appellate Body Report WT/DS217/AB/R, WT/DS234/AB/R, DSR 2003:II, p. 489
<i>US – Offset Act (Byrd Amendment) (Article 21.3(c))</i>	Award of the Arbitrator, <i>United States – Continued Dumping and Subsidy Offset Act of 2000 – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS217/14, WT/DS234/22, 13 June 2003, DSR 2003:III, p. 1163
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257
<i>US – Section 211 Appropriations Act</i>	Appellate Body Report, <i>United States – Section 211 Omnibus Appropriations Act of 1998</i> , WT/DS176/AB/R, adopted 1 February 2002, DSR 2002:II, p. 589
<i>US – Section 337 Tariff Act</i>	GATT Panel Report, <i>United States Section 337 of the Tariff Act of 1930</i> , L/6439, adopted 7 November 1989, BISD 36S, p. 345
<i>US – Softwood Lumber IV</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571
<i>US – Softwood Lumber VI (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
<i>US – Tax Incentives</i>	Appellate Body Report, <i>United States – Conditional Tax Incentives for Large Civil Aircraft</i> , WT/DS487/AB/R and Add.1, adopted 22 September 2017

Short Title	Full Case Title and Citation
<i>US – Tax Incentives</i>	Panel Report, <i>United States – Conditional Tax Incentives for Large Civil Aircraft</i> , WT/DS487/R and Add.1, adopted 22 September 2017, as modified by Appellate Body Report WT/DS487/AB/R
<i>US – Tuna II (Mexico)</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/AB/R, adopted 13 June 2012, DSR 2012:IV, p. 1837
<i>US – Upland Cotton</i>	Panel Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/R, Add.1 to Add.3 and Corr.1, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, p. 299
<i>US – Upland Cotton (Article 21.5 – Brazil)</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil</i> , WT/DS267/AB/RW, adopted 20 June 2008, DSR 2008:III, p. 809
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323

WORLD TRADE ORGANIZATION  
APPELLATE BODY

**Brazil – Certain Measures Concerning  
Taxation and Charges**

Brazil, *Appellant/Appellee*  
European Union,  
*Other Appellant<sup>1</sup>/Appellee<sup>2</sup>/Third Participant<sup>3</sup>*  
Japan,  
*Other Appellant<sup>4</sup>/Appellee<sup>5</sup>/Third Participant<sup>6</sup>*

Argentina, *Third Participant*  
Australia, *Third Participant*  
Canada, *Third Participant*  
China, *Third Participant*  
Colombia, *Third Participant*  
India, *Third Participant*  
Korea, *Third Participant*  
Russia, *Third Participant*  
Singapore, *Third Participant<sup>7</sup>*  
South Africa, *Third Participant<sup>8</sup>*  
Chinese Taipei, *Third Participant<sup>9</sup>*  
Turkey, *Third Participant*  
Ukraine, *Third Participant<sup>10</sup>*  
United States, *Third Participant*

AB-2017-7  
AB-2017-8

Appellate Body Division:

Graham, Presiding Member  
Van den Bossche, Member  
Zhao, Member

## 1 INTRODUCTION

1.1. Brazil, the European Union, and Japan each appeal certain issues of law and legal interpretations developed in the Panel Reports, *Brazil – Certain Measures Concerning Taxation and Charges*.<sup>11</sup>

1.2. On 31 October 2014, the European Union requested the establishment of a panel pursuant to Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXIII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), Articles 4.4 and 30 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), and Article 8 of the Agreement on Trade-Related Investment Measures (TRIMs Agreement) concerning certain tax measures adopted by Brazil through various programmes aimed at the information and communication technology (ICT) and automotive sectors.<sup>12</sup> On 17 December 2014, pursuant to the request of the European Union, a Panel was established to consider this complaint.<sup>13</sup>

1.3. On 17 September 2015, Japan requested the establishment of a panel pursuant to Articles 4.7 and 6 of the DSU, Article XXIII of the GATT 1994, Articles 4.4 and 30 of the SCM Agreement, and Article 8 of the TRIMs Agreement concerning certain tax measures adopted by Brazil through various

<sup>1</sup> In DS472 only.

<sup>2</sup> In DS472 only.

<sup>3</sup> In DS497 only.

<sup>4</sup> In DS497 only.

<sup>5</sup> In DS497 only.

<sup>6</sup> In DS472 only.

<sup>7</sup> In DS497 only.

<sup>8</sup> In DS472 only.

<sup>9</sup> In DS472 only.

<sup>10</sup> In DS497 only.

<sup>11</sup> WT/DS472/R, WT/DS497/R, 30 August 2017.

<sup>12</sup> Request for the Establishment of a Panel by the European Union, WT/DS472/5 (European Union's panel request).

<sup>13</sup> Panel Reports, para. 1.5 (referring to the Minutes of the DSB Meeting held on 17 December 2014, WT/DSB/M/353).

programmes aimed at the ICT and automotive sectors.<sup>14</sup> On 28 September 2015, pursuant to the request by Japan, a Panel was established to consider this complaint.<sup>15</sup>

1.4. Following the establishment of the Panel upon request from Japan, and pursuant to Article 9.3 of the DSU, the Panels were composed with the same persons and adopted their Joint Working Procedures and joint timetable on 9 October 2015.<sup>16</sup>

1.5. The taxes and contributions relevant for the purposes of the present appeals are: (i) the Tax on Industrialised Products (IPI tax)<sup>17</sup>; (ii) the Social Integration Programme/Civil Service Asset Formation Programme (PIS/PASEP) contribution and the Contribution to Social Security Financing (COFINS)<sup>18</sup>; (iii) the Social Integration and Civil Service Asset Formation Programmes contribution applicable to Imports of Foreign Goods or Services (PIS/PASEP-Importation) and the Contribution to Social Security Financing applicable to Imports of Goods or Services (COFINS-Importation)<sup>19</sup>; and (iv) the Contribution of Intervention in the Economic Domain (CIDE).<sup>20</sup>

1.6. The measures at issue can be divided into three groups of measures through which Brazil provides exemptions, reductions, or suspensions of the federal taxes and contributions mentioned above. The first group of measures concerns the ICT sector and comprises tax treatment granted under: (i) the Informatics programme; (ii) the programme of Incentives for the Semiconductors Sector (PADIS programme); (iii) the programme of Support for the Technological Development of the Industry of Digital TV Equipment (PATVD programme); and (iv) the programme for Digital Inclusion (Digital Inclusion programme).<sup>21</sup> The second group comprises tax treatment granted under the programme of Incentive to the Technological Innovation and densification of the Automotive Supply Chain (INOVAR-AUTO programme), which targets the automotive sector. The third group of measures comprises tax treatment granted under: (i) the regime for Predominantly

<sup>14</sup> Request for the Establishment of a Panel by Japan, WT/DS497/3 (Japan's panel request).

<sup>15</sup> Panel Reports, para. 1.9 (referring to Minutes of the DSB Meeting held on 28 September 2015, WT/DSB/M/368).

<sup>16</sup> Panel Reports, paras. 1.14-1.15.

<sup>17</sup> The IPI tax is a Brazilian federal tax that applies to all national or foreign industrialized (i.e. manufactured) products. IPI tax rates are product-specific and linked to the price or value of the industrialized product on which it is imposed. In the case of domestic products, the taxable base is the transaction value, while for imported products, the taxable base is the customs value plus the import duties and charges paid. The IPI tax is not paid directly by the entity bearing the ultimate burden of paying the IPI tax. In the case of domestic products, the IPI tax is charged by the industrial establishment selling the industrialized product to the entity that buys the industrialized product. The taxes retained by the industrial establishment selling the industrialized product must be remitted to the Federal Revenue Service on a monthly basis. In the case of imported products, the IPI tax is charged by the customs authorities to the importer of the industrialized product during the customs clearance process. The IPI tax is non-cumulative, and the tax due in each transaction shall be compensated by the amount charged in previous transactions. This is effected by means of a credit system, by which the tax due on products entering the facilities of the taxpayer is deducted from the amount due on the exit of products in the same taxation period, which, in turn, means that when a taxpayer remits to the government the IPI tax collected for any given transaction, the taxpayer may deduct the IPI tax paid in earlier stages of the supply chain, thereby ensuring that the tax is levied only on the value added. (Panel Reports, paras. 2.3-2.20)

<sup>18</sup> The PIS/PASEP contribution and the COFINS contribution are Brazilian federal contributions that apply to gross revenues earned by all types of legal entities. These contributions are subject, as a general rule, to the non-cumulative regime and operate as taxes on value added, where companies generate credits in relation to their purchases of taxed products, which they can offset with debits when paying their PIS/PASEP and COFINS liabilities. The system of tax credits ensures that prior-stage PIS/PASEP and COFINS contributions can be deducted at each stage of the supply chain. (Panel Reports, paras. 2.21-2.29)

<sup>19</sup> The PIS/PASEP-Importation and COFINS-Importation contributions are the import-focused variants of the PIS/PASEP and COFINS contributions. These contributions apply to individual import transactions and are levied upon importation of goods. The taxable base is the customs value of the goods. Importers are subject to the non-cumulative regime, so they can offset the amounts paid upon importation with their domestic PIS/PASEP and COFINS liabilities. Importers, therefore, pay the contributions only with respect to the value added, i.e. the difference between the customs value and the importers' sales price. The tax credit mechanism with respect to the non-cumulative PIS/PASEP and COFINS domestic regime applies equally in the case of importers. (Panel Reports, paras. 2.30-2.34)

<sup>20</sup> The CIDE contribution is a Brazilian federal contribution that applies to remittances/royalty payments abroad. The tax rate is 10%, and the taxable persons are legal entities holding a license of use or acquiring technological knowledge, as well as those entering into agreements that imply technological transfer, made with persons residing or domiciled abroad. The basis of calculation is the amount paid, credited, delivered, used, or remitted every month to persons residing or domiciled abroad. (Panel Reports, paras. 2.35-2.36)

<sup>21</sup> Panel Reports, para. 2.37.

Exporting Companies (PEC programme); and (ii) the Special Regime for the Purchase of Capital Goods for Exporting Enterprises (RECAP programme).<sup>22</sup>

1.7. The Informatics programme provides for exemptions and reductions on the IPI tax on the sale of information technology goods. It also provides for suspensions of the IPI tax on the purchase or import of raw materials, intermediate goods, and packaging materials used in the production of information technology, and automation goods incentivized under the programme.<sup>23</sup> In order to benefit from the tax treatment, companies must obtain an accreditation.<sup>24</sup> The eligible companies under the Informatics programme are companies that: (i) develop or produce information technology and automation goods and services in compliance with the relevant Basic Productive Processes (PPBs)<sup>25</sup>; and (ii) invest in information technology research and development (R&D) activities in Brazil.<sup>26</sup> Moreover, under this programme, products that have obtained the status of "developed in Brazil" are subject to additional tax reductions.<sup>27</sup>

1.8. The PADIS programme exempts, through zero rates, accredited companies from paying certain taxes with respect to semiconductors and information displays, as well as inputs, tools, equipment, machinery, and software for the production of semiconductors and displays.<sup>28</sup> In order to obtain accreditation, legal persons must: (i) invest in R&D in Brazil; and (ii) engage in certain activities in Brazil with respect to semiconductor electronic devices, information displays, and inputs and equipment intended for the manufacture of electronic semiconductor devices and information displays.<sup>29</sup>

1.9. The PATVD programme exempts accredited companies from paying certain taxes with respect to radio frequency signal transmitting equipment for digital television (digital television transmission equipment), as well as machinery, apparatus, instruments, equipment, inputs, and software for the production of digital television transmission equipment (production goods).<sup>30</sup> In order to obtain accreditation, legal persons must: (i) invest in R&D in Brazil; (ii) engage in developing and manufacturing activities of digital television transmission equipment; and (iii) either comply with the relevant PPB or, alternatively, meet the criteria for a product to be considered "developed in Brazil".<sup>31</sup>

1.10. The Digital Inclusion programme exempts, through zero rates, Brazilian retailers from paying PIS/PASEP and COFINS contributions with respect to the sale of certain digital consumer goods produced in Brazil in accordance with the relevant PPBs.<sup>32</sup>

1.11. The INOVAR-AUTO programme provides for reduction of the IPI tax burden on certain motor vehicles either: (i) through presumed IPI tax credits granted to accredited companies; or (ii) through reduced IPI tax rates on the importation of vehicles originating in certain countries, as well as on certain domestic vehicles.<sup>33</sup> All companies using presumed IPI tax credits, and certain companies using reduced IPI tax rates, must obtain one of three forms of accreditation: (i) domestic manufacturer; (ii) importer/distributor; or (iii) investor.<sup>34</sup> In order to obtain accreditation, a

<sup>22</sup> Panel Reports, para. 2.37.

<sup>23</sup> Panel Reports, para. 2.39.

<sup>24</sup> Panel Reports, para. 2.49.

<sup>25</sup> The Panel defined a PPB as "the minimum set of operations performed at a manufacturing facility that characterizes the actual industrialization of a given product". (Panel Reports, para. 2.62 (referring to Decree 5,906 of 26 September 2006 (regulating Articles 4, 9, 11, and 16-A of Law 8,248 of 23 October 1991) (Informatics Law) (Decree 5,906/2006) (Panel Exhibit JE-7), Article 16)) In other words, the Panel explained that PPBs indicate the minimum stages or steps of the manufacturing process of a product that must be performed in Brazil. (Ibid.) On appeal, the participants do not take issue with the definition of a PPB set out by the Panel.

<sup>26</sup> Panel Reports, para. 2.48.

<sup>27</sup> Panel Reports, para. 2.67. For an information technology or automation good to be considered as "developed in Brazil", two requirements must be met: (i) products must comply with the specifications, rules, and standards laid out in Brazilian legislation; and (ii) the specifications, projects, and developments must have been carried out in Brazil by technicians of proven skill in such activities who are residents and domiciled in Brazil. (Panel Reports, para. 2.68)

<sup>28</sup> Panel Reports, para. 2.71.

<sup>29</sup> Panel Reports, para. 2.76.

<sup>30</sup> Panel Reports, para. 2.82.

<sup>31</sup> Panel Reports, para. 2.87. (emphasis omitted)

<sup>32</sup> Panel Reports, para. 2.91.

<sup>33</sup> Panel Reports, para. 2.97.

<sup>34</sup> Panel Reports, paras. 2.112-2.113.

company must comply with certain requirements of both a general and specific nature. All such companies must comply with the same two general requirements and also with certain additional specific requirements that vary by the type of accreditation.<sup>35</sup> A company applying for accreditation as a domestic manufacturer shall comply with the two general requirements<sup>36</sup> as well as "three out of four specific requirements, one of which must be the performance of a minimum number of defined manufacturing and engineering infrastructure activities in Brazil".<sup>37</sup> A company applying for accreditation as importer/distributor shall comply with the two general requirements and "the following three specific requirements: (i) investments in R&D in Brazil; (ii) expenditure on engineering, basic industrial technology and capacity-building of suppliers in Brazil; and, (iii) participation in the vehicle labelling programme by [the] National Institute of Metrology, Quality and Technology (INMETRO)".<sup>38</sup> A company applying for accreditation as an investor shall submit to the Ministry of Development, Industry and Trade (MDIC) an investment project containing a description and the technical features of the vehicles to be imported and manufactured. Accreditation shall be granted once the investment project is approved by that Ministry. An investor shall be required to apply for a specific accreditation for every factory, plant, or industrial project that it plans to establish.<sup>39</sup>

1.12. Under the PEC programme, the IPI tax and the PIS/PASEP, COFINS, PIS/PASEP-Importation, and COFINS-Importation contributions are suspended with respect to raw materials, intermediate goods, and packaging materials purchased by predominantly exporting companies.<sup>40</sup> Similarly, under the RECAP programme, the PIS/PASEP, COFINS, PIS/PASEP-Importation, and COFINS-Importation contributions are suspended with respect to purchases of new machinery, tools, apparatus, instruments, and equipment by predominantly exporting companies.<sup>41</sup>

1.13. Additional factual aspects of the measures at issue and the relevant taxes and contributions are set forth in greater detail in paragraphs 2.1-2.176 of the Panel Reports.

1.14. Before the Panel, the European Union and Japan raised claims, *inter alia*, under Articles III:2, III:4, and III:5 of the GATT 1994; Article 2.1 of the TRIMs Agreement; and Article 3.1(b) of the SCM Agreement with respect to tax treatment established under the Informatics, PADIS, PATVD, and Digital Inclusion programmes (the ICT programmes) and the INOVAR-AUTO programme. Brazil invoked Article XX(a) of the GATT 1994 to justify certain inconsistencies with respect to the PATVD programme and Articles XX(b) and XX(g) to justify certain inconsistencies with respect to the INOVAR-AUTO programme. The European Union and Japan also raised claims under Article I:1 of the GATT 1994 with respect to the INOVAR-AUTO programme, in response to which Brazil invoked the Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries, Decision of 28 November 1979 (Enabling Clause) as a defence. With respect to the PEC and RECAP programmes, the European Union and Japan raised claims under Article 3.1(a) of the SCM Agreement.<sup>42</sup>

1.15. In the Panel Reports, circulated to Members of the World Trade Organization (WTO) on 30 August 2017, the Panel first addressed two broad defences raised by Brazil concerning the ICT and INOVAR-AUTO programmes. First, the Panel rejected Brazil's argument that Article III of the GATT 1994, Article 2 of the TRIMs Agreement, and Article 3.1(b) of the SCM Agreement are inapplicable to "pre-market" measures.<sup>43</sup> The Panel found that these provisions are not *per se*

<sup>35</sup> Panel Reports, para. 2.114.

<sup>36</sup> The two general requirements that all companies seeking accreditation under the INOVAR-AUTO programme must meet are: (i) compliance with tax obligations at the federal level; and (ii) commitment to achieve certain minimum levels of energy efficiency for products marketed in Brazil. (Panel Reports, para. 2.121)

<sup>37</sup> Panel Reports, para. 2.115. (fn omitted)

<sup>38</sup> Panel Reports, para. 2.116. (fn omitted)

<sup>39</sup> Panel Reports, para. 2.117.

<sup>40</sup> Panel Reports, paras. 2.148 and 2.150 (referring to Law 10,637 of 30 December 2002 (PIS/PASEP – non-cumulative) (Law 10,637/2002) (Panel Exhibits JE-94 and BRA-100), Article 29, section 1.II (for IPI tax); Law 10,865 of 30 April 2004 providing for the Contribution to Social Integration and the Civil Servants Investment Programmes and the Contribution to the Financing of Social Security levied on the import of goods and services and sets forth other provisions (Law 10,865/2004) (Panel Exhibit JE-181), Article 40 (for PIS/PASEP and COFINS contributions)).

<sup>41</sup> Panel Reports, paras. 2.163 and 7.1138. We note the definition of a predominantly exporting company in paragraphs 5.144-5.145 of these Reports below.

<sup>42</sup> Panel Reports, paras. 3.1-3.3.

<sup>43</sup> Panel Reports, para. 7.70.

inapplicable to certain measures, in particular "pre-market" measures, directed at producers.<sup>44</sup> Second, the Panel rejected Brazil's argument that the ICT and INOVAR-AUTO programmes constitute payment of subsidies exclusively to domestic producers within the meaning of Article III:8(b) of the GATT 1994, and therefore are exempted from the disciplines of Article III of the GATT 1994 and Article 2.1 of the TRIMs Agreement. To the Panel, those aspects of a measure resulting in product discrimination are not exempted *per se* from these disciplines, even if the measure takes the form of a subsidy paid exclusively to domestic producers.<sup>45</sup> The Panel also made the following findings concerning the measures at issue:

- a. with respect to the ICT programmes:
  - i. the production-step requirements under the Informatics, PADIS, PATVD, and Digital Inclusion programmes; and the requirement for products to obtain the status of "developed in Brazil", under the Informatics, PATVD, and Digital Inclusion programmes, result in imported products being subject to internal taxes in excess of those applied to like domestic products, inconsistently with Article III:2, first sentence, of the GATT 1994<sup>46</sup>;
  - ii. the production-step requirements under the Informatics, PADIS, PATVD, and Digital Inclusion programmes, and the requirement for products to obtain the status of "developed in Brazil", under the Informatics, PATVD, and Digital Inclusion programmes; the aspect of the mechanism for the calculation of the amount of resources required to be invested in R&D under the Informatics and PADIS programmes relating to the deductible part; and the lower administrative burden on companies purchasing domestic incentivized intermediate products under the Informatics and PADIS programmes accord to imported products treatment less favourable than that accorded to like domestic products, inconsistently with Article III:4 of the GATT 1994<sup>47</sup>;
  - iii. it is not necessary to make findings with respect to the complaining parties' claims under Article III:5 of the GATT 1994 in order to secure a positive solution to this dispute, and the Panel therefore exercises judicial economy with respect to these claims<sup>48</sup>;
  - iv. the Informatics, PADIS, PATVD, and Digital Inclusion programmes constitute trade-related investment measures, and the aspects of these programmes found to be inconsistent with Articles III:2 and III:4 of the GATT 1994 are also inconsistent with Article 2.1 of the TRIMs Agreement<sup>49</sup>;
  - v. the tax exemptions, reductions, and suspensions granted under the Informatics, PADIS, PATVD, and Digital Inclusion programmes are subsidies within the meaning of Article 1.1 of the SCM Agreement, which are contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b) of the SCM Agreement, and thus are prohibited subsidies, inconsistent with Articles 3.1(b) and 3.2 of the SCM Agreement<sup>50</sup>; and
  - vi. those aspects of the PATVD programme found to be inconsistent with the GATT 1994 and the TRIMs Agreement are not justified under Article XX(a) of the GATT 1994.<sup>51</sup>

<sup>44</sup> Panel Reports, paras. 7.70, 8.2, and 8.13.

<sup>45</sup> Panel Reports, paras. 7.87, 8.3, and 8.14.

<sup>46</sup> Panel Reports, paras. 7.173-7.174, 8.5.a, and 8.16.a. The Panel exercised judicial economy with respect to Japan's claim under Article III:2, second sentence, of the GATT 1994. (Panel Reports, paras. 7.180 and 8.16.b)

<sup>47</sup> Panel Reports, paras. 7.318, 8.5.b, and 8.16.c.

<sup>48</sup> Panel Reports, paras. 7.347, 8.5.c, and 8.16.d.

<sup>49</sup> Panel Reports, paras. 7.365, 8.5.d, and 8.16.e.

<sup>50</sup> Panel Reports, paras. 7.500, 8.5.e, and 8.16.f.

<sup>51</sup> Panel Reports, paras. 7.626, 8.5.f, and 8.16.g. On appeal, Brazil does not challenge this finding by the Panel.



- b. with respect to the INOVAR-AUTO programme:
- i. certain aspects of the accreditation process, the system of rules on accrual and calculation of presumed tax credits, and the rules on the use of presumed tax credits resulting from expenditure on strategic inputs and tools in Brazil result in imported products being subject to internal taxes in excess of those applied to like domestic products, inconsistently with Article III:2 of the GATT 1994<sup>52</sup>;
  - ii. certain aspects of the accreditation process, the system of rules on accrual and calculation of presumed tax credits, and the rules on the use of presumed tax credits resulting from expenditure on strategic inputs and tools in Brazil; the accreditation requirement to perform a minimum number of manufacturing steps in Brazil; that aspect of the rules on accrual of presumed IPI tax credits pertaining to expenditure in strategic inputs and tools; and those aspects of the accreditation requirements to invest in R&D in Brazil and make expenditures on engineering, basic industrial technology, and capacity-building of suppliers in Brazil, pertaining to the purchase of Brazilian laboratory equipment, accord less favourable treatment to imported products than that accorded to like domestic products, inconsistently with Article III:4 of the GATT 1994<sup>53</sup>;
  - iii. it is not necessary to make findings with respect to the complaining parties' claims under Article III:5 of the GATT 1994 in order to secure a positive solution to this dispute, and the Panel therefore exercises judicial economy with respect to these claims<sup>54</sup>;
  - iv. the INOVAR-AUTO programme constitutes a trade-related investment measure, and those aspects of the programme found to be inconsistent with Articles III:2 and III:4 of the GATT 1994 are also inconsistent with Article 2.1 of the TRIMs Agreement<sup>55</sup>;
  - v. tax reductions through presumed tax credits granted under the INOVAR-AUTO programme are subsidies within the meaning of Article 1.1 of the SCM Agreement and contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b) of the SCM Agreement, and thus are prohibited subsidies, inconsistent with Articles 3.1(b) and 3.2 of the SCM Agreement<sup>56</sup>;
  - vi. those aspects of the INOVAR-AUTO programme found to be inconsistent with the GATT 1994 and the TRIMs Agreement are not justified under Article XX(b) or XX(g) of the GATT 1994<sup>57</sup>;
  - vii. the tax reductions accorded to imported products from Mercado Común del Sur (Southern Common Market) (MERCOSUR) members and Mexico under the INOVAR-AUTO programme are advantages granted by Brazil to products originating in those countries, which are not accorded immediately and unconditionally to like products originating in other WTO Members, inconsistently with Article I:1 of the GATT 1994<sup>58</sup>;
  - viii. the complaining parties were not under a burden to invoke the Enabling Clause in their panel requests, and their claims under Article I:1 of the GATT 1994 are therefore within the Panel's terms of reference<sup>59</sup>; and

<sup>52</sup> Panel Reports, paras. 7.688, 8.6.a, and 8.17.a. The Panel exercised judicial economy with respect to Japan's claim under Article III:2, second sentence, of the GATT 1994. (Panel Reports, paras. 7.691 and 8.17.b) On appeal, Brazil, however, does not challenge the Panel's finding under Article III:2, first sentence, of the GATT 1994.

<sup>53</sup> Panel Reports, paras. 7.772-7.773, 8.6.b, and 8.17.c.

<sup>54</sup> Panel Reports, paras. 7.792, 8.6.c, and 8.17.d.

<sup>55</sup> Panel Reports, paras. 7.806, 8.6.d, and 8.17.e.

<sup>56</sup> Panel Reports, paras. 7.847, 8.6.e, and 8.17.f.

<sup>57</sup> Panel Reports, paras. 7.965, 7.1011, 8.6.f, and 8.17.g. On appeal, Brazil does not challenge these findings by the Panel.

<sup>58</sup> Panel Reports, paras. 7.1048, 8.6.g, and 8.17.h.

<sup>59</sup> Panel Reports, paras. 7.1083, 7.1120, 8.6.h, and 8.17.i.

- ix. the tax reductions accorded to imported products from Argentina, Mexico, and Uruguay and found to be inconsistent under Article I:1 of the GATT 1994 are not justified under paragraph 2(b) or 2(c) of the Enabling Clause<sup>60</sup>; and
- c. with respect to the PEC and RECAP programmes:
  - i. the tax suspensions granted thereunder are subsidies within the meaning of Article 1.1 of the SCM Agreement and contingent upon export performance within the meaning of Article 3.1(a) of the SCM Agreement, and thus are prohibited subsidies, inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement.<sup>61</sup>

1.16. In accordance with Article 19.1 of the DSU, and having found that Brazil acted inconsistently with its obligations under Articles I:1, III:2, and III:4 of the GATT 1994; Article 2.1 of the TRIMs Agreement; and Articles 3.1(a), 3.1(b), and 3.2 of the SCM Agreement with respect to the measures at issue, the Panel recommended that the Dispute Settlement Body (DSB) request Brazil to bring its measures into conformity with its obligations under the covered agreements.<sup>62</sup> Pursuant to Article 4.7 of the SCM Agreement, the Panel further recommended that Brazil withdraw the subsidies found to be WTO-inconsistent within 90 days.<sup>63</sup>

1.17. On 28 September 2017, Brazil notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Reports and certain legal interpretations developed by the Panel, and filed a Notice of Appeal<sup>64</sup> and an appellant's submission pursuant to Rule 20 and Rule 21, respectively, of the Working Procedures for Appellate Review<sup>65</sup> (Working Procedures).

1.18. On 29 September 2017, the Appellate Body Secretariat transmitted the Working Schedule for Appeal drawn up by the Appellate Body Division hearing these appeals, setting out the deadlines for filing further written submissions.

1.19. On 3 October 2017, the European Union notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Reports and certain legal interpretations developed by the Panel, and filed a Notice of Other Appeal and an other appellant's submission<sup>66</sup> pursuant to Rule 23 of the Working Procedures. On the same date, Japan also notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Reports and certain legal interpretations developed by the Panel, and filed a Notice of Other Appeal and an other appellant's submission<sup>67</sup> pursuant to Rule 23 of the Working Procedures.

1.20. On 9 October 2017, the Appellate Body Division hearing these appeals received a joint letter from Argentina, Australia, Canada, and the United States requesting an extension of the deadline for the filing of their third participants' submissions in these proceedings (the joint request). On 9 October 2017, the Appellate Body Division hearing these appeals invited the participants and the other third participants, if they so wished, to comment on the joint request by 11 October 2017. No objections were received. On 12 October 2017, the Appellate Body Division hearing these appeals issued a Procedural Ruling deciding, in accordance with Rule 16(2) of the Working Procedures, to extend the deadline for the filing of third participants' submissions by one week to 26 October 2017.

1.21. On 16 October 2017, Brazil, the European Union, and Japan each filed an appellee's submission.<sup>68</sup> On 26 October 2017, Argentina, Australia, and the United States each filed a third participant's submission.<sup>69</sup> On the same day, Canada, China, Colombia, Korea, Russia, Singapore, South Africa, the Separate Customs Territory of Taiwan, Penghu, Kinmen and

<sup>60</sup> Panel Reports, paras. 7.1097, 7.1121, 8.6.i, and 8.17.j.

<sup>61</sup> Panel Reports, paras. 7.1238, 8.7, and 8.18.

<sup>62</sup> Panel Reports, paras. 8.9 and 8.20.

<sup>63</sup> Panel Reports, paras. 8.11 and 8.22.

<sup>64</sup> WT/DS472/8; WT/DS497/6.

<sup>65</sup> WT/AB/WP/6, 16 August 2010.

<sup>66</sup> WT/DS472/9.

<sup>67</sup> WT/DS497/7.

<sup>68</sup> Pursuant to Rule 22 of the Working Procedures.

<sup>69</sup> Pursuant to Rule 24(1) of the Working Procedures.

Matsu (Chinese Taipei), and Turkey each notified its intention to appear at the oral hearing as a third participant.<sup>70</sup> On 15 June 2018, India and Ukraine each notified its intention to appear at the oral hearing as a third participant.<sup>71</sup>

1.22. On 24 November 2017, the participants and third participants were informed that, in accordance with Rule 15 of the Working Procedures, the Chair of the Appellate Body had notified the Chair of the DSB of the Appellate Body's decision to authorize Appellate Body Member Mr Peter Van den Bossche to complete the disposition of these appeals, even though his second term of office was due to expire before the completion of the appellate proceedings.

1.23. On 27 November 2017, the Chair of the Appellate Body notified the Chair of the DSB that the Appellate Body would not be able to circulate its Reports in these appeals within the 60-day period pursuant to Article 17.5 of the DSU, or within the 90-day period pursuant to the same provision.<sup>72</sup> The Chair of the Appellate Body explained that this was due to a number of factors, including the enhanced workload of the Appellate Body in 2017, scheduling difficulties arising from appellate proceedings running in parallel with an overlap in the composition of the Divisions hearing the appeals, the number and complexity of the issues raised in this and concurrent appellate proceedings, together with the demands that these concurrent appeals place on the WTO Secretariat's translation services, and a shortage of staff in the Appellate Body Secretariat. Although the appeals in this dispute were initiated on 28 September 2017, due to the multiple appeals pending before the Appellate Body, the reduced number of Appellate Body Members, and the shortage of staff in the Appellate Body Secretariat, work on these appeals could gather pace only in March 2018. On 19 November 2018, the Chair of the Appellate Body informed the Chair of the DSB that the Reports in these proceedings would be circulated no later than 13 December 2018.<sup>73</sup>

1.24. The oral hearing was held on 19 and 20 June 2018. The participants and three third participants (Argentina, Australia, and the United States) made opening statements. The participants and one third participant (the United States) responded to questions posed by the Members of the Appellate Body Division hearing these appeals. The participants made closing statements. None of the third participants made closing statements.

## **2 ARGUMENTS OF THE PARTICIPANTS**

2.1. The claims and arguments of the participants are reflected in the executive summaries of their written submissions provided to the Appellate Body.<sup>74</sup> The Notices of Appeal and Other Appeal, and the executive summaries of the participants' claims and arguments, are contained in Annexes A and B of the Addendum to these Reports, WT/DS472/AB/R/Add.1, WT/DS497/AB/R/Add.1.

## **3 ARGUMENTS OF THE THIRD PARTICIPANTS**

3.1. The arguments of the third participants that filed a written submission (Argentina, Australia, and the United States) are reflected in the executive summaries of their written submissions provided to the Appellate Body<sup>75</sup>, and are contained in Annex C of the Addendum to these Reports, WT/DS472/AB/R/Add.1, WT/DS497/AB/R/Add.1.

## **4 ISSUES RAISED IN THIS APPEAL**

4.1. The following issues are raised in these appeals by Brazil:

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<sup>70</sup> Pursuant to Rule 24(2) of the Working Procedures.

<sup>71</sup> Pursuant to Rule 24(4) of the Working Procedures.

<sup>72</sup> WT/DS472/10; WT/DS497/8.

<sup>73</sup> WT/DS472/11; WT/DS497/9.

<sup>74</sup> Pursuant to the Appellate Body's communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings" (WT/AB/23, 11 March 2015).

<sup>75</sup> Pursuant to the Appellate Body's communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings" (WT/AB/23, 11 March 2015).

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- a. with respect to the Panel's findings under Article III:8(b) of the GATT 1994:
- i. whether the Panel erred in its interpretation and application of Article III:8(b) of the GATT 1994 in finding that subsidies that are provided exclusively to domestic producers pursuant to Article III:8(b) are not *per se* exempted from the disciplines of Article III of the GATT 1994<sup>76</sup>;
- b. with respect to the Panel's findings under Articles III:2 and III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement:
- i. whether the Panel erred in the application of Article III:2 of the GATT 1994 in finding that imported finished and intermediate Information and Communication Technology, Automation and Related Goods (ICT products) were taxed in excess of like domestic finished and intermediate ICT products;
  - ii. whether the Panel erred in the application of Article III:4 of the GATT 1994 in finding that the accreditation requirements under the ICT programmes accord treatment less favourable to imported ICT products than that accorded to like domestic ICT products inconsistently with Article III:4 of the GATT 1994;
  - iii. whether the Panel erred in the application of Article III:4 of the GATT 1994 in finding that the ICT programmes are inconsistent with Article III:4 of the GATT 1994 by virtue of the lower administrative burden on companies purchasing incentivized domestic intermediate products;
  - iv. whether the Panel erred in finding that the PPBs and other production-step requirements under the ICT programmes are contingent upon the use of domestic goods, inconsistently with Article III:4 of the GATT 1994;
  - v. consequently, whether the Panel erred in finding that the above-mentioned aspects of the ICT programmes are inconsistent with Article 2.1 of the TRIMs Agreement;
  - vi. whether the Panel erred in the application of Article III:4 of the GATT 1994 in finding that the accreditation requirements under the INOVAR-AUTO programme are inconsistent with Article III:4 because they are more burdensome for companies seeking accreditation as importers/distributors as opposed to domestic manufacturers; and
  - vii. consequently, whether the Panel erred in finding that the above-mentioned aspect of the INOVAR-AUTO programme is inconsistent with Article 2.1 of the TRIMs Agreement;
- c. with respect to the Panel's findings under Article 3.1(a) of the SCM Agreement:
- i. whether the Panel erred in the application of Article 1.1(a)(1)(ii) of the SCM Agreement by identifying the benchmark treatment as the treatment applicable to non-accredited companies and rejecting the treatment of structural credit accumulators as the benchmark treatment;
  - ii. conditionally, in the event that the Appellate Body upholds the Panel's findings concerning the benchmark treatment, whether the Panel:
    - erred in the application of Article 1.1(a)(1)(ii) of the SCM Agreement in its comparison of the benchmark treatment with the challenged treatment under the PEC and RECAP programmes;
    - erred in finding that "cash availability" and "implicit interest income" are government revenue "otherwise due" within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement; and

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<sup>76</sup> Panel Reports, para. 7.87.

- failed to conduct an objective assessment of the facts of the case under Article 11 of the DSU in its assessment of a piece of evidence submitted by Brazil;
- d. with respect to the Panel's findings under Article 3.1(b) of the SCM Agreement:
- i. whether the Panel erred in the application of Article 1.1(a)(1)(ii) of the SCM Agreement by: (i) failing to compare the tax treatment accorded to the group of taxpayers in the benchmark treatment with the group of taxpayers under the ICT programmes; and (ii) finding that "cash availability" and "implicit interest income" are government revenue otherwise due within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement; and
  - ii. whether the Panel erred in finding that the PPBs and other production-step requirements under the ICT programmes and the accreditation requirement to perform a number of manufacturing steps in Brazil under the INOVAR-AUTO programme constitute a requirement to use domestic over imported goods under Article 3.1(b) of the SCM Agreement;
- e. with respect to the Panel's findings under Article I:1 of the GATT 1994 and the Enabling Clause:
- i. whether the Panel erred in its interpretation of paragraph 4(a) of the Enabling Clause in finding that the European Union and Japan did not have the burden to raise the Enabling Clause in their panel requests; and consequently, whether the Panel erred in finding that the claims raised by the European Union and Japan under Article I:1 of the GATT 1994 with regard to the INOVAR-AUTO programme were within its terms of reference;
  - ii. whether the Panel erred in its interpretation of paragraph 2(b) of Enabling Clause and in finding that the differential tax treatment under the INOVAR-AUTO programme was not justified under that provision; and
  - iii. whether the Panel erred in its interpretation of paragraph 2(c) of the Enabling Clause and in finding that the differential tax treatment under the INOVAR-AUTO programme was not justified under that provision; and
- f. with respect to the Panel's findings under Article 4.7 of the SCM Agreement:
- i. whether the Panel acted inconsistently with Articles 11 and 12.7 of the DSU in recommending that Brazil withdraw the prohibited subsidies found to exist within 90 days.

4.2. The following issues are raised in these appeals by the European Union and Japan with respect to the Panel's findings concerning the in-house scenario under the PPBs and other production-step requirements:

- a. whether the Panel's failure to make findings on the in-house scenario, in its analysis of the claims under Article III:4 of the GATT 1994, Article 2.1 of the TRIMs Agreement, and Article 3.1(b) of the SCM Agreement, in relation to the ICT programmes and the INOVAR-AUTO programme, constitutes false judicial economy and a failure to make an objective assessment of the matter before the Panel, inconsistent with Article 11 of the DSU (raised by the European Union and Japan);
- b. conditionally, in the event that the Appellate Body finds that the Panel did not exercise judicial economy, whether the Panel acted inconsistently with Article 11 of the DSU by failing to provide coherent reasoning for its findings (raised by Japan);
- c. in the event that that the Appellate Body considers that the Panel correctly exercised judicial economy by not making specific findings in the in-house scenario, whether the Appellate Body should review and modify the Panel's legal interpretation and findings to "make it clearer", pursuant to Article 17.3 of the DSU, that the Panel did not need to rule

on both the "in-house" and "outsourcing" scenarios because the measures at issue are *per se* inconsistent with the relevant covered agreements (raised by the European Union and Japan); and

- d. in the event that the Appellate Body rejects the above-mentioned claims by the European Union, whether the Panel erred in the application of Article III:4 of the GATT 1994, Article 2.1 of the TRIMs Agreement, and Article 3.1(b) of the SCM Agreement, by failing to consider the European Union's claims under these provisions in light of all the relevant facts of the case (raised by the European Union).

## 5 ANALYSIS OF THE APPELLATE BODY

### 5.1 Articles III:2 and III:4 of the GATT 1994

5.1. We begin our analysis with Brazil's claims on appeal concerning Articles III:2 and III:4 of the GATT 1994, namely that the Panel erred in finding that: (i) the ICT programmes are inconsistent with Article III:2, first sentence, of the GATT 1994 because under these programmes imported ICT products are taxed in excess of like domestic ICT products<sup>77</sup>; (ii) the ICT programmes are inconsistent with Article III:4 of the GATT 1994 because they accord to imported products treatment less favourable than that accorded to like domestic products<sup>78</sup>; and (iii) the accreditation requirements under the INOVAR-AUTO programme are inconsistent with Article III:4 of the GATT 1994 because they accord to imported products treatment less favourable than that accorded to like domestic products.<sup>79</sup>

5.2. We are, however, mindful of the fact that a substantial part of Brazil's appeal of the Panel's findings under Articles III:2 and III:4 of the GATT 1994 is closely connected with Brazil's appeal that the Panel erred in its interpretation and application of Article III:8(b) of the GATT 1994, given that Brazil advanced arguments under Article III:8(b) as a "general defence"<sup>80</sup> to all of the complaining parties' claims of inconsistency with Article III. For instance, in its appeal of the Panel's findings under Articles III:2 and III:4, Brazil contends that the Panel erred in failing to establish, "at the threshold"<sup>81</sup>, that the ICT and INOVAR-AUTO programmes constitute the "payment of subsidies to domestic producers" under Article III:8(b) and therefore are not subject to the disciplines of Articles III:2 and III:4.<sup>82</sup> While Brazil puts forth stand-alone arguments that the Panel erred in its interpretation of Article III:8(b), it also advances arguments highlighting the Panel's allegedly flawed understanding of the scope of that provision as part of its appeal of the Panel's findings under Articles III:2 and III:4. We address all of these connected arguments in section 5.2 of these Reports.

5.3. At this juncture, we also consider it useful to recall certain terminologies employed by the Panel in this dispute regarding the categories of products involved under the ICT and INOVAR-AUTO programmes. We do not understand the participants to take issue or dispute on appeal the Panel's understanding set out below.

5.4. The Panel noted that the European Union's and Japan's claims with respect to the ICT and INOVAR-AUTO programmes pertained to two distinct types of products: "incentivised products" and inputs for the "incentivised products".<sup>83</sup> The Panel further noted that Brazil subcategorized the

<sup>77</sup> Brazil's appellant's submission, para. 15.

<sup>78</sup> Brazil's appellant's submission, para. 15. We note that Brazil's appeal under Article III:4 of the GATT 1994 also concerns those aspects of the ICT programmes that allegedly contain local content requirements that the Panel found to be inconsistent with Article III:4 and, consequently, with Article 2.1 of the TRIMs Agreement. However, we do not address these aspects of Brazil's claims on appeal in this section. We address them in section 5.4.2.4 of these Reports when addressing Brazil's claims under Article 3.1(b) of the SCM Agreement.

<sup>79</sup> Brazil's appellant's submission, para. 15. We note that Brazil's appeal under Article III:4 of the GATT 1994 also concerns those aspects of the INOVAR-AUTO programme that allegedly contain local content requirements that the Panel found to be inconsistent with Article III:4 and, consequently, with Article 2.1 of the TRIMs Agreement. However, we do not address these aspects of Brazil's claims on appeal in this section. We address them in section 5.4.2.4.3 of these Reports when addressing Brazil's claims under Article 3.1(b) of the SCM Agreement.

<sup>80</sup> Panel Reports, para. 7.71.

<sup>81</sup> Brazil's appellant's submission, paras. 15 and 42.

<sup>82</sup> Brazil's appellant's submission, paras. 15, 42, and 247.

<sup>83</sup> Panel Reports, para. 7.23.

"incentivised products" as "intermediate" and "finished" products.<sup>84</sup> The Panel acknowledged that these terms are not "treaty language", but nonetheless considered that "these distinctions form a useful analytical tool in understanding the arguments and claims of the parties."<sup>85</sup>

5.5. The Panel noted that a "finished product", as identified by Brazil, is a product that will not undergo any further manufacturing and will be "incentivised" if "the company producing them is accredited under a particular programme."<sup>86</sup> The Panel explained that, "[i]f a finished product is 'incentivised', it means that it receives a particular tax benefit on its sale."<sup>87</sup>

5.6. "Intermediate products", the Panel explained, will be subject to further manufacturing and will also be "incentivised" if the company producing them is accredited under a particular programme.<sup>88</sup> The Panel noted that, "[i]f an intermediate product is incentivised, it will be subject to a particular tax benefit on its sale."<sup>89</sup> The Panel also recognized that "such intermediate products will be further used in the production of a 'finished' product."<sup>90</sup>

5.7. With the aforesaid background in mind, we now turn to address Brazil's claim on appeal that the Panel erred in finding that imported finished and intermediate ICT products were taxed in excess of like domestic ICT products inconsistently with Article III:2, first sentence, of the GATT 1994.

#### **5.1.1 Whether the Panel erred in finding that imported finished and intermediate ICT products were taxed in excess of like domestic finished and intermediate ICT products inconsistently with Article III:2, first sentence, of the GATT 1994**

5.8. Before the Panel, Brazil put forth a broad defence contending that Article III of the GATT 1994 does not apply to the ICT programmes because "the disciplines of Article III govern discrimination on *products*, whereas the challenged programmes are not product-related but rather impose process and production-step requirements"<sup>91</sup> and "concern only pre-market obligations" regarding production and investment in R&D by producers.<sup>92</sup>

5.9. The Panel considered that the "plain text" of Article III "is sufficient to refute Brazil's argument"<sup>93</sup> and explained that "there is no reason why a measure directed at a producer rather than a product could not 'affect' the internal sale, offering for sale, purchase, etc. of domestic and imported products."<sup>94</sup> The Panel concluded that "Article III ... is not *per se* inapplicable to certain measures, in particular 'pre-market' measures directed at producers"<sup>95</sup> and therefore that the "general defence by Brazil ... fails."<sup>96</sup>

5.10. Thereafter, the Panel turned to address the European Union's and Japan's claims under Article III:2, first sentence, of the GATT 1994. The Panel found that the complaining parties have made a *prima facie* case that the relevant tax treatment provided for in the ICT programmes was exclusively based on the origin of the products and that Brazil had failed to successfully rebut the *prima facie* case of likeness made by the complaining parties.<sup>97</sup> The Panel then considered whether

<sup>84</sup> Panel Reports, para. 7.23.

<sup>85</sup> Panel Reports, para. 7.23.

<sup>86</sup> Panel Reports, para. 7.24.

<sup>87</sup> Panel Reports, para. 7.24.

<sup>88</sup> Panel Reports, para. 7.25.

<sup>89</sup> Panel Reports, para. 7.25.

<sup>90</sup> Panel Reports, para. 7.25.

<sup>91</sup> Panel Reports, para. 7.58. (emphasis original)

<sup>92</sup> Panel Reports, para. 7.61 (referring to Brazil's first written submission to the Panel, paras. 167, 173, 181, 184, 229, 231-232, 287, 327, 340, 377, 461, 477, 489, 578, 586, and 744 and sections 5.1.2.3.1, 5.2.2.3.1, 5.3.2.3.1, and 5.4.3.2.1 (DS472) and paras. 125, 140, 143, 182, 185-186, 208, 238, 276, 290, 318, 333, 398, 413, 424, 426, 497, 514, and 519 and sections 4.1.2.4.1, 4.2.2.4.1, 4.3.2.4.1, and 4.4.2.4.1 (DS497)).

<sup>93</sup> Panel Reports, para. 7.63.

<sup>94</sup> Panel Reports, para. 7.63.

<sup>95</sup> Panel Reports, para. 7.70.

<sup>96</sup> Panel Reports, para. 7.67.

<sup>97</sup> Panel Reports, paras. 7.139-7.140.



the relevant tax treatment provided for in the ICT programmes resulted in imported ICT products being taxed in excess of like domestic ICT products.<sup>98</sup>

5.11. With respect to *finished ICT products*, the Panel noted that "neither the complaining parties nor Brazil question[s] the fact that the challenged programmes establish different levels of taxation."<sup>99</sup> Recalling the relevant requirements under each of the ICT programmes<sup>100</sup>, the Panel noted that the tax reductions and exemptions apply to the relevant domestic ICT products, provided that "the companies that manufacture these products, which must be located (and operate) in Brazil, fulfil certain requirements."<sup>101</sup> The Panel considered that only ICT products manufactured in Brazil can satisfy the requirements to benefit from the tax reductions or exemptions.<sup>102</sup> As for imported finished ICT products, the Panel noted that these products will never be able to qualify for the tax reductions and exemptions established in the ICT programmes because "such products are never manufactured in Brazil by companies located or operating in Brazil; such finished products are never produced in accordance with the relevant PPBs or similar production requirements."<sup>103</sup> The Panel further noted that imported ICT products developed outside of Brazil will never be able to obtain "the status of being 'developed in Brazil' and thus will never be able to qualify for the additional reductions".<sup>104</sup> For these reasons, the Panel found that, contrary to domestic finished ICT products manufactured in Brazil by accredited companies, "like imported ICT finished products cannot benefit from the tax reductions and exemptions (including through zero rates) established in the ICT programmes and are, therefore, subject to a higher tax burden than like domestic ICT products."<sup>105</sup>

5.12. With respect to *intermediate ICT products*, the Panel recalled that Brazil contended that "there is no difference in the tax treatment between intermediate ICT products manufactured by accredited and non-accredited companies."<sup>106</sup> The Panel proceeded to examine "how the Brazilian tax system applies to both incentivized domestic intermediate ICT products and like imported intermediate ICT products in order to determine whether the latter bear a higher tax burden".<sup>107</sup> The Panel observed that:

In the case of sales of *incentivized domestic intermediate ICT products*, which are manufactured by *accredited companies*, companies purchasing these products do not pay the IPI tax and PIS/PASEP and COFINS contributions (under the PADIS programme) or do not pay or pay a reduced IPI tax (under the Informatics programme). Consequently, they do not obtain any credit (in the case of tax exemptions) or they obtain a reduced credit (in the case of tax reductions) to offset against debits when paying their monthly liabilities.

In the case of sales of *imported intermediate ICT products*, which are never incentivized because they are manufactured by companies that cannot get accredited, the companies purchasing the imported (and, therefore, non-incentivized) intermediate ICT products must pay the IPI tax and PIS/PASEP and COFINS contributions. As a result of this payment, they obtain a tax credit that can later be used to offset debits from the same taxes and contributions, or ask for compensation with other taxes or reimbursement.<sup>108</sup>

5.13. The Panel considered that, to the extent the transaction involves the payment of a tax as well as the granting of a tax credit, "these two elements must be taken into account in order to make an overall assessment of the actual tax burden imposed on imported intermediate ICT products, on the one hand, and like domestic incentivized intermediate ICT products, on the other."<sup>109</sup> The Panel

<sup>98</sup> Panel Reports, para. 7.142.

<sup>99</sup> Panel Reports, para. 7.149 (referring to Brazil's first written submissions to the Panel, paras. 336, 382, and 485 (DS472) and paras. 286, 324, and 422 (DS497)).

<sup>100</sup> Panel Reports, para. 7.150.

<sup>101</sup> Panel Reports, para. 7.150. (fn omitted)

<sup>102</sup> Panel Reports, para. 7.151 (referring to Panel Reports, para. 7.135).

<sup>103</sup> Panel Reports, para. 7.151.

<sup>104</sup> Panel Reports, para. 7.151 (referring to Panel Reports, para. 7.136).

<sup>105</sup> Panel Reports, para. 7.154.

<sup>106</sup> Panel Reports, para. 7.157.

<sup>107</sup> Panel Reports, para. 7.160.

<sup>108</sup> Panel Reports, paras. 7.161-7.162. (fn omitted; emphasis original)

<sup>109</sup> Panel Reports, para. 7.164 (referring to Panel Report, *Argentina – Hides and Leather*, para. 11.184).

found that "there is a different effective tax burden" on imported ICT products vis-à-vis like domestic ICT products for two reasons: (i) the availability of cash flow for those companies that benefit from the tax exemption or reduction, and (ii) the "time-value" of money.<sup>110</sup> For these reasons, the Panel concluded that "imported intermediate ICT products, which are never incentivized, are subject to a higher tax burden than like domestic incentivized intermediate ICT products."<sup>111</sup>

5.14. As a preliminary matter, we note that, on appeal, Brazil takes issue with the Panel's finding that "Article III of the GATT 1994 is not *per se* inapplicable to certain measures, in particular 'pre-market' measures directed at producers."<sup>112</sup> Brazil contends that Article III deals with non-discrimination between domestic and imported products, "thus being applicable only to measures which affect a *product* once it has been produced and enters the marketplace"<sup>113</sup> and "not to production (pre-market)" measures.<sup>114</sup> In response to questioning at the oral hearing in these appellate proceedings, Brazil, however, confirmed that it does not wish to pursue any further this line of argument regarding the inapplicability of Article III to producer-related measures.

5.15. Article III:2, first sentence, of the GATT 1994 stipulates that "[t]he products of the territory of any Member imported into the territory of any other Member shall not be subject, directly or indirectly," to internal taxes in excess of those applied to like domestic products. The Appellate Body has explained that "[t]his language suggests that the provision applies to a broad range of measures."<sup>115</sup> Article III:2, first sentence, thus has a broad scope of application by not only disciplining internal taxes that directly affect products but also internal taxes that indirectly affect products.<sup>116</sup> Moreover, we observe that Article III:1 of the GATT 1994 is couched in broad and inclusive language referring to among other things internal taxes, other internal charges, laws, regulations and requirements affecting the internal sale, and the offering for sale of products. The Appellate Body has explained that "Article III:1 constitutes part of the context of Article III:2, in the same way that it constitutes part of the context of each of the other paragraphs in Article III."<sup>117</sup> These considerations suggest that, while the focus of Article III:2, first sentence is, in particular, "on the treatment accorded to 'products'"<sup>118</sup>, it does not exclude from its scope measures that are on their face directed at producers, which nevertheless subject the product concerned to taxation in excess, and thereby have an impact on the conditions of competition.<sup>119</sup>

5.16. Article III:4 of the GATT 1994 prohibits treatment less favourable to products of foreign origin imported into the territory of a Member than that accorded to like domestic products. Article III:4 specifies that this obligation is applicable with respect to all laws, regulations, and requirements "affecting their internal sale, offering for sale, purchase, transportation, distribution or use". The Appellate Body has interpreted the word "affecting" as "having a 'broad scope of application'".<sup>120</sup> The Appellate Body has found that "measures that restrict the rights of traders may violate GATT obligations with respect to trade in goods", recalling, in particular, that "restrictions imposed on investors, wholesalers, and manufacturers, as well as on points of sale and ports of entry, have been found to be inconsistent with Article III:4."<sup>121</sup> Thus, measures directed at producers that may affect the "specific transactions, activities and uses"<sup>122</sup> mentioned in Article III:4, such that they modify

<sup>110</sup> Panel Reports, para. 7.169.

<sup>111</sup> Panel Reports, para. 7.172.

<sup>112</sup> Brazil's appellant's submission, para. 263 (quoting Panel Reports, para. 7.70).

<sup>113</sup> Brazil's appellant's submission, para. 264. (emphasis original)

<sup>114</sup> Brazil's appellant's submission, para. 265.

<sup>115</sup> Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 112. (fn omitted)

<sup>116</sup> The Appellate Body has found that "[a]ny measure that indirectly affects the conditions of competition between imported and like domestic products would come within the provisions of Article III:2, first sentence." (Appellate Body Report, *Canada – Periodicals*, p. 19)

<sup>117</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 18.

<sup>118</sup> Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.62.

<sup>119</sup> However, whether measures directed at producers subject the product concerned to taxation in excess, and thereby have an impact on the conditions of competition, must be determined on the basis of the facts and circumstances at issue.

<sup>120</sup> Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 210. The Appellate Body explained that "[i]t is ... not any 'laws, regulations and requirements' which are covered by Article III:4, but only those which 'affect' the specific transactions, activities and uses mentioned in that provision." (Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 208 (emphasis original))

<sup>121</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, para. 227. (fn omitted)

<sup>122</sup> Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 208.

the conditions of competition to the detriment of imported products vis-à-vis like domestic products, fall within the scope of Article III:4.<sup>123</sup>

5.17. With this background in mind, we now turn to address Brazil's claim on appeal that the Panel erred in finding that imported finished ICT products were taxed in excess of like domestic finished ICT products inconsistently with Article III:2, first sentence, of the GATT 1994.

#### **5.1.1.1 Whether the Panel erred in finding that imported finished ICT products were taxed in excess of like domestic finished ICT products**

5.18. On appeal, Brazil contends that the Panel failed "to undertake a thorough analysis of the case presented by complainants and to carefully scrutinize the design, structure and operation of the ICT programmes in applying Article III:2 ... to the facts of this dispute".<sup>124</sup> Instead, according to Brazil, the Panel completely disregarded the fact that the complaining parties had not submitted any evidence that "the tax treatment under the ICT programmes resulted in *de jure* discrimination based exclusively on the origin of products in a manner contrary to the principles set forth in Article III."<sup>125</sup> Brazil submits that "there is nothing in the design, structure and operation of the challenged measures that by 'necessary implication' would amount to *de jure* tax discrimination within the meaning of Article III:2."<sup>126</sup>

5.19. In response, the European Union submits that "the Panel focused on the impact of the tax incentives on domestic versus imported *products*" in order to conclude that imported ICT products, which are manufactured outside Brazil, will never be able to obtain the tax reductions and exemptions available under the ICT programmes to like domestic ICT products manufactured by accredited companies.<sup>127</sup> According to the European Union, the Panel found that imported ICT products will be subject to taxes in excess of those applied to finished domestic ICT products by "looking into the design, structure and operation of the ICT programmes".<sup>128</sup> The European Union submits that "[n]o more is required to find discrimination under Article III:2, first sentence, of the GATT 1994."<sup>129</sup>

5.20. Japan submits that the Panel did not "simply assume" that the ICT programmes were inconsistent with Article III:2.<sup>130</sup> According to Japan, the Panel engaged in a thorough analysis of Article III:2 and its application to the ICT programmes, ultimately finding that these programmes led to imported products being taxed in excess of domestic products in violation of Article III:2, first sentence.<sup>131</sup>

5.21. We recall that, as part of its analysis concerning "whether the complaining parties ... made a *prima facie* case that the relevant ICT programmes draw distinctions between the relevant products based exclusively on origin"<sup>132</sup>, the Panel noted that, in order for an ICT product to be subject to the tax treatment provided for in the ICT programmes, companies that manufacture these products "must be located (and operate) in Brazil"<sup>133</sup> and "must comply with one or more"<sup>134</sup> of the following requirements:

- a. invest in R&D in Brazil (in the case of the Informatics, PADIS, and PATVD programmes);

<sup>123</sup> However, the determination of whether such measures modify the conditions of competition to the detriment of imported products so as to accord treatment less favourable within the meaning of Article III:4 of the GATT 1994 must be determined on the basis of the facts and circumstances at issue.

<sup>124</sup> Brazil's appellant's submission, para. 87.

<sup>125</sup> Brazil's appellant's submission, para. 88.

<sup>126</sup> Brazil's appellant's submission, para. 93.

<sup>127</sup> European Union's appellee's submission, para. 107 (referring to Panel Reports, para. 7.151). (emphasis original)

<sup>128</sup> European Union's appellee's submission, para. 107.

<sup>129</sup> European Union's appellee's submission, para. 107.

<sup>130</sup> Japan's appellee's submission, para. 53.

<sup>131</sup> Japan's appellee's submission, para. 53 (referring to Panel Reports, paras. 7.154 and 7.172).

<sup>132</sup> Panel Reports, para. 7.127.

<sup>133</sup> Panel Reports, para. 7.150.

<sup>134</sup> Panel Reports, para. 7.134.

b. manufacture in Brazil in accordance with the relevant PPBs (in the case of the Informatics, PADIS, PATVD, and Digital Inclusion programmes) or carry out certain manufacturing steps in Brazil (in the case of the PADIS and PATVD programmes); and/or

c. develop the products in Brazil (in order to obtain additional tax reductions under the Informatics programme or to obtain tax exemptions (through zero rates) under the PATVD programme).<sup>135</sup>

5.22. With respect to the requirement that ICT products be manufactured in accordance with the relevant PPBs<sup>136</sup>, the Panel considered that "only ICT products manufactured in Brazil can meet this requirement given that PPBs require that a certain number of manufacturing operations that characterize the effective 'production' of a certain product be performed in Brazil."<sup>137</sup> The Panel further considered that the same applies for the requirement that certain manufacturing steps be performed in Brazil.<sup>138</sup> The Panel found that, "by necessary implication, only a product manufactured in Brazil can benefit from the tax treatment under the ICT programmes."<sup>139</sup> As for the requirement that products be "developed in Brazil", the Panel recalled that "the relevant Implementing Order explains that in order to meet this requirement, the 'specifications, projects and developments [of the products benefiting from the relevant tax treatment] must be carried out in Brazil'."<sup>140</sup> The Panel considered that imported products that have been "developed" outside of Brazil, but are like domestic products developed in Brazil, "can never meet this requirement, and therefore cannot qualify for the relevant tax treatment".<sup>141</sup> The Panel concluded that, for the purposes of Article III:2, "all incentivized products that receive the tax treatment under the challenged programmes[] can be considered to be Brazilian domestic products."<sup>142</sup> On this basis, the Panel found that the complaining parties had made a *prima facie* case that "the differential tax treatment provided for in the challenged ICT programmes is exclusively based on the origin of the products."<sup>143</sup>

5.23. Brazil accepts that "[i]t is undisputed that foreign producers cannot be accredited under the ICT programmes."<sup>144</sup> We note that "'finished' products will be 'incentivised' if the company producing them is accredited under a particular programme" and "[i]f a finished product is 'incentivised', it means that it receives a particular tax benefit on its sale."<sup>145</sup> Imported finished ICT products are therefore not eligible for either tax reductions or exemptions under the ICT programmes and consequently, bear the full tax burden, as opposed to like domestic finished ICT products. The Panel rightly considered that imported finished ICT products cannot qualify for the relevant tax treatment<sup>146</sup> because they: (i) "are never manufactured in Brazil by companies located or operating in Brazil [and] ... are never produced in accordance with the relevant PPBs or similar production requirements"; and (ii) "will never be able to obtain the status of being 'developed in Brazil'".<sup>147</sup> This, in our view, demonstrates that the Panel analysed the design, structure, and operation of the ICT programmes and came to the conclusion that they are designed in such a manner that only "Brazilian domestic products"<sup>148</sup> can "benefit from the tax reductions or exemptions"<sup>149</sup> to the exclusion of imported finished ICT products. We, therefore, reject Brazil's argument that there is

<sup>135</sup> Panel Reports, para. 7.134. (fns omitted)

<sup>136</sup> The Panel defined a PPB as "the minimum set of operations performed at a manufacturing facility that characterizes the actual industrialization of a given product". (Panel Reports, para. 2.62 (referring to Decree 5,906/2006 (Panel Exhibit JE-7), Article 16)). In other words, the Panel explained that PPBs indicate the minimum stages or steps of the manufacturing process of a product that must be performed in Brazil. (Ibid.) On appeal, the participants do not take issue with the definition of a PPB set out by the Panel.

<sup>137</sup> Panel Reports, para. 7.135 (referring to Brazil's first written submissions to the Panel, para. 128 (DS472) and para. 85 (DS497)).

<sup>138</sup> Panel Reports, para. 7.135.

<sup>139</sup> Panel Reports, para. 7.135.

<sup>140</sup> Panel Reports, para. 7.136 (referring to Panel Reports, fn 228 to para. 2.87).

<sup>141</sup> Panel Reports, para. 7.136. (fn omitted)

<sup>142</sup> Panel Reports, para. 7.137.

<sup>143</sup> Panel Reports, para. 7.139.

<sup>144</sup> Brazil's appellant's submission, para. 97.

<sup>145</sup> Panel Reports, para. 7.24.

<sup>146</sup> Panel Reports, para. 7.136.

<sup>147</sup> Panel Reports, para. 7.151.

<sup>148</sup> Panel Reports, para. 7.137.

<sup>149</sup> Panel Reports, para. 7.151 (referring to Panel Reports, para. 7.135).

nothing in the design, structure, and operation of the ICT programmes that would amount to *de jure* discrimination based exclusively on the origin of products.<sup>150</sup>

5.24. Brazil further contends that, "[g]iven the non-cumulative nature of Brazil's indirect taxes", the application of the credit-debit system to the products manufactured by non-accredited companies "results in principle in the same tax burden" as for products manufactured by accredited companies, to which the credit-debit system does not apply.<sup>151</sup> Thus, Brazil asserts that "[i]t was ... incumbent upon the Panel to examine evidence of the *effects* of the ICT programmes on the *effective* tax burden borne by the imported products in order to establish a violation of Article III:2."<sup>152</sup>

5.25. In response, the European Union submits that Brazil "clearly indicated" before the Panel that its rebuttal based on the functioning of the credit-debit system was "relevant only with regard to incentivised intermediate products".<sup>153</sup> In any event, the European Union submits that Brazil's contention regarding imported finished ICT products is "wrong on substance".<sup>154</sup> The European Union explains that the sale of a finished product to a distributor or a consumer represents the last possible stage of the application of the product taxes in question. The European Union reasons that, "[i]f at that stage the tax rate is higher for imported products than for like domestic incentivized products, then the tax burden imposed on the product is higher for the former products."<sup>155</sup>

5.26. Japan recalls that the Panel noted that, with respect to finished ICT products, none of the parties disputed that the ICT programmes establish different levels of taxation, and that only ICT products manufactured in Brazil could satisfy the requirements to qualify for tax reductions.<sup>156</sup> Japan contends that the Panel conducted a thorough and detailed analysis of the actual tax burden under the ICT programmes.<sup>157</sup>

5.27. We note that, with respect to finished ICT products, Brazil argued before the Panel that "any possible difference in taxation aims at compensating accredited companies for the costs they must incur in order to meet the requirements provided for in the challenged programmes."<sup>158</sup> As noted above, imported finished ICT products are not eligible for either tax reductions or exemptions because foreign producers cannot be accredited under the ICT programmes and, consequently, bear the full tax burden, as opposed to like domestic finished ICT products. For intermediate ICT products, Brazil, however, argued that "there is no difference in the tax burden on imported products compared to domestic products, because its tax system is neutral in terms of tax collection throughout the production chain."<sup>159</sup> Therefore, it appears that Brazil does not dispute that finished ICT products are subject to different levels of taxation. Indeed, as noted by the Panel, with respect to finished products, "neither the complaining parties *nor* Brazil question[s] the fact that the challenged programmes establish different levels of taxation"<sup>160</sup> and further that the parties "acknowledge[]" that "the level of taxation on like imported and domestic *finished [ICT] products* is different because of the tax reductions and exemptions provided for in the relevant ICT programmes."<sup>161</sup> These considerations suggest that Brazil is conflating its defence with respect to finished ICT products with that of intermediate ICT products by drawing arguments that it made in the specific context of intermediate ICT products. In any event, Brazil's justification that "any possible difference in taxation" under the ICT programmes with respect to domestic finished ICT products is aimed at "compensating accredited companies for the costs they must incur in order to meet the requirements" seems to flow largely from policy reasons and considerations.<sup>162</sup> As also noted by the

<sup>150</sup> Brazil's appellant's submission, paras. 88 and 93.

<sup>151</sup> Brazil's appellant's submission, para. 97.

<sup>152</sup> Brazil's appellant's submission, para. 98. (emphasis original)

<sup>153</sup> European Union's appellee's submission, para. 96. (emphasis omitted)

<sup>154</sup> European Union's appellee's submission, para. 104.

<sup>155</sup> European Union's appellee's submission, para. 104.

<sup>156</sup> Japan's appellee's submission, para. 56 (referring to Panel Reports, paras. 7.149 and 7.151).

<sup>157</sup> Japan's appellee's submission, para. 58.

<sup>158</sup> Panel Reports, para. 7.95 (referring to Brazil's first written submissions to the Panel, paras. 156 and 205 (DS472) and paras. 105 and 161 (DS497)).

<sup>159</sup> Panel Reports, para. 7.95 (referring to Brazil's first written submissions to the Panel, para. 185 (DS472) and para. 144 (DS497)).

<sup>160</sup> Panel Reports, para. 7.149 (referring to Brazil's first written submissions to the Panel, paras. 336, 382, and 485 (DS472) and paras. 286, 324, and 422 (DS497)). (emphasis added)

<sup>161</sup> Panel Reports, para. 7.149. (emphasis added)

<sup>162</sup> Panel Reports, para. 7.95.

Panel<sup>163</sup>, the justification for a measure that is found to be inconsistent with Article III:2, first sentence, can be assessed, for example, in the context of the general exceptions under Article XX of the GATT 1994.

5.28. That said, we note that a finished product "is a product that will not undergo any further manufacturing"<sup>164</sup> and therefore the sale of a finished product represents the last stage of a transaction. In the case of an imported finished ICT product, when an importer sells the imported finished ICT product to a wholesaler, retailer, or distributor, the importer will charge the IPI tax to the wholesaler, retailer, or distributor and remit the tax to the Brazilian Government.<sup>165</sup> In contrast, in the case of a like domestic finished ICT product that is subject to IPI tax exemption or reduction under the ICT programmes, the seller does not charge any tax or charges a reduced tax, as the case may be, to the wholesaler, retailer, or distributor.<sup>166</sup> At this last stage the tax rate is thus higher for imported finished ICT products than for like domestic finished ICT products, and the tax burden on the former is necessarily in excess of that on the latter.<sup>167</sup> In other words, imported finished ICT products bear the full value of the taxes as prescribed under the ICT programmes in comparison to like domestic finished ICT products. In these circumstances, we fail to see how the credit-debit system, as Brazil contends, applies and offsets any tax burden in the case of imported finished ICT products and "results in principle in the same tax burden" as imposed on like domestic finished ICT products.<sup>168</sup>

5.29. Thus, we agree with the Panel that, because imported finished ICT products are "subject to a higher tax burden than like domestic ICT products", they are consequently "taxed in excess of like domestic finished ICT products, contrary to Article III:2, first sentence, of the GATT 1994".<sup>169</sup>

#### **5.1.1.2 Whether the Panel erred in finding that imported intermediate ICT products were taxed in excess of like domestic intermediate ICT products**

5.30. We now turn to intermediate ICT products regarding which Brazil asserts on appeal that the Panel erred in its assessment of "the impact of the tax suspension and exemptions granted under the ICT programmes in the beginning or in the middle of the production chain".<sup>170</sup> According to Brazil, the Panel "opted to ignore the fact that the credit-debit system in a value added tax ... ensures that the amount collected at each step of production is equivalent to the value added at that step".<sup>171</sup> Brazil thus submits that "[i]n the end, the tax burden of a product subject to the payment of a tax, which generates a credit, and a product that is subject to a suspension, but receives no credit, will be the same."<sup>172</sup>

5.31. In response, the European Union submits that the Panel did not agree with Brazil that "the suspension or exemption of indirect value-added taxes in the beginning or in the middle of the production chain does not affect the final amount of tax collected by the tax authorities."<sup>173</sup> Instead, the European Union contends that the Panel clearly indicated that it was concerned with determining the effective tax burden. The European Union further contends that the Panel clearly stated that it was required to take account of the functioning of the tax credit-debit system in assessing the effective tax burden imposed on imported products compared to the burden imposed on incentivized domestic products.<sup>174</sup> The European Union asserts that "Brazil does not take issue with the Panel's description of the Brazilian tax debit-credit mechanism ... which provide[s] the factual basis for the Panel analysis."<sup>175</sup>

<sup>163</sup> Panel Reports, para. 7.153.

<sup>164</sup> Panel Reports, para. 7.24.

<sup>165</sup> Panel Reports, para. 2.14.

<sup>166</sup> Panel Reports, para. 2.15.

<sup>167</sup> European Union's appellee's submission, para. 104.

<sup>168</sup> Brazil's appellant's submission, para. 97.

<sup>169</sup> Panel Reports, para. 7.154. (fn omitted)

<sup>170</sup> Brazil's appellant's submission, para. 100.

<sup>171</sup> Brazil's appellant's submission, para. 101.

<sup>172</sup> Brazil's appellant's submission, para. 101.

<sup>173</sup> European Union's appellee's submission, para. 127 (referring to Brazil's appellant's submission, para. 101).

<sup>174</sup> European Union's appellee's submission, para. 126 (referring to Panel Reports, paras. 7.160 and 7.164).

<sup>175</sup> European Union's appellee's submission, para. 132.

5.32. Japan submits that "the ICT programmes' structure and design impose origin-based discrimination with respect to tax burdens imposed on products covered by the programmes."<sup>176</sup> According to Japan, the Panel came to this conclusion after "thoroughly analysing the actual tax burden under the programmes as well as by fully addressing the arguments put forward".<sup>177</sup>

5.33. The Panel described the functioning of the credit-debit system, in particular, in paragraphs 2.11-2.13 of the Panel Reports. On appeal, Brazil neither takes issue with the understanding set out by the Panel in the above-mentioned paragraphs of the Panel Reports, nor has raised a claim under Article 11 of the DSU. That said, we recall that when comparing the situations concerning the sale of "incentivized domestic intermediate ICT products", on the one hand, and "imported ... intermediate ICT products", on the other hand, the Panel explained that:

First, the tax exemptions (including through zero rates) ... do not involve any payment by the purchaser of the incentivized domestic intermediate ICT product but, at the same time, do not generate any tax credit that the purchaser can later use to offset future tax liabilities (i.e. tax debits). Second, the tax reductions ... involve a smaller tax payment by the purchaser of the incentivized domestic intermediate ICT product but, at the same time, generate a lower tax credit to be used later to offset future tax liabilities. Third, the situation absent the tax exemptions and/or reductions involves the full payment of the tax by the purchaser and, at the same time, the granting to the purchaser of tax credits to be used later to offset tax liabilities.<sup>178</sup>

5.34. Therefore, when tax exemptions or reductions are applied, no credit or lower tax credit is accrued because the tax is not due, or is due at a lower rate, whereas under the credit-debit non-cumulative system that applies to imported (and, therefore, non-incentivized) intermediate ICT products, a tax credit (of the same value as the tax paid) is granted to the purchaser. However, while on the face of it, the tax system may appear to be neutral in terms of tax collection with respect to intermediate ICT products (whether domestic or imported), the Panel, in our view, rightly considered that "a thorough look into the operation of the tax holistically is necessary in order to determine the effective tax burden on the products at issue."<sup>179</sup> This exercise, as the Panel also noted, would require taking into consideration "the granting of tax credits to purchasers of imported (and, therefore, non-incentivized) intermediate ICT products following the payment of the tax".<sup>180</sup>

5.35. Article III:2, first sentence, of the GATT 1994 is concerned with the protection of "the equal competitive relationship between imported and domestic products".<sup>181</sup> The Appellate Body explained that "the words of the first sentence require an examination of the conformity of an internal tax measure with Article III" by determining, first, "whether the taxed imported and domestic products are 'like'" and, second, "whether the taxes applied to the imported products are 'in excess of' those applied to the like domestic products".<sup>182</sup> With respect to the second element, the Appellate Body has found that "[e]ven the smallest amount of 'excess' is too much."<sup>183</sup> A determination of whether an infringement of Article III:2, first sentence, exists must be made on the basis of an overall assessment of the actual tax burdens imposed on imported products, on the one hand, and like domestic products, on the other hand.<sup>184</sup> The Panel was mindful that, under the credit-debit system, "the same tax rate may be applied"<sup>185</sup> but nonetheless considered, and rightly so, that "the fact that the nominal value of the tax collected may be identical is not determinant of the tax measure's consistency under Article III:2."<sup>186</sup> The Panel took into account Brazil's argument that the effect of the tax treatment under the ICT programmes in relation to intermediate products is "neutral"

<sup>176</sup> Japan's appellee's submission, para. 64.

<sup>177</sup> Japan's appellee's submission, para. 64.

<sup>178</sup> Panel Reports, para. 7.163.

<sup>179</sup> Panel Reports, para. 7.164.

<sup>180</sup> Panel Reports, para. 7.164.

<sup>181</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16. (fn omitted) The Appellate Body explained that "the first sentence of Article III:2 is, in effect, an application of [the] general principle" of Article III:1 of the GATT 1994. (Ibid., p. 18) We also recall that the panel in *Argentina – Hides and Leather* considered that "the purpose of Article III:2, first sentence, ... is to ensure 'equality of competitive conditions between imported and like domestic products.'" (Panel Report, *Argentina – Hides and Leather*, para. 11.182 (quoting Appellate Body Report, *Canada – Periodicals*, p. 18))

<sup>182</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 18-19.

<sup>183</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 23.

<sup>184</sup> Panel Report, *Argentina – Hides and Leather*, para. 11.184.

<sup>185</sup> Panel Reports, para. 7.167.

<sup>186</sup> Panel Reports, para. 7.165.



because "both products covered by the relevant ICT programmes and products outside these programmes are subject to the same tax burden."<sup>187</sup> However, the Panel ultimately found that "there is a different effective tax burden on imported ICT products vis-à-vis like domestic ICT products for two reasons: the availability of cash flow for those companies that benefit from the tax exemption or reduction, and the 'time-value' of money."<sup>188</sup>

5.36. In this regard, Brazil contends on appeal that the relevant Brazilian taxes are "not paid up front but are levied monthly on the whole of the previous month's activities" and, therefore, "it is simply not correct to conclude that the payment of taxes necessarily reduces the cash flow availability of purchasers of non-incentivized products, or that credits lose their value over time, to the detriment of imported products."<sup>189</sup> Brazil submits that the Panel "improperly concluded" that the ICT programmes result in a higher tax burden on imported intermediate ICT products because "the payment of tax up front would limit the cash availability of the purchaser and generate a tax credit, the value of which diminishes over time."<sup>190</sup>

5.37. In response, the European Union explains that "the payment of a tax at the moment of the purchase of an intermediate product deprives the purchaser of the sum paid and therefore affects its cash-flow."<sup>191</sup> By the same token, the European Union notes that "money depreciates over time through the effect of inflation."<sup>192</sup> Thus, the European Union submits that, if the purchase of an imported intermediate product involves the payment of a tax at the moment of the purchase and the generation of a tax credit that can be compensated at some later point in time, "it follows necessarily that the imported intermediate product carries a tax burden that is effectively heavier [than] that imposed on the purchase of an incentivised domestic intermediate product, which is tax exempted or subject to a lower tax rate."<sup>193</sup>

5.38. Japan contends that, during the time lag between purchase of inputs and sale of outputs, funds related to the payment of taxes are temporarily unavailable. The ICT programmes, according to Japan, "mitigate the negative financial consequences of this lag, by reducing or eliminating the required IPI, PIS/PASEP, and COFINS taxes otherwise due" when domestic manufacturers of intermediate goods purchase inputs covered by the ICT programmes.<sup>194</sup> Thus, Japan submits that "the Panel properly concluded that 'this has the effect of limiting the availability of cash flow by companies purchasing imported intermediate ICT products and results in a higher effective tax burden on these products.'"<sup>195</sup>

5.39. Under the credit-debit system, purchases of non-incentivized imported intermediate ICT products involve the payment of a tax upfront that is not faced by companies that purchase incentivized like domestic intermediate ICT products, which are exempted from the relevant taxes.<sup>196</sup> Even in the case of tax reductions, companies purchasing incentivized like domestic intermediate ICT products have to pay a lower tax as compared to companies purchasing non-incentivized imported intermediate ICT products. Indeed, as the Panel also noted, "the tax to be paid would be lower than the tax for like imported intermediate ICT products, which are not incentivized."<sup>197</sup> We fail to see how these situations do not have the effect of limiting the availability of cash flow for companies purchasing non-incentivized imported intermediate ICT products.<sup>198</sup> The fact that purchasers of imported intermediate ICT products have to pay the relevant taxes under the

<sup>187</sup> Brazil's appellant's submission, para. 102.

<sup>188</sup> Panel Reports, para. 7.169 (referring to European Union's second written submission to the Panel, paras. 57-59 and 331; response to Panel question No. 43, paras. 188-191; Japan's second written submission to the Panel, para. 143).

<sup>189</sup> Brazil's appellant's submission, para. 107. (fn omitted)

<sup>190</sup> Brazil's appellant's submission, para. 103.

<sup>191</sup> European Union's appellee's submission, para. 134.

<sup>192</sup> European Union's appellee's submission, para. 134.

<sup>193</sup> European Union's appellee's submission, para. 134.

<sup>194</sup> Japan's appellee's submission, para. 62.

<sup>195</sup> Japan's appellee's submission, para. 62 (quoting Panel Reports, para. 7.170).

<sup>196</sup> Panel Reports, para. 7.170.

<sup>197</sup> Panel Reports, para. 7.170.

<sup>198</sup> We observe that, in the context of its assessment of whether the tax treatment under the ICT programmes constitutes financial contributions, the Panel noted that "the Brazilian Government ... will hold the advantage of cash availability or cash flow ... that could be generated on the full amount of that tax that it has collected from the seller", noting further the European Union's contention that "the benchmark rate of the ... Central Bank [of Brazil] ... was, at the time of writing of its first written submission, 13.25%." (Panel Reports, para. 7.433 and fn 790 thereto (additional fns to para. 7.433 omitted))

ICT programmes, irrespective of the point in time, compared to purchasers of incentivized like domestic intermediate ICT products, who do not have to pay the relevant tax or pay a reduced amount, "limit[s] the availability of cash flow"<sup>199</sup>, resulting in a higher effective tax burden on imported intermediate ICT products.

5.40. Brazil also contends that the "tax credits accrued from the purchase of imported inputs do not necessarily have to be compensated with debits related to the same tax, and they can be used before the sale of the final product."<sup>200</sup> Brazil, therefore, submits that no heavier tax burden is imposed on imported intermediate ICT products.<sup>201</sup>

5.41. We observe that the Panel noted that "Brazil has indicated that the time period that it takes a company to offset its tax credits can be very short."<sup>202</sup> The Panel also noted that in cases where the IPI tax debits are lower than the IPI tax credits, and the company buying a product cannot offset the credits with debits after a three-month period, "it can request compensation of the credits with other taxes, or reimbursement from the Brazilian Government."<sup>203</sup> In this regard, we are mindful of the fact that Brazil also indicated to the Panel that the process for compensation with other taxes or reimbursement can take a long time.<sup>204</sup> The Panel, in particular, noted that "[t]he reimbursement process may take from several months to years."<sup>205</sup> The value of the tax credit that is generated upon the payment of the relevant tax on the sale of a non-incentivized imported intermediate ICT product will depreciate over time until it is used or adjusted. To that extent, in as much as there is a time lag between the accrual of the tax credit and the adjustment or use thereof, it necessarily results in the value of money (in the form of accrued tax credits) depreciating over time. Therefore, imported intermediate ICT products, the purchase of which is subject to a payment of tax upfront, bear a higher tax burden than that faced by the incentivized like domestic intermediate ICT products, which benefit from tax exemption or reduction. These considerations support the Panel's finding that, in the case of imported intermediate ICT products, even if credits are generated and can be offset later in time, they are subject to a higher tax burden than like incentivized domestic intermediate ICT products purchased from accredited companies, "due to depreciation in the value of money over time".<sup>206</sup>

5.42. Accordingly, we agree with the Panel that "imported intermediate ICT products are taxed in excess of like domestic incentivized intermediate ICT products contrary to Article III:2, first sentence, of the GATT 1994."<sup>207</sup>

### **5.1.2 Whether the Panel erred in finding that the ICT programmes are inconsistent with Article III:4 of the GATT 1994**

5.43. We now turn to consider Brazil's claim on appeal that the Panel erred in finding that the ICT programmes accord to imported products treatment less favourable than that accorded to like domestic products inconsistently with Article III:4 of the GATT 1994, and, consequently, also erred in its finding under Article 2.1 of the TRIMs Agreement.

5.44. Before the Panel, the European Union and Japan argued that the conditions for accreditation necessary for products to obtain the tax advantages under the ICT programmes and the lower administrative burden on companies purchasing domestic incentivized intermediate ICT products

<sup>199</sup> Panel Reports, para. 7.170.

<sup>200</sup> Brazil's appellant's submission, para. 108.

<sup>201</sup> Brazil's appellant's submission, para. 108.

<sup>202</sup> Panel Reports, para. 7.171.

<sup>203</sup> Panel Reports, para. 7.171 (referring to Brazil's second written submission to the Panel, paras. 11-12 and 17).

<sup>204</sup> Panel Reports, para. 7.171 (referring to Brazil's closing statement at the first meeting of the Panel, para. 15; second written submission to the Panel, paras. 185 and 234; comments on para. 2.28 of the draft descriptive part of the Panel Reports). We observe that Brazil made these statements in the context of describing the phenomenon of tax credit accumulation. (Brazil's second written submission to the Panel, paras. 182-185 and 234)

<sup>205</sup> Panel Reports, para. 2.20. (fn omitted)

<sup>206</sup> Panel Reports, para. 7.171. (fn omitted)

<sup>207</sup> Panel Reports, para. 7.172.

accord less favourable treatment to imported ICT products than that accorded to like domestic ICT products inconsistently with Article III:4.<sup>208</sup>

5.45. The Panel first considered the claim with respect to the conditions of accreditation, i.e. "the conditions that companies must fulfil in respect of particular incentivized products to become accredited producers of, and thus [become] eligible for the tax incentives on, those products."<sup>209</sup> The Panel noted that "the purpose of complying with the requirements for accreditation" is to obtain a tax exemption, reduction, or suspension on the sales or purchases of products.<sup>210</sup> The Panel recalled that "only products produced in Brazil can satisfy the conditions ... for accreditation ... and only products developed in Brazil can satisfy the requirement of being 'developed in Brazil'."<sup>211</sup> Imported like products, the Panel recalled, "cannot satisfy those requirements, and thus can never qualify for the tax exemptions, reductions or suspensions granted under the relevant ICT programmes".<sup>212</sup> The Panel further recalled that, as a consequence of these accreditation requirements, "imported *finished* and *intermediate* products bear a higher tax burden than like domestic *finished* and *intermediate* products."<sup>213</sup> The Panel considered that "the conditions for accreditation, which when fulfilled create a lower internal tax burden on domestic products than on like imported products, modify the conditions of competition to the detriment of the imported products."<sup>214</sup> The Panel, therefore, concluded that "the accreditation requirements of the ICT programmes, by restricting access to the tax incentives only to domestic products, result in less favourable treatment being accorded to imported products than to like domestic products."<sup>215</sup>

5.46. With respect to the claim concerning the lower administrative burden placed on companies purchasing domestic incentivized intermediate ICT products, the Panel noted that a purchaser of an incentivized intermediate product subject to a tax exemption or reduction will not need to anticipate any tax, or will only need to anticipate a reduced amount of tax.<sup>216</sup> However, the Panel considered that the purchaser of a non-incentivized intermediate ICT product will need to anticipate the full amount of those taxes when purchasing the products, and will have to undergo the administrative procedure to claim a tax credit in relation to those taxes, to request compensation with the same or other taxes, or to ask for reimbursement.<sup>217</sup> The Panel reasoned that, when faced with a decision to choose from either "a product whose purchase will entail no payment of taxes" or "a product whose purchase will entail the payment of the tax and the administrative burden that comes with the procedure of offsetting the tax with other debits (or requesting compensation or reimbursement)", a purchaser, under normal circumstances, "will prefer to avoid the administrative burden that comes with the payment of the tax".<sup>218</sup> Recalling that an imported intermediate ICT product will never be eligible for the tax reductions or exemptions, the Panel, therefore, found that "the incentive to avoid the administrative burden, by purchasing incentivized *intermediate* products, modifies the conditions of competition between domestic and like imported products, to the detriment of the imported products."<sup>219</sup>

<sup>208</sup> Panel Reports, para. 7.181. The European Union and Japan also raised a claim regarding the aspect of the mechanism for the calculation of the amount of resources required to be invested in R&D under the Informatics and PADIS programmes, where the amounts paid when purchasing incentivized products are deducted from the calculation. (Ibid.) The Panel found that "the mechanisms under the Informatics and PADIS programmes for the calculation of the amount of resources required to be invested in R&D accord to imported products treatment less favourable than that accorded to like domestic products, and thus are inconsistent with Article III:4 of the GATT 1994." (Panel Reports, para. 7.243) On appeal, Brazil does not challenge this finding by the Panel. (Brazil's response to questioning at the oral hearing)

<sup>209</sup> Panel Reports, para. 7.214.

<sup>210</sup> Panel Reports, para. 7.197.

<sup>211</sup> Panel Reports, para. 7.223 (referring to Panel Reports, paras. 7.135-7.140).

<sup>212</sup> Panel Reports, para. 7.223 (referring to Panel Reports, paras. 7.135-7.140).

<sup>213</sup> Panel Reports, para. 7.224 (referring to Panel Reports, paras. 7.154 and 7.172). (emphasis original)

<sup>214</sup> Panel Reports, para. 7.225. (fn omitted)

<sup>215</sup> Panel Reports, para. 7.225.

<sup>216</sup> Panel Reports, para. 7.252.

<sup>217</sup> Panel Reports, para. 7.252.

<sup>218</sup> Panel Reports, para. 7.253.

<sup>219</sup> Panel Reports, para. 7.254. (emphasis original)

### 5.1.2.1 Whether the Panel erred in finding that the accreditation requirements under the ICT programmes accord treatment less favourable to imported products than that accorded to like domestic products inconsistently with Article III:4 of the GATT 1994

5.47. On appeal, Brazil asserts that the Panel's analysis with respect to the accreditation requirements under the ICT programmes "conflates tax discrimination, which is under the purview of Article III:2 ... with regulatory discrimination, to which Article III:4 applies".<sup>220</sup> Brazil contends that "the Panel ... seems to have found that [the] accreditation requirements under the ICT programmes are inconsistent with Article III:4 because they allegedly restrict access to the tax incentives only to domestic products."<sup>221</sup> Brazil submits that in order to find a violation of Article III:4 of the GATT 1994, the Panel was required to identify a regulatory discrimination other than the differences in tax treatment that may result in a violation of Article III:2 of the GATT 1994. Therefore, Brazil contends that "[t]o the extent that the Panel's findings that the ICT programmes violate Article III:4 were based on this flawed reasoning, they should be reversed."<sup>222</sup>

5.48. In response, the European Union submits that "[t]he conditions for accreditation amount to a regulatory discrimination since only domestic products are incentivised; that the incentive consists in lower taxation when compared to imported like products is the consequence of the fact that the incentives are only granted to domestic products in detriment of imported like products."<sup>223</sup> The European Union further submits that the Panel, having recalled the relevant Appellate Body jurisprudence, found that the same measure, or certain aspects of the same measures, can fall both within Articles III:2 and III:4 of the GATT 1994, and that Brazil has not appealed this finding.<sup>224</sup>

5.49. Japan disagrees with Brazil's claim that the Panel conflated Articles III:2 and III:4 of the GATT 1994.<sup>225</sup> Japan submits that the Panel determined that, as a result of the accreditation requirements, imported finished and intermediate ICT products bear a higher tax burden than domestic finished and intermediate ICT products.<sup>226</sup> Japan submits that, "[f]rom this factual premise, the Panel correctly concluded that the accreditation requirements modify the conditions of competition to the detriment of imported products."<sup>227</sup>

5.50. Article III:4 of the GATT 1994 prohibits Members from according treatment less favourable to products of foreign origin than that accorded to like domestic products. It specifies that this obligation is applicable with respect to all laws, regulations, and requirements "affecting their internal sale, offering for sale, purchase, transportation, distribution or use". The Appellate Body found that "the mere fact that a Member draws regulatory distinctions between imported and like domestic products is, in itself, not determinative of whether imported products are treated less favourably within the meaning of Article III:4."<sup>228</sup> Rather, the Appellate Body explained that "what is relevant is whether such regulatory differences distort the conditions of competition to the detriment of imported products."<sup>229</sup> Thus, according to the Appellate Body, whether a measure involves treatment less favourable "must be founded on a careful analysis of the contested measure and of its implications in the marketplace".<sup>230</sup>

5.51. We note that the aspect of the ICT programmes challenged by the complaining parties as being inconsistent with Article III:4 concerned the accreditation requirements, the fulfilment of which enabled the obtaining of the relevant tax exemption, reduction, or suspension on the sales or purchases of ICT products. Indeed, as the Panel also recognized, "[i]n respect of Article III:4, the complaining parties challenge the laws, regulations and requirements, namely the accreditation requirements for gaining access to the tax incentives."<sup>231</sup> The Panel further considered that

<sup>220</sup> Brazil's appellant's submission, para. 138.

<sup>221</sup> Brazil's appellant's submission, para. 139.

<sup>222</sup> Brazil's appellant's submission, para. 140.

<sup>223</sup> European Union's appellee's submission, para. 176.

<sup>224</sup> European Union's appellee's submission, para. 174.

<sup>225</sup> Japan's appellee's submission, para. 69.

<sup>226</sup> Japan's appellee's submission, para. 68 (referring to Panel Reports, paras. 7.154-7.172).

<sup>227</sup> Japan's appellee's submission, para. 68 (referring to Panel Reports, para. 7.225).

<sup>228</sup> Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 128. (fn omitted)

<sup>229</sup> Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 128.

<sup>230</sup> Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215. The Appellate Body, however, cautioned that "the examination need not be based on the *actual effects* of the contested measure in the marketplace." (Ibid. (emphasis original; fn omitted))

<sup>231</sup> Panel Reports, para. 7.220.

"the aspects challenged by the complaining parties under Article III:4 are different from, albeit related to, the differential tax treatment of like domestic and imported products that they challenge under Article III:2."<sup>232</sup> We recall that the Panel also noted that "a single measure can be inconsistent with two or more provisions of Article III at the same time" since "multiple features of a single measure may operate simultaneously" and therefore, in such a situation, "different aspects of the same measure could be considered to be covered by the disciplines of either or both Article III:2 and III:4."<sup>233</sup>

5.52. As noted, Brazil contends that the Panel's analysis with respect to the accreditation requirements conflates tax discrimination under Article III:2 with regulatory discrimination under Article III:4.<sup>234</sup> However, the Panel was mindful of the fact that the ICT programmes included both fiscal and regulatory aspects that were applicable to the products at issue.<sup>235</sup> While the accreditation requirements relate to regulatory aspects<sup>236</sup>, the tax exemptions or reductions under the ICT programmes relate to fiscal aspects. This is evident from the Panel's conclusion that the conditions for accreditation "modify the conditions of competition to the detriment of the imported products" by creating "a lower internal tax burden on domestic products than on like imported products".<sup>237</sup> It is undisputed that, in order to be eligible for the tax exemption, reduction, or suspension under the ICT programmes, companies must fulfil the accreditation requirements. The accreditation requirements under the ICT programmes therefore result in less favourable treatment for imported ICT products in the form of the differential tax burden that imported ICT products are subjected to by virtue of the fact that "foreign producers cannot be accredited under the ICT programmes."<sup>238</sup> The consequence being, as the Panel also noted, imported ICT products "can never qualify for the tax exemptions, reductions or suspensions".<sup>239</sup>

5.53. We note that the aspects of the ICT programmes found to be inconsistent with Article III:2, first sentence, and Article III:4 are distinct. In the case of Article III:2, first sentence, the aspect of the ICT programme found to be inconsistent is the differential tax treatment that results in a higher tax burden on imported ICT products, i.e. imported ICT products are taxed in excess of like domestic ICT products. Whereas, for the purposes of Article III:4, the aspect of the ICT programmes found to be inconsistent is the accreditation requirements that result in less favourable treatment in the form of the differential burden that imported ICT products are subjected to. We do not see why that cannot be the case since different aspects of the same measure may be found to be inconsistent with one or more paragraphs of Article III of the GATT 1994. As the Appellate Body explained in *Thailand – Cigarettes (Philippines)*, "[a]lthough Thailand may be correct in stating that prior WTO reports have examined measures consisting of 'administrative requirements relating to the sale of imported products' under Article III:4", it does not exclude the possibility that "if such requirements subject imported and like domestic products to internal taxes or other internal charges, the same

<sup>232</sup> Panel Reports, para. 7.220. We observe that the Panel also noted that:

The complaining parties allege that certain tax aspects of the programmes, insofar as they apply to incentivized *finished* and *intermediate* products, are discriminatory and inconsistent with Article III:2. The complaining parties also allege that the specific conditions and criteria to be satisfied by incentivized *finished* and *intermediate* products in order to receive the tax advantages[] are inconsistent with Article III:4 of the GATT 1994, by consisting of conditions for obtaining the advantage in respect of the incentivized products.

(*Ibid.*, para. 7.35 (emphasis original))

<sup>233</sup> Panel Reports, para. 7.34. (fn omitted)

<sup>234</sup> Brazil's appellant's submission, para. 138.

<sup>235</sup> Panel Reports, para. 7.35.

<sup>236</sup> The Panel, as we recall, found that "the purpose of complying with the requirements for accreditation is to obtain a tax exemption, reduction or suspension on the sales or purchases of products, so it is clear that the requirements at issue affect the sale, offering for sale or purchase of products." (Panel Reports, para. 7.197)

<sup>237</sup> Panel Reports, para. 7.225. (fn omitted)

<sup>238</sup> Brazil's appellant's submission, para. 97.

<sup>239</sup> Panel Reports, para. 7.223.

measures, or certain aspects of the same measures, could not also be scrutinized under Article III:2."<sup>240</sup>

5.54. In light of the foregoing considerations, we agree with the Panel that the accreditation requirements of the ICT programmes, by restricting access to the tax incentives only to domestic products, modify the conditions of competition to the detriment of imported products, and result in less favourable treatment being accorded to imported ICT products than to like domestic ICT products inconsistently with Article III:4 of the GATT 1994.<sup>241</sup>

**5.1.2.2 Whether the Panel erred in finding that the ICT programmes are inconsistent with Article III:4 of the GATT 1994 by virtue of the lower administrative burden on companies purchasing incentivized domestic intermediate products**

5.55. We now turn to Brazil's claim on appeal that the Panel erred in finding that imported intermediate ICT products are subject to more onerous administrative requirements than like domestic intermediate ICT products.<sup>242</sup>

5.56. On appeal, Brazil asserts that the Panel's reasoning concerning the alleged lower administrative burden on companies purchasing domestic incentivized intermediate products "has no grounds, either in law or in the facts of the present dispute".<sup>243</sup> Brazil submits that "[t]he Panel misconstrued the functioning of the Brazilian tax system and found an administrative burden in the operation of the debit and credit tax system where there is none."<sup>244</sup> Brazil explains that a "careful review" of the functioning of the credit-debit system applicable to "IPI, PIS, PASEP and COFINS taxes under the Brazilian Tax Code shows unequivocally that incentivised domestic intermediate products are not subject to a lower administrative burden when compared to like imported intermediate products".<sup>245</sup>

5.57. In response, the European Union submits that the Panel's reasoning is firmly grounded on the functioning of the credit-debit system as described in the Panel Reports.<sup>246</sup> The European Union adds that, while Brazil makes the claim that the Panel's findings have no factual or legal ground, "it is unable to argue that the Panel violated Article 11 of the DSU by failing to make an objective assessment of the facts of the case when it described the functioning of the Brazilian tax system and the credit-debit mechanism."<sup>247</sup> The European Union recalls that the parties to the dispute agreed on the basic functioning of Brazil's tax system before the Panel<sup>248</sup> and "it was Brazil itself who explained that offsetting tax credits in certain situations can be burdensome, and can take years."<sup>249</sup>

5.58. Japan submits that "Brazil cannot seek a de novo review of the facts at this stage of the proceeding."<sup>250</sup> Japan contends that Brazil's argument also fails to account for the "undisputed fact" that purchasers of non-incentivized imported intermediate ICT products will have to "claim compensation from the Brazilian Government, which could take years, whereas the purchasers of incentivized domestic intermediate products do not".<sup>251</sup>

<sup>240</sup> Appellate Body Report, *Thailand – Cigarettes (Philippines)*, fn 144 to para. 114 (quoting Thailand's appellant's submission, para. 69). (additional text thereto omitted) We also observe that a similar proposition was considered by the panel in *Mexico – Taxes on Soft Drinks* where the panel found that the measure at issue in that dispute (i.e. the Law on the Special Tax on Production and Services (LIEPS) that provided for the soft drink tax, the distribution tax, and the bookkeeping requirements) was inconsistent with both Articles III:2 and III:4 of the GATT 1994. (Panel Report, *Mexico – Taxes on Soft Drinks*, paras. 8.59, 8.96, and 8.123) Particularly, with respect to the claim under Article III:4, the panel found that "through the soft drink tax, the distribution tax and the bookkeeping requirements, Mexico accords less favourable treatment to imported non-cane sugar sweeteners ... than that accorded to like products of national origin ... inconsistent[ly] with Article III:4." (Panel Report, *Mexico – Taxes on Soft Drinks*, para. 8.123)

<sup>241</sup> Panel Reports, para. 7.225.

<sup>242</sup> Brazil's appellant's submission, para. 121.

<sup>243</sup> Brazil's appellant's submission, para. 152.

<sup>244</sup> Brazil's appellant's submission, para. 152.

<sup>245</sup> Brazil's appellant's submission, para. 153.

<sup>246</sup> European Union's appellee's submission, para. 204.

<sup>247</sup> European Union's appellee's submission, para. 205.

<sup>248</sup> European Union's appellee's submission, para. 206 (referring to Panel Reports, para. 2.1).

<sup>249</sup> European Union's appellee's submission, para. 206.

<sup>250</sup> Japan's appellee's submission, para. 73.

<sup>251</sup> Japan's appellee's submission, para. 73. (fn omitted)

5.59. We have considered above that the Panel took into account the functioning of the credit-debit system. We are mindful of Brazil's contention that this "system ... operates as a ledger in which both purchases of inputs and intermediate goods and sales of final goods are recorded, and debits and credits are offset"<sup>252</sup> and that there is "no[] change in the event of suspensions, reductions or exemptions of indirect taxes".<sup>253</sup> Brazil's contention would not, however, change the fact that purchasers of imported intermediate ICT products that are not incentivized under the ICT programmes will have to anticipate and pay the full amount of tax due on such imported intermediate ICT products. Although any such tax paid on the purchase of imported intermediate ICT products will generate a corresponding tax credit in favour of the purchaser, nonetheless, offsetting this tax credit entails an *administrative burden* that is not faced and/or faced to a lesser extent by a purchaser of domestic intermediate ICT products that are incentivized.<sup>254</sup> This is the case because, under the credit-debit system, "if the tax credit cannot be offset by debits after three taxation periods", the process of compensating the tax credit with other federal taxes, or reimbursement thereof can "be burdensome for companies, and can take years".<sup>255</sup> We therefore reject Brazil's argument that the Panel erroneously "found an administrative burden in the operation of the debit and credit tax system" in the context of its analysis under Article III:4.<sup>256</sup>

5.60. The ICT programmes are designed in a manner that creates incentives for the market participants, that is, purchasers of intermediate ICT products, to behave in a manner that has the "direct practical effect"<sup>257</sup> of treating imported intermediate ICT products less favourably than like domestic intermediate ICT products. In this case, by creating an incentive to purchase incentivized domestic intermediate ICT products in order to be relieved from and/or to face reduced administrative burdens. Accordingly, we agree with the Panel that, "when faced with a decision to choose", a purchaser, "under normal circumstances, will prefer to avoid the administrative burden that comes with the payment of the tax"<sup>258</sup> and thus prefer to purchase incentivized domestic intermediate ICT products.<sup>259</sup>

5.61. In light of the foregoing considerations, we agree with the Panel that "the ICT programmes are inconsistent with Article III:4 of the GATT 1994, because they accord to imported *intermediate* products treatment less favourable than that accorded to like domestic *intermediate* products, due to the lower administrative burden imposed on firms purchasing incentivised *intermediate* products."<sup>260</sup>

### **5.1.3 Whether the Panel erred in finding that the ICT programmes are inconsistent with Article 2.1 of the TRIMs Agreement**

5.62. Before the Panel, the European Union and Japan argued that the ICT programmes are inconsistent with Article 2.1 of the TRIMs Agreement, both independently and in conjunction with Article 2.2 and paragraph 1(a) of that Agreement's Illustrative List, because they are inconsistent with Article III of the GATT 1994.<sup>261</sup> Brazil agreed that the ICT programmes are investment measures, submitting, however, that they do not relate to trade in goods.<sup>262</sup>

5.63. The Panel found that "the ICT programmes affect, and ... are aimed at promoting, investment" and "also have an impact on trade, by affecting the sale and purchase of imported products, including

<sup>252</sup> Brazil's appellant's submission, para. 155.

<sup>253</sup> Brazil's appellant's submission, para. 155.

<sup>254</sup> In this regard, we note that purchasers of incentivized intermediate domestic ICT products, in most cases, will not need to anticipate the tax due on the purchase of such intermediate ICT products since the Informatics, PADIS, PATVD, and Digital Inclusion programmes provide for tax exemptions, through zero rates, to accredited companies selling domestic intermediate ICT products. It is only in the context of the IPI tax reduction provided under the Informatics programme that purchasers of domestic intermediate ICT products may have to anticipate and pay the reduced amount of IPI tax due.

<sup>255</sup> Panel Reports, para. 7.251 (referring to Brazil's first written submission to the Panel, para. 702 (DS497)).

<sup>256</sup> Brazil's appellant's submission, para. 152.

<sup>257</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 145.

<sup>258</sup> Panel Reports, para. 7.253.

<sup>259</sup> Panel Reports, para. 7.254.

<sup>260</sup> Panel Reports, para. 7.255. (emphasis original)

<sup>261</sup> Panel Reports, para. 7.348 (referring to European Union's first written submission to the Panel, paras. 690, 841, 998, and 1118; Japan's first written submission to the Panel, paras. 371, 437, 479-496, and 533-548).

<sup>262</sup> Panel Reports, para. 7.351.



the inputs used in the production of incentivized *finished* and *intermediate* products".<sup>263</sup> The Panel concluded that the ICT programmes are trade-related investment measures within the meaning of the TRIMs Agreement.<sup>264</sup> Having so found, the Panel recalled its findings that certain aspects of the ICT programmes are inconsistent with Articles III:2 and III:4 of the GATT 1994.<sup>265</sup> Therefore, the Panel found that "those aspects of the ICT programmes found to be inconsistent with Article III:2 and III:4 ... are also inconsistent with Article 2.1 of the TRIMs Agreement."<sup>266</sup>

5.64. On appeal, Brazil does not make any specific arguments in connection with the Panel's finding under Article 2.1 of the TRIMs Agreement. Rather, Brazil's request for reversal of the Panel's finding under that provision is premised on us reversing the Panel's findings under Article III:4 of the GATT 1994.<sup>267</sup> We have, however, for the reasons stated above, agreed with the Panel's findings that certain aspects of the ICT programmes are inconsistent with Article III:4 of the GATT 1994. Consequently, we agree with the Panel's finding that those aspects of the ICT programmes found to be inconsistent with Article III:4 are also inconsistent with Article 2.1 of the TRIMs Agreement.<sup>268</sup>

#### **5.1.4 Whether the Panel erred in finding that the accreditation requirements under the INOVAR-AUTO programme are inconsistent with Article III:4 of the GATT 1994 because they are more burdensome for companies seeking accreditation as importers/distributors as opposed to domestic manufacturers**

5.65. We now turn to Brazil's claim on appeal with respect to Article III:4 of the GATT 1994 concerning the INOVAR-AUTO programme. Brazil contends that the Panel erred in finding that "the accreditation requirements under the INOVAR-AUTO programme were ... discriminatory because they would be ... more burdensome" for companies seeking accreditation as importers/distributors than for domestic manufacturers.<sup>269</sup> We note that, unlike in the context of the ICT programmes where foreign manufacturers cannot be accredited<sup>270</sup>, under the INOVAR-AUTO programme foreign manufacturers can be accredited as importers/distributors and thus be entitled to the relevant tax benefits.<sup>271</sup> Therefore, the claim of error under Article III:4 with respect to the INOVAR-AUTO programme is primarily directed towards, as Brazil contends, the Panel's alleged erroneous conclusion that "foreign companies seeking accreditation under the INOVAR-AUTO programme must go through a more burdensome accreditation process than domestic manufacturers."<sup>272</sup>

5.66. We recall that with respect to the accreditation requirements under the INOVAR-AUTO programme, the Panel noted that "the purpose of complying with the requirements for accreditation is to obtain presumed IPI tax credits on the sale of products."<sup>273</sup> The Panel noted that there are three types of accreditation that entitle companies to accrue and use presumed IPI tax credits: (i) accreditation for domestic manufacturers; (ii) accreditation for importers/distributors; and (iii) accreditation for investors.<sup>274</sup> The Panel recalled that foreign manufacturers, as such, cannot obtain accreditation under the INOVAR-AUTO programme, because they are not located or do not operate in Brazil.<sup>275</sup> The Panel observed that such foreign manufacturers would have to become accredited as importers/distributors in order for their products to be eligible for the tax benefits.<sup>276</sup> The Panel recalled its earlier conclusion that "this results in a higher tax burden on imported vehicles manufactured by foreign manufacturers" because "foreign manufacturers are required to be legally

<sup>263</sup> Panel Reports, para. 7.360. (emphasis original)

<sup>264</sup> Panel Reports, para. 7.361.

<sup>265</sup> Panel Reports, para. 7.363 (referring to Panel Reports, paras. 7.174 and 7.318-7.319).

<sup>266</sup> Panel Reports, para. 7.363.

<sup>267</sup> Having sought reversal of the Panel's findings under Article III:4 of the GATT 1994, specifically with respect to paragraphs 7.318-7.319, 8.5.b, and 8.16.c of the Panel Reports, Brazil submits that "[a]s a result, Brazil also requests that the Appellate Body reverse the Panel's finding in paragraphs 7.365, 8.5(d) and 8.16(e) of the Panel Report[s] that in respect of those elements the ICT programmes are inconsistent with Article 2.1 of the TRIMs Agreement." (Brazil's appellant's submission, para. 172 (emphasis original))

<sup>268</sup> Panel Reports, para. 7.363.

<sup>269</sup> Brazil's appellant's submission, para. 278.

<sup>270</sup> Brazil's appellant's submission, para. 97.

<sup>271</sup> Panel Reports, para. 7.731 (referring to Panel Reports, paras. 7.656-7.661).

<sup>272</sup> Brazil's appellant's submission, para. 286 (quoting Panel Reports, para. 7.658).

<sup>273</sup> Panel Reports, para. 7.706.

<sup>274</sup> Panel Reports, para. 7.656. The Panel noted that "[a]ll accredited companies must comply with two general requirements and with a series of specific requirements that differ depending on the type of accreditation." (Ibid. (fn omitted))

<sup>275</sup> Panel Reports, para. 7.731.

<sup>276</sup> Panel Reports, para. 7.731 (referring to Panel Reports, paras. 7.656-7.661).

established in Brazil" in order to be accredited as importers/distributors, and "foreign manufacturers seeking accreditation as importers/distributors are required to comply with more accreditation requirements than domestic manufacturers in order to obtain the tax benefits."<sup>277</sup> Consequently, the Panel considered that "[f]oreign manufacturers ... bear a higher burden than domestic manufacturers in becoming accredited."<sup>278</sup>

5.67. For these reasons, the Panel found that, "under the INOVAR-AUTO programme, the conditions for accreditation in order to receive presumed tax credits ... accord less favourable treatment to imported products than that accorded to like domestic products, inconsistently with Article III:4 of the GATT 1994."<sup>279</sup>

5.68. On appeal, Brazil takes issue with the Panel's finding that the accreditation requirements under the INOVAR-AUTO programme are discriminatory because "they would be allegedly more burdensome to 'importers/distributors' than to 'domestic manufacturers'" and therefore result in less favourable treatment being accorded to imported finished motor vehicles.<sup>280</sup> Brazil submits that, in reaching its conclusions on the discriminatory impact of the types of accreditation provided under the INOVAR-AUTO programme, "the Panel limited itself to conducting a *quantitative* analysis of the requirements provided under INOVAR-AUTO [programme] (number of requirements)."<sup>281</sup> According to Brazil, the "mere difference in the number of requirements" to be fulfilled by domestic manufacturers and importers/distributors was "enough" for the Panel to find that the accreditation requirements were inconsistent with Article III:4.<sup>282</sup> Brazil contends that, in order to find a "potential discriminatory impact", the Panel was required to have conducted a "*qualitative* analysis of the requirements taking into account the actual and relative weight of such requirements in terms of the overall burden imposed to companies – foreign and domestic alike – that request accreditation to the programme".<sup>283</sup>

5.69. In response, the European Union recalls that, in order to be eligible for the presumed IPI tax credits, "companies must obtain accreditation, and in order to obtain accreditation companies must comply with certain requirements."<sup>284</sup> The European Union notes that the Panel distinguished two different consequences flowing from this design of the INOVAR-AUTO programme. First, according to the European Union, the Panel "rightly noted that the requirement with respect to domestic manufacturing activities is automatically complied with by domestic manufacture[r]s, whereas foreign manufacturers should comply with three (instead of two) different requirements".<sup>285</sup> Second, in the European Union's view, "the Panel considered that foreign companies seeking to establish themselves in Brazil face a supplementary burden in comparison to domestic producers already established in Brazil" in as much as "compliance with the accreditation criteria necessarily entails establishing in Brazil, with a corresponding administrative and economic burden."<sup>286</sup> Thus, the European Union submits that "no more was required" for the Panel to determine that the accreditation requirements modify the conditions of competition to the detriment of imported motor vehicles and in favour of like domestic motor vehicles.<sup>287</sup>

5.70. Japan notes that Brazil asserts that "the Panel should have conducted a '*qualitative* analysis of the requirements taking into account the actual and relative weight of such requirements in terms of the overall burden imposed to companies – foreign and domestic alike – that request accreditation to the programme.'"<sup>288</sup> Japan submits that Brazil, however, does not provide any legal authority for this proposition, and, "beyond generalized assertions, fails to explain why the Panel's thorough analysis of the burden imposed on foreign products was inadequate".<sup>289</sup> According to Japan, the

<sup>277</sup> Panel Reports, para. 7.731 (referring to Panel Reports, paras. 7.656-7.661).

<sup>278</sup> Panel Reports, para. 7.731 (referring to Panel Reports, paras. 7.656-7.661).

<sup>279</sup> Panel Reports, para. 7.772.

<sup>280</sup> Brazil's appellant's submission, para. 278 (referring to Panel Reports, para. 7.732).

<sup>281</sup> Brazil's appellant's submission, para. 287. (emphasis original)

<sup>282</sup> Brazil's appellant's submission, para. 287.

<sup>283</sup> Brazil's appellant's submission, para. 288. (emphasis original)

<sup>284</sup> European Union's appellee's submission, para. 359 (referring to Panel Reports, paras. 2.113-2.122).

<sup>285</sup> European Union's appellee's submission, para. 362.

<sup>286</sup> European Union's appellee's submission, para. 363 (quoting Panel Reports, para. 7.660 (fns omitted)).

<sup>287</sup> European Union's appellee's submission, para. 364.

<sup>288</sup> Japan's appellee's submission, para. 114 (quoting Brazil's appellant's submission, para. 288 (emphasis original)).

<sup>289</sup> Japan's appellee's submission, para. 114.

Panel properly reached the conclusion that the INOVAR-AUTO programme, through the accreditation requirements, favours domestic over imported products and it performed an analysis that included all relevant elements.<sup>290</sup>

5.71. We begin by recalling that, under the INOVAR-AUTO programme, "all companies using presumed IPI tax credits, and certain companies using reduced IPI tax rates, must obtain one of three forms of accreditation"<sup>291</sup>: (i) domestic manufacturers; (ii) importers/distributors; or (iii) investors.<sup>292</sup> The "purpose" of complying with the requirements for accreditation is "to obtain presumed IPI tax credits on the sale of products".<sup>293</sup> Thus, in order to enjoy a reduction on IPI tax liability on a product, in this case motor vehicles, companies "must comply with a set of requirements"<sup>294</sup>, for example, the performance of a minimum number of defined manufacturing and engineering infrastructure activities in Brazil, or investments in R&D in Brazil.

5.72. It is undisputed that, in order for companies to obtain any sort of accreditation that entitles them to accrue and use presumed IPI tax credits, they must either be located and operate in Brazil, in the case of domestic manufacturers and importers/distributors, or be in the process of establishing in the country as domestic manufacturers, in the case of investors.<sup>295</sup> This in turn implies, as the Panel also acknowledged, that "foreign companies exclusively located outside Brazil that manufacture products imported into Brazil cannot, *per se*, get accredited and, consequently, cannot accrue and use presumed IPI tax credits."<sup>296</sup> The only viable way for foreign manufacturers to be able to enjoy the benefit of the presumed IPI tax credits in reducing their IPI tax liability under the INOVAR-AUTO programme is to become accredited as importers/distributors.<sup>297</sup> However, in order to do so, foreign manufacturers must, first and foremost, be located and operate in Brazil.<sup>298</sup> This indicates that foreign manufacturers seeking accreditation as importers/distributors face a corresponding burden that necessarily comes with having to operate, or establish themselves, in Brazil, unlike domestic manufacturers, who already operate or are established in Brazil. We, therefore, agree with the Panel that "unlike for domestic manufacturers, for foreign manufacturers compliance with the accreditation criteria necessarily entails establishing in Brazil, with a corresponding administrative and economic burden."<sup>299</sup>

5.73. Moreover, we note that, in order to become accredited as importers/distributors, a company must comply with the following three specific requirements: (i) investments in R&D in Brazil; (ii) expenditure on engineering, basic industrial technology, and capacity-building of suppliers in Brazil; and (iii) participation in the vehicle-labelling programme by INMETRO.<sup>300</sup> A fourth requirement also exists, which calls for the performance in Brazil of certain manufacturing steps.<sup>301</sup> These activities cannot be considered to be typical for foreign manufacturers seeking to import motor vehicles into Brazil. The fact that foreign manufacturers have to undertake these activities to get accredited as importers/distributors implies that foreign manufacturers face a burden that domestic manufacturers do not face. We also see merit in the Panel's reasoning that foreign manufacturers that are accredited as importers/distributors do not carry out manufacturing activities in Brazil, and there is no reason "why they would purchase strategic inputs and tools in Brazil for the manufacture of motor vehicles"<sup>302</sup> or, for that matter, invest in R&D or make expenditures on engineering, basic industrial technology, and capacity-building of suppliers in Brazil.

5.74. On the other hand, we observe that, in order to be accredited, domestic manufacturers need to comply with three out of four specific requirements. One of these must be the performance of a minimum number of defined manufacturing and engineering infrastructure activities in Brazil.<sup>303</sup>

<sup>290</sup> Japan's appellee's submission, para. 114.

<sup>291</sup> Panel Reports, para. 2.112.

<sup>292</sup> Panel Reports, para. 2.113.

<sup>293</sup> Panel Reports, para. 7.706.

<sup>294</sup> Brazil's appellant's submission, para. 266.

<sup>295</sup> Panel Reports, para. 7.657 (referring to Brazil's responses to Panel questions Nos. 28 and 57).

<sup>296</sup> Panel Reports, para. 7.657.

<sup>297</sup> The Panel noted that Brazil acknowledged that accreditation as investors is "a temporary accreditation which eventually becomes an accreditation as a manufacturer in Brazil". (Panel Reports, fn 1053 to para. 7.657 (referring to Brazil's response to Panel question No. 28))

<sup>298</sup> Panel Reports, para. 7.660 (referring to Brazil's response to Panel question No. 57).

<sup>299</sup> Panel Reports, para. 7.660.

<sup>300</sup> Panel Reports, para. 7.658.

<sup>301</sup> Panel Reports, fn 1056 to para. 7.658.

<sup>302</sup> Panel Reports, para. 7.733 (referring to Panel Reports, paras. 7.662-7.672).

<sup>303</sup> Panel Reports, para. 7.658.

The other two requirements must be among the following three: (i) investments in R&D in Brazil; (ii) expenditure on engineering, basic industrial technology, and capacity-building of suppliers in Brazil; or (iii) participation in the vehicle-labelling programme by INMETRO.<sup>304</sup> Almost all of these requirements can be considered to be typical of the nature of activity carried out by a domestic manufacturer. Indeed, any domestic manufacturer will carry out and perform a minimum number of manufacturing activities in Brazil, and in that process is also likely to make investments in R&D in Brazil and make expenditures in the categories indicated in the INOVAR-AUTO programme.<sup>305</sup> To that extent, we agree with the Panel that the performance of a minimum number of manufacturing activities in Brazil "is inherent to any domestic manufacturer".<sup>306</sup> This in turn, as the Panel rightly noted, results in domestic manufacturers being subject *de facto* to only two other specific requirements.<sup>307</sup>

5.75. Therefore, the INOVAR-AUTO programme is designed in such a manner that the accreditation requirements thereunder adversely modify the "equality of competitive conditions for imported products"<sup>308</sup> compared to like domestic products. This is so because, first, foreign manufacturers seeking accreditation as importers/distributors in order to enjoy a reduction on IPI tax liability have to operate or establish themselves in Brazil with the corresponding burden unlike domestic manufacturers, who already operate and are established in Brazil. Second, foreign manufacturers seeking accreditation as importers/distributors are required to comply with more accreditation requirements and undertake certain activities prescribed under the INOVAR-AUTO programme, which are, in any event, as we have considered above, not typical for foreign manufacturers seeking to import motor vehicles into Brazil. Brazil contends that "the Panel limited itself to conducting a *quantitative* analysis"<sup>309</sup> and instead should have "conducted a qualitative analysis of the [accreditation] requirements".<sup>310</sup> Brazil does not, however, elaborate on the type or kind of qualitative analysis that the Panel should have undertaken. In any event, the Panel, in our view, conducted a qualitative analysis in as much as it recognized that "even if it were to consider that the number of requirements imposed on domestic manufacturers and importers/distributors is the same", foreign manufacturers bear a higher burden since "compliance with the accreditation criteria necessarily entails establishing in Brazil, with a corresponding administrative and economic burden", which is not faced by domestic manufacturers who are already established in Brazil.<sup>311</sup> These considerations are sufficient to support the conclusion that "[f]oreign manufacturers ... bear a higher burden than domestic manufacturers in becoming accredited" in order for "their products to be eligible for the tax benefits".<sup>312</sup> Thus, the accreditation requirements "modify the conditions of competition to the detriment of imported motor vehicles and in favour of like domestic motor vehicles".<sup>313</sup>

5.76. For these reasons, we agree with the Panel that, "under the INOVAR-AUTO programme, the conditions for accreditation in order to receive presumed tax credits ... accord less favourable treatment to imported products than that accorded to like domestic products" within the meaning of Article III:4 of the GATT 1994.<sup>314</sup>

### **5.1.5 Whether the Panel erred in finding that the INOVAR-AUTO programme is inconsistent with Article 2.1 of the TRIMs Agreement**

5.77. Before the Panel, the European Union and Japan argued that the INOVAR-AUTO programme is inconsistent with Article 2.1 of the TRIMs Agreement, both independently and in conjunction with Article 2.2 and paragraph 1(a) of that Agreement's Illustrative List, because it is inconsistent with

<sup>304</sup> Panel Reports, fn 1055 to para. 7.658.

<sup>305</sup> We observe that the Panel also considered that one of the other requirements involving "investing in R&D in Brazil" is also "linked to the development of their manufacturing activity in the country". (Panel Reports, para. 7.659)

<sup>306</sup> Panel Reports, para. 7.659.

<sup>307</sup> Panel Reports, para. 7.659.

<sup>308</sup> Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 126. (fn omitted)

<sup>309</sup> Brazil's appellant's submission, para. 287. (emphasis original)

<sup>310</sup> Brazil's appellant's submission, para. 288. (emphasis omitted)

<sup>311</sup> Panel Reports, para. 7.660.

<sup>312</sup> Panel Reports, para. 7.731.

<sup>313</sup> Panel Reports, para. 7.732.

<sup>314</sup> Panel Reports, para. 7.772.

Article III of the GATT 1994.<sup>315</sup> Brazil agreed that the INOVAR-AUTO programme is an investment measure, submitting, however, that it does not relate to trade in goods.<sup>316</sup>

5.78. The Panel found that the INOVAR-AUTO programme constitutes a trade-related investment measure within the meaning of the TRIMs Agreement.<sup>317</sup> The Panel further recalled that it had found that "the INOVAR-AUTO programme is inconsistent with Article III:2 and III:4 of the GATT 1994."<sup>318</sup> The Panel therefore considered that "those aspects of the INOVAR-AUTO programme found to be inconsistent with Article III:2 and III:4 ... are also inconsistent with Article 2.1 of the TRIMs Agreement."<sup>319</sup>

5.79. On appeal, Brazil does not make any specific arguments in connection with the Panel's finding under Article 2.1 of the TRIMs Agreement. Rather, as we understand it, Brazil's request for reversal of the Panel's finding under Article 2.1 of the TRIMs Agreement is premised on us reversing the Panel's findings under Article III:4 of the GATT 1994.<sup>320</sup> We have, however, for the reasons stated above, agreed with the Panel's findings that certain aspects of the INOVAR-AUTO programme are inconsistent with Article III:4 of the GATT 1994. Consequently, we agree with the Panel's finding that those aspects of the INOVAR-AUTO programme found to be inconsistent with Article III:4 of the GATT 1994 are also inconsistent with Article 2.1 of the TRIMs Agreement.<sup>321</sup>

## 5.2 Article III:8(b) of the GATT 1994<sup>322</sup>

### 5.2.1 Introduction

5.80. We now address Brazil's appeal of the Panel's interpretation and application of Article III:8(b) of the GATT 1994. Before examining the complainants' claims of inconsistencies under Article III of the GATT 1994, the Panel addressed the two "general defences" put forth by Brazil.<sup>323</sup> Rejecting Brazil's first defence that the product-based disciplines of Article III are not applicable to measures directed at producers, the Panel found that "Article III of the GATT 1994 is not *per se* inapplicable to certain measures, in particular 'pre-market' measures directed at producers."<sup>324</sup> With respect to Brazil's second defence that the measures at issue fall under Article III:8(b), the Panel found that "subsidies that are provided exclusively to domestic producers pursuant to Article III:8(b) of the GATT 1994 are not *per se* exempted from the disciplines of Article III of the GATT 1994."<sup>325</sup> Instead, in the Panel's view, "aspects of a subsidy resulting in product discrimination (including requirements to use domestic goods, as prohibited by Article 3.1 of the SCM Agreement) are not exempted from the disciplines of Article III pursuant to Article III:8(b)."<sup>326</sup> The Panel thus turned to assess the consistency of the challenged measures with Article III of the GATT 1994 and Article 2.1 of the TRIMs Agreement. The Panel found, *inter alia*, that certain aspects of the ICT programmes are inconsistent with Article III:2, first sentence, and Article III:4<sup>327</sup>, and that the accreditation requirements under the INOVAR-AUTO programme are inconsistent with Article III:4.<sup>328</sup> Flowing from its findings of inconsistency under Articles III:2 and III:4, the Panel also found the same

<sup>315</sup> Panel Reports, paras. 7.793 (referring to European Union's first written submission to the Panel, paras. 435-451; Japan's first written submission to the Panel, paras. 253-266).

<sup>316</sup> Panel Reports, para. 7.795.

<sup>317</sup> Panel Reports, para. 7.802.

<sup>318</sup> Panel Reports, para. 7.804 (referring to Panel Reports, paras. 7.645, 7.688, and 7.772-7.773).

<sup>319</sup> Panel Reports, para. 7.804.

<sup>320</sup> Having sought reversal of the Panel's findings under Article III:4 of the GATT 1994, specifically with respect to paras. 7.773, 8.6.b, and 8.17.c of the Panel Reports, Brazil submits that:

As a result, Brazil further requests that the Appellate Body *reverse* the Panel's consequential finding in paragraphs 7.806, 8.6(d) and 8.17(e) of the Panel Report that these aspects of [the] INOVAR-AUTO [programme] are inconsistent with Article 2.1 of the TRIMs Agreement.  
(Brazil's appellant's submission, para. 294 (emphasis original))

<sup>321</sup> Panel Reports, para. 7.804.

<sup>322</sup> One Member of the Division expressed a separate opinion regarding the scope of the term "payment of subsidies" in Article III:8(b) of the GATT 1994. This separate opinion can be found in subsection 5.2.5 of these Reports.

<sup>323</sup> Panel Reports, para. 7.53.

<sup>324</sup> Panel Reports, para. 7.70. See also Panel Reports, para. 7.67.

<sup>325</sup> Panel Reports, para. 7.87.

<sup>326</sup> Panel Reports, para. 7.88.

<sup>327</sup> Panel Reports, paras. 7.173-7.174, 7.230, 7.243, and 7.255.

<sup>328</sup> Panel Reports, para. 7.772.

aspects of the ICT and INOVAR-AUTO programmes to be inconsistent with Article 2.1 of the TRIMs Agreement.<sup>329</sup>

5.81. On appeal, Brazil takes issue with the Panel's analysis of its second defence and claims that the Panel erred in its interpretation of Article III:8(b) in finding that "subsidies that are provided exclusively to domestic producers pursuant to Article III:8(b) of the GATT 1994 are not *per se* exempted from the disciplines of Article III of the GATT 1994."<sup>330</sup> Brazil further contends that the Panel, premised on its erroneous interpretation<sup>331</sup>, also erred in its application of Article III:8(b) in finding that: (i) the ICT programmes are inconsistent with Article III:2, first sentence, and Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement; and (ii) the accreditation requirements under the INOVAR-AUTO programme are inconsistent with Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement.<sup>332</sup> We begin our analysis by discussing, briefly, the legal standard under Article III:8(b) of the GATT 1994 before addressing Brazil's claims of error on appeal.

### 5.2.2 The legal standard under Article III:8(b) of the GATT 1994

5.82. Article III:8 of the GATT 1994 provides as follows:

(a) The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

(b) The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.

5.83. Article III:8(b) states that the provisions of Article III "*shall not prevent*"<sup>333</sup> the payment of subsidies exclusively to domestic producers. This language is comparable to the *chapeau* of Article XX of the GATT 1994, which states, in relevant part, that "nothing in this Agreement *shall be construed to prevent* the adoption or enforcement by any Member of measures" enumerated in paragraphs (a)-(j) of Article XX.<sup>334</sup> It is well established that Article XX is an *affirmative defence* and sets out the "general exceptions" to the obligations contained in other provisions of the GATT 1994.<sup>335</sup> In other words, recourse to Article XX serves as a justification for WTO Members to adopt and enforce measures that are found to be inconsistent with other provisions of the GATT 1994.

5.84. In contrast to the opening clause of Article III:8(b), Article III:8(a) begins with the words "[t]he provisions of this Article *shall not apply to*" the measures enumerated thereunder.<sup>336</sup> The Appellate Body in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* explained that:

The opening clause of Article III:8(a) uses the term "apply" in the negative, thus precluding the application of the other provisions of Article III to measures that meet the requirements of that paragraph. Article III:8(a) therefore establishes a derogation from the national treatment obligation of Article III for government procurement activities falling within its scope. Measures satisfying the requirements of Article III:8(a) are not subject to the national treatment obligations set out in other paragraphs of Article III. Article III:8(a) is a derogation limiting the scope of the national treatment

<sup>329</sup> Panel Reports, paras. 7.363 and 7.804.

<sup>330</sup> Brazil's appellant's submission, paras. 5 and 16 (quoting Panel Reports, para. 7.87). See also *ibid.*, paras. 31 and 34.

<sup>331</sup> Brazil's appellant's submission, para. 35.

<sup>332</sup> Brazil's appellant's submission, paras. 35-36 (referring to Panel Reports, paras. 7.174, 7.318-7.319, 7.365, 7.688, 7.772-7.773, 7.806, 8.5.a-b, 8.5.d, 8.6.a-b, and 8.6.d).

<sup>333</sup> Emphasis added.

<sup>334</sup> Emphasis added.

<sup>335</sup> Appellate Body Report, *Indonesia – Import Licensing Regimes*, para. 5.42 (referring to Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16, DSR 1997:I, p. 337). See also Appellate Body Report, *Thailand – Cigarettes*, para. 177.

<sup>336</sup> Emphasis added.



obligation and it is not a justification for measures that would otherwise be inconsistent with that obligation.<sup>337</sup>

The opening clause of Article III:8(a) thus makes clear that the provision is a *derogation* limiting the scope of the national treatment obligation by making it inapplicable to certain government procurement activities. By contrast, the differently worded opening clause of Article III:8(b), which is similar to the text of the *chapeau* of Article XX, suggests to us that the provision is akin to an *exception* to the national treatment obligation and serves as a justification or affirmative defence for measures that would otherwise be inconsistent with that obligation.<sup>338</sup> Thus, while Article III:8(a) *precludes* the application of the national treatment obligation in Article III to government procurement activities falling within its scope, Article III:8(b) provides a *justification* for measures that would otherwise be inconsistent with the national treatment obligation in Article III.<sup>339</sup>

5.85. Turning to the term "payment of subsidies" used in Article III:8(b), we note that neither "payment" nor "subsidies" is defined in the GATT 1994. Although the term "subsidies" is used in several other provisions of the GATT 1994, and Article 1.1 of the SCM Agreement defines what constitutes a "subsidy", Article III:8(b) uses the term "*payment of subsidies*", and not "subsidies" alone. The interpretative issue at hand therefore relates not to the definition of "subsidies" under the GATT 1994 generally or under the SCM Agreement, but focuses instead on the precise scope of the term "payment of subsidies" as used in Article III:8(b), in particular.

5.86. The dictionary meanings of "payment" include "[a] sum of money (or equivalent) paid or payable" and "the remuneration of a person with money or its equivalent".<sup>340</sup> We note that whereas the conduct made permissible by Article III:8(b) is the "*payment of subsidies*", other provisions of the GATT 1994, including Article XVI, and the SCM Agreement, dealing with subsidies, use the terms "grant" or "maintain" when referring to subsidies.<sup>341</sup> This difference in language suggests to us that the term "payment of subsidies" in Article III:8(b) encompasses a narrower range of conduct than that covered by the terms "subsidy" or the "granting" or "maintaining" of a subsidy, as used elsewhere in the GATT 1994 and in the SCM Agreement.

5.87. In *Canada – Periodicals*, the Appellate Body was tasked with determining whether the reduced postal rates for certain eligible Canadian publishers constituted a "payment of subsidies" within the meaning of Article III:8(b).<sup>342</sup> Answering in the negative, the Appellate Body concluded that Article III:8(b) "was intended to exempt from the obligations of Article III only the payment of subsidies which involves the expenditure of revenue by a government".<sup>343</sup> In this regard, the Appellate Body quoted and expressly agreed with the GATT panel in *US – Malt Beverages* that:

Article III:8(b) limits, therefore, the permissible producer subsidies to "payments" after taxes have been collected or payments otherwise consistent with Article III. This separation of tax rules, e.g. on tax exemptions or reductions, and subsidy rules makes sense economically and politically. Even if the proceeds from non-discriminatory product

<sup>337</sup> Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.56 (referring to Appellate Body Reports, *China – Raw Materials*, para. 334).

<sup>338</sup> See Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.56 (referring to Appellate Body Reports, *China – Raw Materials*, para. 334).

<sup>339</sup> It is in this vein that the Appellate Body in *US – Tax Incentives* observed that Article III:8(b) "exempts from the national treatment obligation in Article III 'the payment of subsidies exclusively to domestic producers'". (Appellate Body Report, *US – Tax Incentives*, para. 5.16)

<sup>340</sup> Oxford English Dictionary online, definition of "payment", <http://www.oed.com/view/Entry/139189?rskey=9c29D2&result=1#eid>.

<sup>341</sup> Article XVI:1 of the GATT 1994, for example, provides, in relevant part: If any Member *grants or maintains any subsidy*, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory, it shall notify the WTO in writing of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary. In any case in which it is determined that serious prejudice to the interests of any other Member is caused or threatened by any such subsidization, the Member *granting the subsidy* shall, upon request, discuss with the other Member or Members concerned, or with the WTO, the possibility of limiting the subsidization. (emphasis added)

<sup>342</sup> Appellate Body Report, *Canada – Periodicals*, pp. 33-34.

<sup>343</sup> Appellate Body Report, *Canada – Periodicals*, p. 34.

taxes may be used for subsequent subsidies, the domestic producer, like his foreign competitors, must pay the product taxes due. The separation of tax and subsidy rules contributes to greater transparency. It also may render abuses of tax policies for protectionist purposes more difficult, as in the case where producer aids require additional legislative or governmental decisions in which the different interests involved can be balanced.<sup>344</sup>

5.88. Turning to the immediate context of the term "payment of subsidies", Article III:8(b) defines this term as "including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of [Article III]". It also includes "subsidies effected through governmental purchases of domestic products". Although the use of the word "including" makes clear that these two examples in Article III:8(b) are not meant to provide an exhaustive list of what constitutes the "payment of subsidies", the Appellate Body in *Canada – Periodicals* considered that they nonetheless "exemplify the kinds of programmes which are exempted from the obligations of Articles III:2 and III:4 of the GATT 1994".<sup>345</sup> These examples must therefore be given due importance in the interpretation of the term "payment of subsidies".

5.89. The text of the first example, namely, "payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of [Article III]", makes it clear that it is not the payment of subsidies that must be consistent with the obligations under Article III of the GATT. Instead, it is the internal taxes applied to products, the proceeds of which are used for the payment of subsidies, which must be consistent with the obligations under Article III.<sup>346</sup> When these internal taxes are applied in a manner consistent with Article III, the proceeds derived from such taxes may be used for payments of subsidies exclusively to domestic producers, and such payments of subsidies, as well as any resulting discrimination against like imported products, will be justified under Article III:8(b).<sup>347</sup> However, when the internal taxes are higher on imported products than on like domestic products, or otherwise accord less favourable treatment to imported products, and are thus inconsistent with Article III, the payment of subsidies derived from the proceeds of such GATT-inconsistent taxes would not be justified under Article III:8(b). In other words, the text of the first example suggests that subsidies that are paid through the proceeds of discriminatory internal taxes applied, directly or indirectly, on products continue to be subject to the obligations in Article III.<sup>348</sup> We note in this regard that the Appellate Body in *Canada – Periodicals* agreed with the GATT panel in *US – Malt Beverages* that, "[e]ven if the proceeds from non-discriminatory product taxes may be used for subsequent subsidies, the domestic producer, like his foreign competitors, must pay the product taxes due."<sup>349</sup>

5.90. In addition to the immediate context, we consider that Article III:2, which sets out the national treatment obligation with respect to internal tax measures, also provides relevant context for the interpretation of the term "payment of subsidies". As we see it, the prohibition against discriminatory internal taxes in Article III:2 may be rendered ineffective if discriminatory internal taxes on imported products could be justified as subsidies for competing domestic producers in terms

<sup>344</sup> Appellate Body Report, *Canada – Periodicals*, p. 34 (quoting GATT Panel Report, *US – Malt Beverages*, para. 5.10).

<sup>345</sup> Appellate Body Report, *Canada – Periodicals*, pp. 33-34.

<sup>346</sup> We note that subsidies to domestic producers can be paid in product markets other than those from which the tax proceeds are derived.

<sup>347</sup> Insofar as the payments of subsidies are derived from the general budget, and cannot be traced to a particular tax, they would, of course, be justified under III:8(b).

<sup>348</sup> Giving due importance to the examples means that one cannot accept that the opposite of the situation reflected in the first example, namely the payment of subsidies derived from proceeds of taxes applied *inconsistently* with Article III, would also be covered by Article III:8(b). One cannot but understand the inclusion in the scope of Article III:8(b) of payments of subsidies derived from proceeds of taxes *consistent* with Article III as the exclusion from the scope of Article III:8(b) of payments of subsidies derived from proceeds of taxes *inconsistent* with Article III.

<sup>349</sup> Appellate Body Report, *Canada – Periodicals*, p. 34 (quoting GATT Panel Report, *US – Malt Beverages*, para. 5.10, where the GATT panel further explained that "[t]he separation of tax and subsidy rules contributes to greater transparency. It also may render abuses of tax policies for protectionist purposes more difficult, as in the case where producer aids require additional legislative or governmental decisions in which the different interests involved can be balanced.").



of Article III:8(b).<sup>350</sup> For example, instead of applying differential tax rates on imported and like domestic products, a WTO Member could apply the same tax rate to imported and like domestic products and subsequently provide for a reduction of the tax rate for products produced by domestic producers, but not those produced by foreign producers. Indeed, if the scope of "payment of subsidies" is seen as encompassing an exemption or reduction of internal product taxes that are "otherwise due", it would allow WTO Members to circumvent Article III:2 and adopt discriminatory tax measures by disguising them in the form of a scheme of exemption or reduction of internal product taxes for domestic producers alone.

5.91. Our above discussion is supported by the negotiating history of Article III:8(b), which was also relied on by the Appellate Body in *Canada – Periodicals*.<sup>351</sup> Specifically, we consider relevant the following discussion from the Reports of the Committees and Principal Sub-Committees of the Interim Commission for the International Trade Organization concerning Article 18 of the Havana Charter, which corresponds to Article III of the GATT 1994:

This sub-paragraph [i.e. what is now Article III:8(b) of the GATT 1994] was redrafted in order to make it clear that nothing in Article [III] could be construed to sanction [i.e. to allow for] the exemption of domestic products from internal taxes imposed on like imported products or the remission of such taxes. At the same time the Sub-Committee recorded its view that nothing in this sub-paragraph or elsewhere in Article [III] would override the provisions [of Article XVI].<sup>352</sup>

5.92. An examination of the text and context of Article III:8(b), as supported by its negotiating history, therefore suggests that the term "payment of subsidies" in Article III:8(b) does not include within its scope the exemption or reduction of internal taxes applied, directly or indirectly, on domestic products. Instead, as the Appellate Body has observed, Article III:8(b) "was intended to exempt from the obligations of Article III only the payment of subsidies which involves the expenditure of revenue by a government".<sup>353</sup>

5.93. Regarding the phrase "exclusively to domestic producers", we note that the dictionary meaning of "exclusively" is "[s]o as to exclude all except some particular object, subject, etc.; solely."<sup>354</sup> Placed in its context, the use of the term "exclusively" therefore indicates that Article III:8(b) exempts from the disciplines of Article III those "payments of subsidies" that are made *solely* to domestic producers, *to the exclusion* of foreign producers. Subsidies provided exclusively to domestic producers will often, if not always, have an impact on the conditions of competition between the product produced by the subsidized domestic producers (for example, by lowering the cost of production of such products) and the like imported product produced by foreign producers that are not paid the subsidy.<sup>355</sup> In the absence of Article III:8(b), such subsidies paid exclusively to domestic producers could therefore be seen as being inconsistent with the broadly worded national treatment obligation in Article III insofar as they alter the conditions of competition in favour of the product produced by the domestic producer to whom the subsidy is paid.<sup>356</sup>

<sup>350</sup> See e.g. GATT Panel Report, *US – Malt Beverages*, para. 5.9. The GATT panel further noted that an "expansive interpretation of Article III:8(b) ..., if carried to its logical conclusion, ... would virtually eliminate the prohibition in Article III:2 of discriminatory internal taxation by enabling contracting parties to exempt all domestic products from indirect taxes." *Ibid.*, para. 5.12.

<sup>351</sup> Appellate Body Report, *Canada – Periodicals*, p. 34.

<sup>352</sup> Interim Commission for the International Trade Organization, Reports of the Committees and Principal Sub-Committees: ICITO I/8, Geneva, September 1948, p. 66. Article 18 and Section C of Chapter IV of the Havana Charter for an International Trade Organization correspond, respectively, to Article III and Article XVI of the GATT 1947. See also Appellate Body Report, *Canada – Periodicals*, p. 34.

<sup>353</sup> Appellate Body Report, *Canada – Periodicals*, p. 34.

<sup>354</sup> Oxford English Dictionary online, definition of "exclusively", <http://www.oed.com/view/Entry/65834?redirectedFrom=exclusively#eid>.

<sup>355</sup> In *US – Tax Incentives*, the Appellate Body observed that "[s]ubsidies that relate to domestic production ... can ordinarily be expected to increase the supply of the subsidized domestic goods in the relevant market". (Appellate Body Report, *US – Tax Incentives*, para. 5.15)

<sup>356</sup> In this regard, we note that the chair of the working party of Sub-Committee A, which redrafted Article 18 of the Havana Charter (which corresponds to Article III of the GATT 1994), acknowledged that the text of Article III:8(b) was added "because it was felt that if subsidies were paid on domestic and not on imported products, it might be construed that Members were not applying the 'national treatment' rule." (E/CONF.2/c.3/A/W.49, p. 2)

5.94. In *US – Tax Incentives*, the Appellate Body observed that Article III:8(b) "makes clear that the provision of subsidies to domestic producers only, and not to foreign ones, does not *in itself* constitute a breach of Article III."<sup>357</sup> Insofar as the payment of a subsidy only to domestic producers, to the exclusion of foreign producers, affects the conditions of competition in the relevant product market(s), Article III:8(b) carves out an exception for the payment of such subsidies from the national treatment obligation under Article III. In other words, to the extent that the payment of subsidies exclusively to domestic producers of a given product affects the conditions of competition between such a product and the like imported product, resulting in an inconsistency with the national treatment obligation in Article III, such a payment would be justified under the exception contained in Article III:8(b), provided that the conditions thereunder are met.<sup>358</sup>

5.95. Moreover, besides the effect of the payment of subsidies exclusively to domestic producers on the conditions of competition in the relevant product market(s), there will often be conditions for eligibility that attach to such payments. For instance, insofar as Article III:8(b) justifies the payment by WTO Members of subsidies exclusively to domestic producers, conditions for eligibility that define the class of eligible "domestic producers" by reference to their activities in the subsidized products' markets would be justified under Article III:8(b). By contrast, a requirement to use domestic over imported goods in order to have access to the subsidy may, however, not be covered by the exception in Article III:8(b) and would therefore continue to be subject to the national treatment obligation in Article III. This is because, while the payment of subsidies and certain eligibility criteria may affect the conditions of competition between the product produced by the producer receiving the subsidy and the like imported products, a requirement to use domestic products in order to have access to the subsidy would impact the conditions of competition between a *different set of domestic and like imported products*, namely, the domestic product whose use is mandated and the like imported product.<sup>359</sup>

5.96. Turning to the term "domestic producers", as used in Article III:8(b), we note that the dictionary meaning of "producer" is "[a] person who ... produces (in various senses)".<sup>360</sup> The scope of Article III:8(b) suggests that the focus of inquiry under that provision ought to be on whether the domestic entity at issue is a *producer* of the product with respect to which a violation of the national treatment obligation arising from the "payment of subsidies" is alleged. This is because Article III:8(b) serves as a justification only for discrimination resulting from the effects of the payment of a subsidy on the conditions of competition in the relevant product market(s). Therefore, whether a domestic entity is a "domestic producer" within the meaning of Article III:8(b) is a question that must be answered in light of the specific facts and circumstances of a given case, including the nature of discrimination that is alleged.

### 5.2.3 Whether the Panel erred in its interpretation and application of Article III:8(b) of the GATT 1994

5.97. Having set out the legal standard under Article III:8(b), we now turn to address Brazil's claim that the Panel erred in its interpretation and application of Article III:8(b) of the GATT 1994. Brazil claims that the Panel erred in its interpretation of Article III:8(b) in finding that "subsidies that are provided exclusively to domestic producers pursuant to Article III:8(b) of the GATT 1994 are not *per se* exempted from the disciplines of Article III of the GATT 1994."<sup>361</sup> Brazil further contends that the Panel, premised on its erroneous interpretation<sup>362</sup>, also erred in its application of Article III:8(b) in finding that: (i) the ICT programmes are inconsistent with Article III:2, first sentence, and Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement; and (ii) the accreditation

<sup>357</sup> Appellate Body Report, *US – Tax Incentives*, para. 5.16. (emphasis added)

<sup>358</sup> That said, the payment of such subsidies and the effects thereof would continue to be regulated by other relevant provisions of the GATT 1994 and the SCM Agreement.

<sup>359</sup> The Appellate Body in *US – Tax Incentives* observed that, "[t]o the extent that 'domestic producers' may generally be expected to manufacture a certain amount of 'domestic goods' in a Member's territory, Article III:8(b) comports with our reading of Article 3.1(b) under which something more than mere subsidization of domestic production is required for finding an import substitution subsidy." (Appellate Body Report, *US – Tax Incentives*, para. 5.16)

<sup>360</sup> Oxford English Dictionary online, definition of "producer", <http://www.oed.com/view/Entry/151981?redirectedFrom=producer#eid>.

<sup>361</sup> Brazil's appellant's submission, paras. 5 and 16 (quoting Panel Reports, para. 7.87). See also *ibid.*, paras. 31 and 34.

<sup>362</sup> Brazil's appellant's submission, para. 35.

requirements under the INOVAR-AUTO programme are inconsistent with Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement.<sup>363</sup>

5.98. According to Brazil, the Panel's interpretation and application of Article III:8(b) erroneously "conflate[] the distinction between the product-related disciplines of Article III and the provisions of the covered agreements concerning subsidies provided to domestic producers, which should be assessed under the SCM Agreement".<sup>364</sup> Brazil takes the overarching position that Article III:8(b) "delineat[es]", in a mutually exclusive manner, the respective scopes of application of the "product-related" disciplines of Article III, on the one hand, and the disciplines of Article XVI and the SCM Agreement concerning "producer subsidy measures", on the other hand.<sup>365</sup> In Brazil's view, a "harmonious interpretation"<sup>366</sup> of these different provisions requires any panel evaluating claims under Article III to determine, as a "threshold analysis",<sup>367</sup> whether the measure at issue is a "product-related" measure subject to the disciplines of Article III or whether the measure provides a subsidy to domestic producers and is therefore subject to the disciplines of the SCM Agreement.<sup>368</sup> Brazil faults the Panel for not undertaking such a "threshold inquiry".<sup>369</sup> In support of its claim, Brazil advances several arguments focusing on different interpretative elements of Article III:8(b), including the introductory clause, the scope of the term "payment of subsidies", and the examples set out in that provision.

5.99. The European Union responds that Brazil's "formalistic interpretation", drawing a "strict line" between the discipline under Article III and the provisions relating to subsidies, goes against the principle of "coherent interpretation".<sup>370</sup> Given that the disciplines under Article III of the GATT 1994 and the SCM Agreement are not mutually exclusive, the European Union maintains that a measure may be found to be inconsistent with both sets of disciplines, as in the present case.<sup>371</sup> Moreover, in the European Union's view, Article III:8(b) cannot be interpreted as excluding the manner in which WTO Members condition the granting of subsidies to domestic producers only because the subsidies are given only to domestic producers. Thus, although the European Union agrees that the product-related effects of payments granted exclusively to domestic producers cannot result in discrimination contrary to Article III, it disagrees that the provision of subsidies containing a requirement to use domestic over imported inputs as a condition to benefit from the subsidy can fall under the carve-out in Article III:8(b).<sup>372</sup> According to the European Union, there was no intention to "compartmentalise" the obligations in case of measures consisting of subsidies exclusively within Article XVI of the GATT 1947, nor was that the intention of negotiators during the Uruguay Round when agreeing to Article 3.1(b) of the SCM Agreement.<sup>373</sup>

5.100. Japan asserts that the ordinary meaning of the text of Article III:8(b) renders it clear that the provision does not constitute a blanket exemption for subsidies paid exclusively to domestic producers. Instead, for Japan, measures that take the form of subsidies paid exclusively to domestic producers may still be subject to the disciplines under Article III if they, or certain elements thereof, result in discrimination between products.<sup>374</sup> For Japan, therefore, if a subsidy is not only contingent on the fact that the recipient is a domestic producer, but also on the use of local content, then this "element" discriminating between foreign and domestic products would be a violation of the national treatment obligation.<sup>375</sup> Moreover, Japan also considers that Article III:8(b) applies to not all, but only "some types" of, subsidies to domestic producers.<sup>376</sup>

5.101. We begin by recalling our discussion above that the national treatment obligation under Article III of the GATT 1994, by the terms of that provision, has a broad scope of application. In

<sup>363</sup> Brazil's appellant's submission, paras. 35-36 (referring to Panel Reports, paras. 7.174, 7.318-7.319, 7.365, 7.688, 7.772-7.773, 7.806, 8.5.a-b, 8.5.d, 8.6.a-b, and 8.6.d).

<sup>364</sup> Brazil's appellant's submission, para. 26.

<sup>365</sup> Brazil's appellant's submission, para. 25.

<sup>366</sup> Brazil's appellant's submission, para. 26.

<sup>367</sup> Brazil's appellant's submission, para. 33.

<sup>368</sup> Brazil's appellant's submission, para. 26.

<sup>369</sup> Brazil's appellant's submission, para. 30.

<sup>370</sup> European Union's appellee's submission, para. 42.

<sup>371</sup> European Union's appellee's submission, para. 44.

<sup>372</sup> European Union's appellee's submission, para. 57.

<sup>373</sup> European Union's appellee's submission, para. 45.

<sup>374</sup> Japan's appellee's submission, paras. 17-19 (referring to Panel Report, *Indonesia – Autos*, para. 14.43)

<sup>375</sup> Japan's appellee's submission, para. 20.

<sup>376</sup> Japan's appellee's submission, para. 42.

particular, a discussion of the relevant WTO jurisprudence reveals that, although the national treatment obligation in Articles III:2 and III:4 is made effective in the context of "products", this does not *ipso facto* suggest that measures that are primarily directed at "producers" are excluded from that obligation.<sup>377</sup> We thus agree with the Panel's view that, based on the plain text of Article III and relevant WTO jurisprudence, "Article III of the GATT 1994 is not *per se* inapplicable to certain measures, in particular 'pre-market' measures directed at producers."<sup>378</sup> The Panel, in our view, correctly observed that, "if the formalistic approach ... were correct, it would be simple to entirely avoid the bedrock national treatment requirement of the multilateral trading system."<sup>379</sup>

5.102. Having agreed with the Panel that the text of Articles III:2 and III:4 does not, in and of itself, exclude from the scope of the national treatment obligation measures that are directed at "producers", we turn to Brazil's argument that Article III:8(b) "delineat[es]", in a *mutually exclusive* manner, the respective scopes of application of the "product-related" disciplines of Article III, on the one hand, and the disciplines of Article XVI and the SCM Agreement concerning "producer subsidy measures", on the other hand.<sup>380</sup> On this basis, Brazil claims that the Panel erred in its interpretation of Article III:8(b) in finding that "subsidies that are provided exclusively to domestic producers pursuant to Article III:8(b) of the GATT 1994 are not *per se* exempted from the disciplines of Article III of the GATT 1994."<sup>381</sup>

5.103. The Panel began its analysis under Article III:8(b) of the GATT 1994 by noting, first, that "at a minimum" the text of the provision makes it clear that "subsidies given exclusively to domestic producers do not *per se* and for that reason alone violate Article III of the GATT 1994."<sup>382</sup> The Panel explained that, in fact, "subsidies as such are not regulated by Article III, but rather by the provisions of Article XVI of the GATT 1994 and by the SCM Agreement."<sup>383</sup> The Panel further noted that, "without Article III:8(b), Article III as a whole, and Article III:4 in particular, might be seen as prohibiting all subsidization that was provided only to domestic, and not to foreign, producers. This is because both Article III:1 ... and Article III:4 speak of, and discipline, *inter alia* regulatory measures 'affecting' the sale, offering for sale, purchase, transportation, distribution, or use, of products."<sup>384</sup> The Panel considered it "clear that a subsidy is a form of regulatory measure that can and often does 'affect' the sale, purchase, etc. of products in ways that create advantages in the domestic market *vis-à-vis* products that have not benefited from the subsidy, including for example imported products".<sup>385</sup> In the Panel's view, providing a "competitive advantage" in relation to market conditions is, in fact, the "typical intention" behind subsidization.<sup>386</sup>

5.104. For the Panel, "the 'adverse effects' provisions of the subsidy disciplines in Article XVI of the GATT 1994 and the SCM Agreement are 'precisely aimed' at the adverse trade effects that can be caused by the competitive advantages provided by subsidization."<sup>387</sup> Thus, the Panel explained that, "in the absence of a provision such as Article III:8(b), Article III:4 might be read to require governments of importing Members to provide subsidies to foreign competitor firms whenever they subsidize their own domestic firms; or alternatively to prohibit all subsidies provided only to domestic and not also to foreign producers."<sup>388</sup> For the Panel, "[s]uch an approach would be inconsistent with the very existence of the SCM Agreement, which in principle permits subsidies, except for two precise types of prohibited subsidies (namely export contingent subsidies and import substitution subsidies), and contains no requirement that subsidies, to be permitted, must be provided to foreign as well as domestic recipients."<sup>389</sup> On this basis, the Panel found that the exclusive provision of subsidies to domestic producers (or any eventual effects thereof in the domestic market) does not

<sup>377</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, para. 227; GATT Panel Report, *US – Section 337 Tariff Act*, para. 5.10; Panel Report, *Argentina – Hides and Leathers*, para. 11.211; Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 114. See also paragraphs 5.14-5.16 above.

<sup>378</sup> Panel Reports, para. 7.70.

<sup>379</sup> Panel Reports, para. 7.63.

<sup>380</sup> Brazil's appellant's submission, para. 25.

<sup>381</sup> Brazil's appellant's submission, paras. 16, 31, and 34 (quoting Panel Reports, para. 7.87).

<sup>382</sup> Panel Reports, para. 7.77.

<sup>383</sup> Panel Reports, para. 7.77.

<sup>384</sup> Panel Reports, para. 7.78.

<sup>385</sup> Panel Reports, para. 7.78.

<sup>386</sup> Panel Reports, para. 7.78.

<sup>387</sup> Panel Reports, para. 7.78.

<sup>388</sup> Panel Reports, para. 7.78.

<sup>389</sup> Panel Reports, para. 7.78.

by itself constitute discriminatory treatment with respect to imported products, as prohibited by Article III.<sup>390</sup>

5.105. Next, the Panel addressed Brazil's argument that "Article III:8(b) effectively *exempts* all tax and regulatory discrimination between imported and domestic products from the disciplines of Article III to the extent that the measures in question are subsidies to domestic producers."<sup>391</sup> The Panel noted, first, that "multilateral rules on subsidies have coexisted with those on national treatment – including the proviso in Article III (Article III:8(b)) that clarifies the nature of that coexistence – since the entry into force of the GATT 1947."<sup>392</sup> According to the Panel, the adoption of the SCM Agreement did not alter this "basic harmonious coexistence".<sup>393</sup> The Panel considered that "the negotiating history of the Uruguay Round suggest[ed] that the intention of Article 3.1(b) of the SCM Agreement was simply to codify the already existing prohibition, pursuant to Article III:4 of the GATT 1994, of subsidies contingent upon the use of domestic over imported goods."<sup>394</sup> The Panel also noted that "the provisions on discrimination in Article III of the GATT 1994 and the provisions of the SCM Agreement can apply to the same measure simultaneously."<sup>395</sup>

5.106. Concerning the element of discrimination that could be introduced by a subsidy, the Panel viewed the text of Article III:8(b) as confirming that, "even if a measure is a subsidy that is provided exclusively to domestic producers, this fact is not sufficient to remove the measure from the application of Article III."<sup>396</sup> Specifically, with respect to tax-based measures, the Panel noted that Article III:8(b) allows WTO Members to provide subsidies exclusively to domestic products using the proceeds of internal taxes or charges, as long as those taxes or charges are applied consistently with Article III.<sup>397</sup> For the Panel, therefore, if "Article III:8(b) exempts tax discrimination from the scope of Article III, the reference in Article III:8(b) itself to 'taxes and charges applied consistently with the provisions of [Article III]' would be meaningless."<sup>398</sup> On this basis, the Panel concluded that "Article III:8(b) does not change the applicability of Article III to discriminatory application of a product tax, even where such a discriminatory application constituted a subsidy exclusively to domestic producers."<sup>399</sup> The Panel found support for its conclusion in the *travaux préparatoires* of the Havana Charter.<sup>400</sup> Furthermore, the Panel was of the view that discriminatory non-tax regulatory measures that involve the provision of a subsidy exclusively to domestic producers are also, for that reason alone, not outside the disciplines of Article III:4, given that the text of Article III:8(b) refers to Article III in its entirety and not just Article III:2.<sup>401</sup>

5.107. Having agreed with the panel in *Indonesia – Autos* that "a subsidy to domestic producers that introduces discrimination between imported and domestic like products is covered by – and inconsistent with – the provisions of Article III"<sup>402</sup>, the Panel thus concluded that "subsidies that are provided exclusively to domestic producers pursuant to Article III:8(b) of the GATT 1994 are not *per se* exempted from the disciplines of Article III of the GATT 1994."<sup>403</sup> Specifically, the Panel considered that the "aspects of a subsidy resulting in product discrimination (including requirements

<sup>390</sup> Panel Reports, para. 7.79.

<sup>391</sup> Panel Reports, para. 7.80.

<sup>392</sup> Panel Reports, para. 7.82.

<sup>393</sup> Panel Reports, para. 7.82.

<sup>394</sup> Panel Reports, para. 7.82.

<sup>395</sup> Panel Reports, paras. 7.39-7.49 and 7.82.

<sup>396</sup> Panel Reports, para. 7.85.

<sup>397</sup> Panel Reports, para. 7.85.

<sup>398</sup> Panel Reports, para. 7.85.

<sup>399</sup> Panel Reports, para. 7.85.

<sup>400</sup> Panel Reports, para. 7.85 and fn 479 thereto (referring to E/CONF.2/C.3/6, p. 17; E/CONF.2/C.3/A/W.32, p. 2). The Panel observed that:

The Reports of the Committees and Principal Sub-Committees of the Interim Commission for the International Trade Organization concerning the provision of the Havana Charter for an International Trade Organization that corresponds to Article III:8(b) of the GATT 1994 state that: "nothing in Article 18 could be construed to sanction the exemption of domestic products from internal taxes imposed on like imported products or the remission of such taxes".

(Ibid. (quoting Interim Commission for the International Trade Organization, Reports of the Committees and Principal Sub-Committees: ICITO I/8, Geneva, September 1948, p. 66))

<sup>401</sup> Panel Reports, para. 7.86.

<sup>402</sup> Panel Reports, para. 7.83 (referring to Panel Report, *Indonesia – Autos*, paras. 14.43-14.46).

<sup>403</sup> Panel Reports, para. 7.87.

to use domestic goods, as prohibited by Article 3.1 of the SCM Agreement) are not exempted from the disciplines of Article III pursuant to Article III:8(b)."<sup>404</sup>

5.108. We recall that, in *US – Tax Incentives*, the Appellate Body stated that "Article III:8(b) makes clear that the provision of subsidies to domestic producers only, and not to foreign ones, does not *in itself* constitute a breach of Article III."<sup>405</sup> As explained in paragraph 5.94 above, insofar as the payment of subsidies exclusively to domestic producers, to the exclusion of foreign producers, affects the conditions of competition in the relevant product market(s), the resulting inconsistency with the national treatment obligation in Article III will be justified under the exception contained in Article III:8(b), provided that the conditions thereunder are met.<sup>406</sup> We therefore agree with the Panel's view that the "exclusive provision of subsidies (or any eventual effects therefrom in the domestic market) does not by itself constitute discriminatory treatment in respect of imported products of the type prohibited by Article III."<sup>407</sup> That said, as discussed above, we note that other aspects of a measure directed at producers that go beyond the mere payment of subsidies exclusively to domestic producers<sup>408</sup>, such as, for example, an additional requirement to use domestic over imported goods in order to have access to the subsidy, may not be covered by the exception in Article III:8(b) and would therefore continue to be subject to the national treatment obligation in Article III.

5.109. Although we agree with the Panel's preliminary observations that discrimination resulting from the payment of subsidies exclusively to domestic producers and the market effects thereof may be justified under Article III:8(b), we have several concerns about the Panel's subsequent analysis leading to its conclusion that "aspects of a subsidy resulting in product discrimination (including requirements to use domestic goods, as prohibited by Article 3.1 of the SCM Agreement) are not exempted from the disciplines of Article III pursuant to Article III:8(b)."<sup>409</sup> We note, in particular, the Panel's unqualified reference to "aspects of a subsidy", as well as its use of the term "including", when referring to domestic content requirements in the statement quoted above. The Panel adopts a similar view when describing the findings of the panel in *Indonesia – Autos*, noting that the "panel found that Article III:8(b) confirms that subsidies to domestic producers do not violate Article III so long as they do not have *any component* that introduces discrimination between imported and domestic products".<sup>410</sup>

5.110. The Panel's interpretation appears to contradict its earlier finding that the "exclusive provision of subsidies (or any eventual effects thereof in the domestic market) does not by itself constitute discriminatory treatment in respect of imported products of the type prohibited by Article III."<sup>411</sup> As part of our analysis above, we have agreed with this statement by the Panel, as well as with its observation that "providing a competitive advantage in relation to market conditions is a typical intention behind subsidization".<sup>412</sup> Accepting the Panel's conclusion would suggest that virtually all of the subsidies paid exclusively to domestic producers would be subject to the national treatment obligation set out in the other paragraphs of Article III and would not be justifiable under Article III:8(b). This is because, as the Panel itself acknowledged, subsidies provided to domestic producers will almost always have an impact on the conditions of competition between the product produced by the subsidized domestic producers and the like imported product produced by foreign

<sup>404</sup> Panel Reports, para. 7.88.

<sup>405</sup> Appellate Body Report, *US – Tax Incentives*, para. 5.16. (emphasis added)

<sup>406</sup> We recall that the chair of the working party of Sub-Committee A, which redrafted Article 18 of the Havana Charter (which corresponds to Article III of the GATT 1994), acknowledged that the text of Article III:8(b) was added "because it was felt that if subsidies were paid on domestic and not on imported products, it might be construed that Members were not applying the 'national treatment' rule". (E/CONF.2/c.3/A/W.49, p. 2)

<sup>407</sup> Panel Reports, para. 7.79. We also agree with the Panel that "providing a competitive advantage in relation to market conditions is a typical intention behind subsidization". (Ibid., para. 7.78)

<sup>408</sup> As discussed above, insofar as Article III:8(b) justifies the payment by WTO Members of subsidies exclusively to domestic producers, conditions for eligibility that define the class of eligible "domestic producers" by reference to their activities in the subsidized products' markets may also be justified under Article III:8(b).

<sup>409</sup> Panel Reports, para. 7.88.

<sup>410</sup> Panel Reports, para. 7.83 (referring to Panel Report, *Indonesia – Autos*, paras. 14.43-14.46). (emphasis added)

<sup>411</sup> Panel Reports, para. 7.79.

<sup>412</sup> Panel Reports, para. 7.78.

producers that are not in receipt of the subsidy.<sup>413</sup> In other words, the Panel's interpretation, taken to its logical conclusion, denies effect to the exception contained in Article III:8(b), because, following the Panel's logic, in order to justify discrimination inconsistent with the national treatment obligations in Article III pursuant to Article III:8(b), the "payment of subsidies exclusively to domestic producers" must not be discriminatory in the first place. Seen in this light, the Panel's conclusion embodies a circular logic inasmuch as it delimits the scope of Article III:8(b) – an exception to the national treatment obligation for certain specific types of subsidies – on the basis of the discriminatory effects of the subsidies themselves.

5.111. To be clear, while we agree with the Panel that certain elements of a subsidy, such as a requirement conditioning access to the subsidy based on the use of domestic over imported goods, may violate the national treatment obligation under Article III in ways other than subsidization, this does not mean that the mere payment of a subsidy, in and of itself, is not justifiable under Article III:8(b).<sup>414</sup> In our view, although the Panel correctly noted that discrimination resulting from requirements to use domestic over imported goods, as prohibited under Article 3.1(b) of the SCM Agreement, is not justified under Article III:8(b), the Panel's unqualified reference to "aspects of a subsidy resulting in product discrimination" not being exempted under Article III:8(b) is overly broad and deprives that provision of any effect because, as acknowledged by the Panel, the very act of subsidization will, in and of itself, often result in product discrimination. Similarly, we find problematic the Panel's endorsement of the panel's conclusion in *Indonesia – Autos* that "Article III:8(b) confirms that subsidies to domestic producers do not violate Article III so long as they do not have *any component* that introduces discrimination between imported and domestic products."<sup>415</sup>

5.112. Because of the aforementioned shortcomings in the Panel's reasoning, we reverse the Panel's overly broad and unqualified findings that "subsidies that are provided exclusively to domestic producers pursuant to Article III:8(b) of the GATT 1994 are not *per se* exempted from the disciplines of Article III of the GATT 1994"<sup>416</sup> and that "aspects of a subsidy resulting in product discrimination (including requirements to use domestic goods, as prohibited by Article 3.1 of the SCM Agreement) are not exempted from the disciplines of Article III pursuant to Article III:8(b)."<sup>417</sup> Instead, based on the proper interpretation of Article III:8(b) set out above, insofar as the payment of subsidies exclusively to domestic producers of a given product affects the conditions of competition between such a product and the like imported product, resulting in an inconsistency with the national treatment obligation in Article III, such a payment would be justified under Article III:8(b), provided that the conditions thereunder are met. Moreover, conditions for eligibility for the payment of subsidies that define the class of eligible "domestic producers" by reference to their activities in the subsidized products' markets would be justified under Article III:8(b). By contrast, a requirement to use domestic over imported goods in order to have access to the subsidy would not be covered by the exception in Article III:8(b) and would therefore continue to be subject to the national treatment obligation in Article III.

5.113. The consequences of the Panel's erroneous conclusion that "subsidies that are provided exclusively to domestic producers pursuant to Article III:8(b) are not *per se* exempted from the

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<sup>413</sup> We recall that in *US – Tax Incentives* the Appellate Body observed that "[s]ubsidies that relate to domestic production ... can ordinarily be expected to increase the supply of the subsidized domestic goods in the relevant market...." (Appellate Body Report, *US – Tax Incentives*, para. 5.15)

<sup>414</sup> As discussed above, we consider that conditions for eligibility for a subsidy that relate to the producer's activities in the subsidized products markets are justified under Article III:8(b). In this regard, we note Brazil's argument that:

A logical consequence of the right to provide subsidies under WTO law is that Members must be free to define what constitutes a domestic producer for the purposes of participating in subsidies programmes. It is typical for regulations authorizing a subsidy to define the basic requirements and qualifying conditions for identifying domestic producers to ensure that only domestic producers – and not foreign producers – benefit from the subsidy. It would therefore be inappropriate to consider that those requirements *per se* violate Article III:4 of the GATT 1994.

(Brazil's appellant's submission, para. 136)

<sup>415</sup> Panel Reports, para. 7.83 (referring to Panel Report, *Indonesia – Autos*, paras. 14.43-14.46). (emphasis added)

<sup>416</sup> Panel Reports, para. 7.87.

<sup>417</sup> Panel Reports, para. 7.88.

disciplines of Article III" manifest themselves in its analysis under Article III:4.<sup>418</sup> Having reached the interpretative conclusion above, the Panel turned to determine "whether the product-related aspects of any subsidies that it may find to exist under the challenged measures are discriminatory in a manner inconsistent with Article III:2, III:4, and III:5 of the GATT 1994".<sup>419</sup> With respect to the consistency of the conditions of accreditation under the ICT programmes with Article III:4, the Panel found "that the conditions of accreditation, which when fulfilled create a lower internal tax burden on domestic products than on like imported products, modify the conditions of competition to the detriment of the imported products".<sup>420</sup> Thus, the aspect of the ICT programmes found to be inconsistent is the accreditation requirements that result in less favourable treatment in the form of the differential tax treatment for imported ICT products. Crucially, this aspect of the subsidy that the Panel found to be inconsistent with Article III:4 was the very aspect of the alleged subsidization sought to be justified by Brazil under Article III:8(b), but never examined by the Panel. In this manner, the Panel's interpretation of Article III:8(b) obviated the need for it to consider whether the "differential tax treatment" arising out of the ICT programmes constitutes the "payment of subsidies" and whether the conditions of accreditation are legitimate conditions for eligibility that are limited to ensuring that such payments are made "exclusively to domestic producers" within the meaning of Article III:8(b).

5.114. Having reversed the Panel's findings under Article III:8(b), we turn to Brazil's argument that the term "subsidies" in Article III:8(b) encompasses all types of subsidies listed in Article 1.1 of the SCM Agreement.<sup>421</sup> Because the exemption or remission of "indirect taxes" is a "subsidy" within the meaning of the SCM Agreement, for Brazil, it is also a subsidy for the purpose of Article III:8(b) of the GATT 1994.<sup>422</sup> Brazil alleges that the Panel's interpretation, therefore, fails to give effect to the definition of a "subsidy" contained in Article 1.1 of the SCM Agreement.<sup>423</sup> Brazil argues that the Appellate Body's interpretation of the term "payment" in the context of Article III:8(b) in *Canada – Periodicals* is in "direct contradiction" with the Appellate Body's interpretation of the term "payment", in the context of Article 9.1(c) of the Agreement on Agriculture, in *Canada – Dairy*.<sup>424</sup> Moreover, recalling that the Appellate Body in *Canada – Periodicals* stated that Article III:8(b) was "intended to exempt from the obligations of Article III only the payment of subsidies which involves the expenditure of revenue by a government"<sup>425</sup>, Brazil asserts that "when a government foregoes the collection of a known amount of tax revenue that it would otherwise collect, it expends revenue in that amount", and "these expenditures are commonly referred to as 'tax expenditures'".<sup>426</sup> Finally, Brazil considers that "the benefit to a domestic producer of a subsidy in the form of a 'grant' is equivalent to the benefit of an exemption of indirect taxes in the corresponding ratio", such that a narrow interpretation of Article III:8(b) that limits its scope to certain types of subsidies only would be "void of any economic logic" and would "elevate form over substance".<sup>427</sup>

5.115. The European Union submits that the Panel did not need to discuss the overlap between the meaning of the term "subsidy" in Article III:8(b) of the GATT 1994 and the definition provided in Article 1.1 of the SCM Agreement because "[t]he Panel excluded the application of Article III:8(b) on the basis that that provision does not carve out subsidies provided to domestic producers *per se*."<sup>428</sup> Thus, the European Union submits that the Appellate Body need not address Brazil's arguments concerning the interpretation of the term "subsidy" in Article III:8(b) as this did not form a part of the Panel's reasoning.<sup>429</sup> Nonetheless, referring to the Appellate Body Report in *Canada – Periodicals*, the European Union submits that a reduction or exemption of tax does not

<sup>418</sup> Panel Reports, para. 7.87. Our discussion of the Panel's analysis under Articles III:2 and III:4 of the GATT 1994 does not indicate an endorsement of the Panel's order of analysis with respect to these provisions and Article III:8(b).

<sup>419</sup> Panel Reports, para. 7.88.

<sup>420</sup> Panel Reports, para. 7.225.

<sup>421</sup> Brazil's appellant's submission, heading B.1.

<sup>422</sup> Brazil's appellant's submission, para. 52.

<sup>423</sup> Brazil's appellant's submission, para. 55.

<sup>424</sup> Brazil's appellant's submission, para. 60 (referring to Appellate Body Report, *Canada – Dairy*, paras. 110 and 112).

<sup>425</sup> Brazil's appellant's submission, para. 61 (quoting Appellate Body Report, *Canada – Periodicals*, p. 34).

<sup>426</sup> Brazil's appellant's submission, para. 61 (referring to OECD, *Tax Expenditures in OECD Countries* (2010), p. 12; Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 813).

<sup>427</sup> Brazil's appellant's submission, paras. 62-63.

<sup>428</sup> European Union's appellee's submission, para. 66.

<sup>429</sup> European Union's appellee's submission, para. 66.



amount to "the payment of subsidies" under Article III:8(b).<sup>430</sup> The European Union also relies on the term "payment" used in Article III:8(b), as opposed to "granting" or "subsidies" used in Article XVI of the GATT 1994, to highlight the limited scope of Article III:8(b).<sup>431</sup> For these reasons, the European Union submits that Article III:8(b) "only carves out 'the payment of subsidies...' (and not any type of subsidies such as revenue foregone), to the extent that such payments do not contain aspects resulting in product discrimination, such as the requirement to use domestic over imported goods."<sup>432</sup>

5.116. Japan considers Brazil's argument concerning the term "payment of subsidies" in Article III:8(b) to be "entirely circular" inasmuch as it states that because revenue foregone is included in the definition of a subsidy under the SCM Agreement, it must therefore also fall within the scope of Article III:8(b).<sup>433</sup> As to Brazil's reliance on the Appellate Body Report in *Canada – Dairy*, Japan points out that the Appellate Body's interpretation of the term "payment" in that dispute related to "very specific language" of a provision in a different covered agreement<sup>434</sup> and ignores the Appellate Body's "very specific language" in *Canada – Periodicals*.<sup>435</sup>

5.117. We note the European Union's argument that the Panel did not need to discuss the overlap between the meaning of the term "subsidy" in Article III:8(b) and the definition provided in Article 1.1 of the SCM Agreement because "[t]he Panel excluded the application of Article III:8(b) on the basis that such provision does not carve out subsidies provided to domestic producers *per se*."<sup>436</sup> The European Union submits that the Appellate Body need not address Brazil's arguments concerning the interpretation of the term "payment of subsidies" in Article III:8(b) as it did not form part of the Panel's reasoning.<sup>437</sup> We agree with the European Union that one reason why the Panel may not have felt compelled to interpret the terms "payment of subsidies exclusively to domestic producers" could have been its finding that such payments are, in any event, not *per se* exempt from the national treatment obligation under Article III. As discussed, however, this line of reasoning embodies a circular logic and denies effect to the terms of Article III:8(b). Having reversed that finding by the Panel, we consider it appropriate to address Brazil's claim on appeal relating to the interpretation of the term "payment of subsidies" in Article III:8(b).

5.118. Brazil argues that, "[b]ecause the exemption or remission of indirect taxes is a 'subsidy' within the meaning of the SCM Agreement, it is also a 'subsidy' for purposes of Article III:8(b) of the GATT 1994."<sup>438</sup> As the European Union rightly points out, however, the issue at hand relates not to the definition of a "subsidy", in the abstract, but, instead, to the scope of the term "payment of subsidies" in Article III:8(b).<sup>439</sup> Even if the exemption of indirect product taxes is a "subsidy" within the meaning of Article 1.1 of the SCM Agreement, this does not answer the question whether such exemption constitutes the "*payment* of subsidies" under Article III:8(b).<sup>440</sup>

5.119. As discussed above, while the conduct made permissible by Article III:8(b) is the "*payment* of subsidies", other provisions of the GATT 1994, including Article XVI, and the SCM Agreement,

<sup>430</sup> European Union's appellee's submission, paras. 67-68 (referring to Appellate Body Report, *Canada – Periodicals*, p. 34).

<sup>431</sup> European Union's appellee's submission, para. 70.

<sup>432</sup> European Union's appellee's submission, para. 74.

<sup>433</sup> Japan's appellee's submission, para. 43.

<sup>434</sup> Japan's appellee's submission, para. 45 (referring to Appellate Body Report, *Canada – Dairy*, para. 110).

<sup>435</sup> Japan's appellee's submission, para. 46 (quoting Appellate Body Report, *Canada – Periodicals*, p. 34).

<sup>436</sup> European Union's appellee's submission, para. 66.

<sup>437</sup> European Union's appellee's submission, para. 66.

<sup>438</sup> Brazil's appellant's submission, para. 52.

<sup>439</sup> European Union's appellee's submission, para. 70.

<sup>440</sup> Moreover, we recall our discussion above that the definition of a subsidy provided in Article 1.1 of the SCM Agreement is "for the purposes of this Agreement", i.e. the SCM Agreement, and does not apply to the GATT 1994.

dealing with subsidies, use the terms "grant" or "maintain" when referring to subsidies.<sup>441</sup> This difference in terminology suggests that the term "payment of subsidies" in Article III:8(b) encompasses a narrower range of conduct than that covered by the terms "subsidy" or the "granting" or "maintaining" of a subsidy elsewhere in the GATT 1994 and the other covered agreements.

5.120. We recall our discussion above of the first example of what constitutes the "payment of subsidy" under Article III:8(b), namely, "payments to domestic producers derived from proceeds of internal taxes or charges applied consistently with the provisions of [Article III]". If subsidies provided in the form of an exemption or reduction of taxes that are "otherwise due" are seen as being within the scope of Article III:8(b), then such discriminatory taxation effectuated through a scheme of foregoing revenue that reduces the tax burden on like domestic products or otherwise affects the conditions of competition to the detriment of the imported products would be justified under Article III:8(b). However, subsidies that are paid through the proceeds of discriminatory taxation would fall outside the scope of the exception in Article III:8(b) by virtue of the first example and would therefore continue to be subject to the national treatment obligation. We further note in this regard that the Appellate Body in *Canada – Periodicals* expressly agreed with the GATT panel in *US – Malt Beverages* that "[e]ven if the proceeds from non-discriminatory product taxes may be used for subsequent subsidies, the domestic producer, like his foreign competitors, must pay the product taxes due."<sup>442</sup> Moreover, the prohibition of discriminatory internal taxes in Article III:2 would also be rendered ineffective if discriminatory internal taxes on imported products could be justified as subsidies for competing domestic producers in terms of Article III:8(b).<sup>443</sup> Indeed, if the scope of "payment of subsidies" is seen as encompassing a reduction or exemption in internal product taxes that are "otherwise due", it would allow WTO Members to adopt discriminatory tax measures by disguising them in the form of a scheme of exemption or reduction of taxes for domestic producers alone.

5.121. We note Brazil's argument that, in *Canada – Dairy*, the Appellate Body interpreted the term "payment", in relation to subsidies, as including "revenue foregone".<sup>444</sup> That dispute addressed the issues of whether the provision of discounted milk to processors or exporters under a Canadian scheme constitutes an export subsidy within the meaning of Article 9.1(c) of the Agreement on Agriculture. The Appellate Body's interpretation of the term "payment" in Article 9.1(c) in that dispute was guided by the language of that provision and was specific to the context in which it appears. For instance, the Appellate Body in *Canada – Dairy* agreed with the panel that "none of the export subsidies listed in Article 9.1 is restricted to grants made solely in money form and several expressly involve subsidies granted in a form other than money."<sup>445</sup> The Appellate Body also considered Article 1(c) of the Agreement on Agriculture as providing relevant context and explained that "[i]n terms of that provision [i.e. Article 1(c)], 'revenue foregone' is to be taken into account in determining whether 'budgetary outlay' commitments, made with respect to export subsidies as listed in Article 9.1, have been exceeded."<sup>446</sup> For the Appellate Body in *Canada – Dairy*, "if a

<sup>441</sup> Article XVI:1 of the GATT 1994, for example, provides, in relevant part:

If any Member *grants or maintains any subsidy*, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory, it shall notify the WTO in writing of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary. In any case in which it is determined that serious prejudice to the interests of any other Member is caused or threatened by any such subsidization, the Member *granting the subsidy* shall, upon request, discuss with the other Member or Members, or with the WTO, the possibility of limiting the subsidization.

(emphasis added)

<sup>442</sup> Appellate Body Report, *Canada – Periodicals*, p. 34 (quoting GATT Panel Report, *US – Malt Beverages*, para. 5.10). The GATT panel further explained that "[t]he separation of tax and subsidy rules contributes to greater transparency. It also may render abuses of tax policies for protectionist purposes more difficult, as in the case where producer aids require additional legislative or governmental decisions in which the different interests involved can be balanced." (Ibid.)

<sup>443</sup> See e.g. GATT Panel Report, *US – Malt Beverages*, para. 5.9. The GATT panel further noted that an "expansive interpretation of Article III:8(b) ..., if carried to its logical conclusion, ... would virtually eliminate the prohibition in Article III:2 of discriminatory internal taxation by enabling contracting parties to exempt all domestic products from indirect taxes." (Ibid., para. 5.12)

<sup>444</sup> Brazil's appellant's submission, para. 60 (quoting Appellate Body Report, *Canada – Dairy*, paras. 110 and 112).

<sup>445</sup> Appellate Body Report, *Canada – Dairy*, para. 109 (referring to Panel Report, *Canada – Dairy*, para. 7.95). (emphasis original)

<sup>446</sup> Appellate Body Report, *Canada – Dairy*, para. 110.

restrictive reading of the words 'payments' were adopted, such that 'payments' under Article 9.1(c) had to be monetary, no account could be taken, under Article 9.1(c), of 'revenue foregone' and this would "prevent a proper assessment of the commitments made by WTO Members under Article 9.2, as envisaged by Article 1(c)".<sup>447</sup> Given the Appellate Body's context-specific interpretation of the term "payment" in Article 9.1(c) of the Agreement on Agriculture, we consider its observations to be of limited relevance to the interpretation of the term "payment of subsidies" in Article III:8(b).

5.122. An examination of the text and context of Article III:8(b), in light of its object and purpose and as confirmed by the negotiating history, therefore suggests that the term "payment of subsidies" in Article III:8(b) does not include within its scope the exemption or reduction of internal taxes affecting the conditions of competition between like products. Instead, as noted by the Appellate Body in *Canada – Periodicals*, Article III:8(b) "was intended to exempt from the obligations of Article III only the payment of subsidies which involves the expenditure of revenue by a government".<sup>448</sup>

#### 5.2.4 Conclusion with respect to Article III:8(b)

5.123. Although the Panel did, at an early stage of its analysis, acknowledge that the payment of subsidies exclusively to domestic producers (and the resulting market effects) does not by itself constitute discriminatory treatment with respect to imported products of the type prohibited by Article III<sup>449</sup>, the Panel's interpretation of Article III:8(b) and its application to the measures at issue obfuscate the distinction between the effects of the payment of a subsidy to a domestic producer on the conditions of competition in the relevant product market(s) and the conditions for eligibility attaching thereto, on the one hand, and any other effects arising from requirements to use domestic over imported inputs in the production process, on the other hand. Moreover, at no stage did the Panel undertake an assessment of whether the measures at issue constitute the "payment of subsidies exclusively to domestic producers" within the meaning of Article III:8(b). Because of these shortcomings in the Panel's reasoning, we reverse the Panel's overly broad and unqualified findings that "subsidies that are provided exclusively to domestic producers pursuant to Article III:8(b) of the GATT 1994 are not *per se* exempted from the disciplines of Article III of the GATT 1994"<sup>450</sup> and that "aspects of a subsidy resulting in product discrimination (including requirements to use domestic goods, as prohibited by Article 3.1 of the SCM Agreement) are not exempted from the disciplines of Article III pursuant to Article III:8(b)".<sup>451</sup>

5.124. Article III:8(b) carves out from the national treatment obligation in Article III the payment of subsidies exclusively to domestic producers. Insofar as the payment of subsidies exclusively to domestic producers of a given product affects the conditions of competition between such a product and the like imported product, resulting in an inconsistency with the national treatment obligation in Article III, such a payment would be justified under Article III:8(b), provided that the conditions thereunder are met. Moreover, conditions for eligibility for the payment of subsidies that define the class of eligible "domestic producers" by reference to their activities in the subsidized products' markets would also be justified under Article III:8(b). By contrast, a requirement to use domestic over imported goods in order to have access to the subsidy would not be covered by the exception in Article III:8(b) and would therefore continue to be subject to the national treatment obligation in Article III. Furthermore, an examination of the text and context of Article III:8(b), in light of its object and purpose and as confirmed by the negotiating history, suggests that the term "payment of subsidies" in Article III:8(b) does not include within its scope the exemption or reduction of internal taxes affecting the conditions of competition between like products. Instead, as noted by the Appellate Body in *Canada – Periodicals*, Article III:8(b) "was intended to exempt from the obligations of Article III only the payment of subsidies which involves the expenditure of revenue by a government".<sup>452</sup> Under a proper interpretation of Article III:8(b), none of the measures at issue in this dispute is capable of being justified under that provision because they all involve the exemption or reduction of internal taxes affecting the conditions of competition between like products and therefore cannot constitute the "payment of subsidies" within the meaning of Article III:8(b).

<sup>447</sup> Appellate Body Report, *Canada – Dairy*, para. 110.

<sup>448</sup> Appellate Body Report, *Canada – Periodicals*, p. 34.

<sup>449</sup> Panel Reports, para. 7.79.

<sup>450</sup> Panel Reports, para. 7.87.

<sup>451</sup> Panel Reports, para. 7.88.

<sup>452</sup> Appellate Body Report, *Canada – Periodicals*, p. 34.

### 5.2.5 Separate opinion of one Appellate Body Member on Article III:8(b) of the GATT 1994

5.125. While I agree with the majority's reversal of the Panel's "overly broad and unqualified" findings in paragraphs 7.87 and 7.88 of its Reports<sup>453</sup>, despite our best efforts to arrive at a consensus, I part company with my distinguished colleagues holding the majority view on the interpretation of the term "payment of subsidies" in Article III:8(b) of the GATT 1994 for the reasons set out below.

5.126. While neither Article III:8(b) nor any other provision of the GATT 1994 dealing with subsidies, including Article XVI, defines a "subsidy", a detailed definition of what constitutes a "subsidy" is found in Article 1.1 of the SCM Agreement. Although the *chapeau* of Article 1.1 states that the definition of a subsidy under that provision is "[f]or the purpose of this Agreement", i.e. the SCM Agreement, I note that Article 1.1 contains several textual references to the provision of the GATT 1994 dealing expressly with subsidies, namely Article XVI. In indicating that "a subsidy shall be deemed to exist if: ... (a)(1)(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)", footnote 1 to Article 1.1(a)(1)(ii) clarifies that:

*In accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III of this Agreement, the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.*<sup>454</sup>

Article 1.1(a)(2) further states that a "subsidy shall be deemed to exist if: ... (a)(2) there is any form of income or price support *in the sense of Article XVI of the GATT 1994*".<sup>455</sup> There are thus explicit textual linkages between the definition of a subsidy set out in Article 1 of the SCM Agreement and Article XVI of the GATT 1994 dealing with subsidies.

5.127. Moreover, the main object of the SCM Agreement, taken as a whole, is "to increase and improve GATT disciplines relating to the use of both subsidies and countervailing measures".<sup>456</sup> Indeed, I do not consider that, for the regulation of subsidies, the provisions of the GATT 1994 and the SCM Agreement operate in isolation; instead, the relevant provisions of the GATT 1994 and the SCM Agreement together define and reflect the *whole package of rights and obligations* of WTO Members with respect to subsidies.<sup>457</sup> Besides the various textual linkages between the GATT 1994 and the SCM Agreement, I consider that the General Interpretative Note to Annex 1A to the WTO Agreement, which clarifies that "in the event of conflict between ... the [GATT] 1994 and ... another agreement in Annex 1A, ... the other agreement shall prevail to the extent of the conflict", further supports the existence of a package of rights and obligations of WTO Members as reflected in the covered agreements.

5.128. For purposes of this package of rights and obligations, "[t]he SCM Agreement defines the *concept* of 'subsidy'".<sup>458</sup> Given the textual linkages between the definition of a subsidy set out in Article 1.1 of the SCM Agreement and the provisions of the GATT 1994 dealing with subsidies, as well as the object and purpose of the SCM Agreement and its relationship with the GATT 1994, I see no reason why the term "subsidies" under the GATT 1994, including in Article III:8(b), should have a different meaning than the definition of a subsidy set out in Article 1.1 of the SCM Agreement.<sup>459</sup>

5.129. I now turn to consider the implication of the use of the term "payment" in Article III:8(b), as opposed to "granting" or "maintaining" as used in other provisions dealing with subsidies. As noted by the majority, the dictionary meanings of "payment" include "[a] sum of money

<sup>453</sup> See paragraph 5.123 above.

<sup>454</sup> Emphasis added.

<sup>455</sup> Emphasis added.

<sup>456</sup> Appellate Body Report, *US – Carbon Steel*, para. 73.

<sup>457</sup> See Appellate Body Report, *Brazil – Desiccated Coconut*, pp. 12-13 and 17.

<sup>458</sup> Appellate Body Report, *US – Carbon Steel*, para. 73. (emphasis added)

<sup>459</sup> As discussed further below, ascribing different definitions to the term "subsidies" under the GATT 1994 and the SCM Agreement may also alter the carefully constructed balance between the rights and obligations with respect to the provision of subsidies under the covered agreements. See paras. 5.136-5.137 above.

(or *equivalent*) paid or payable" or "the remuneration of a person with money or its *equivalent*".<sup>460</sup> Importantly, the reference to "money" or its "*equivalent*" in these dictionary definitions suggests that the scope of "payment" is not limited to direct monetary transfers, but may also include other transfers having an "*equivalent*" value or effect. I recall in this regard that, having considered the *dictionary* meaning of "payment"<sup>461</sup>, which is independent of the context within which the term is used, the Appellate Body in *Canada – Dairy* observed that "according to these meanings, a 'payment' could be made in a form, other than money, that confers value, such as by way of goods or services."<sup>462</sup> I also recall that the Appellate Body in *Canada – Periodicals* stated that Article III:8(b) "was intended to exempt from the obligations of Article III only the payment of subsidies which involves the expenditure of revenue by a government".<sup>463</sup> While I agree that the "payment of subsidies" must involve the "expenditure of revenue by a government" in order for it to be justified under Article III:8(b), I do not consider that the Appellate Body's statement in *Canada – Periodicals* quoted above establishes that the only way through which a government can expend revenue is by means of a direct monetary transfer. Instead, I consider that this was clarified by the Appellate Body in its subsequent report in *Canada – Dairy*, where it explained that a "payment made in the form of goods or services is also 'financed' in the same way as a money payment, and, likewise, 'a charge on the public account' may arise as a result of a payment, or a legally binding commitment to make payment by way of goods or services, or as a result of revenue foregone."<sup>464</sup> Indeed, inasmuch as a charge on the public account is also an expenditure of revenue by the government, I consider that "payments" involving the expenditure of revenue by a government may take various forms and are not necessarily limited to direct monetary transfers. As the Appellate Body explained in *Canada – Dairy*, the foregoing of revenue, such as through a reduction, exemption, or suspension of taxes "otherwise due", incurs a charge on the public account and therefore involves the expenditure of revenue by a government.

5.130. I now address the contextual relevance of the first example of what constitutes the "payment of subsidies" set out under Article III:8(b), namely "payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of [Article III] ...". I note that the text of the first example serves as the lynchpin of both the Panel's analysis as well as my fellow Division Members' interpretation of Article III:8(b). Essentially, they reason that "if ... Article III:8(b) exempts tax discrimination from the scope of Article III, the reference in Article III:8(b) itself to 'taxes and charges applied consistently with the provisions of [Article III]' would be meaningless."<sup>465</sup> I note, however, that the reference in Article III:8(b) to "taxes or charges applied consistently with the provisions of [Article III]" is not an independent or express requirement for *all* measures falling within the scope of Article III:8(b). Instead, this reference is made in the context of the first of the two examples of the "payment of subsidies" contained in that provision, which reads, in relevant part: "the payment of subsidies exclusively to domestic producers, *including* payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of [Article III] and subsidies effected through governmental purchases of domestic products".<sup>466</sup> As my distinguished colleagues forming the majority note, the use of the word "including" makes clear that these examples are "not an exhaustive list" of the kind of programmes that would qualify as "payment of subsidies exclusively to domestic producers".<sup>467</sup> The treaty text relied on by the Panel, namely, "taxes or charges applied consistently with the provisions of [Article III]", is, by the terms of that provision, a requirement *only* in the case of "payments to domestic producers *derived from the proceeds of internal taxes or charges*".<sup>468</sup> Given

<sup>460</sup> Oxford English Dictionary online, definition of "payment", <http://www.oed.com/view/Entry/139189?rskey=9c29D2&result=1#eid>. (emphasis added)

<sup>461</sup> We note that the Appellate Body in *Canada – Dairy* referred to definitions of "payment" that are similar to the ones used by us: "[T]he *Oxford English Dictionary* ... defines 'payment' as 'the remuneration of a person with money or its *equivalent*'. ... Similarly, the *Shorter Oxford English Dictionary* describes a 'payment' as a 'sum of money (or other thing) paid'." (Appellate Body Report, *Canada – Dairy*, para. 107 (quoting Panel Report, *Canada – Dairy*, para. 7.92, in turn quoting *The Shorter Oxford English Dictionary*, C.T. Onions (ed.) (Guild Publishing, 1983), Vol. II, p. 1532) (emphasis added by the Appellate Body; fns omitted))

<sup>462</sup> Appellate Body Report, *Canada – Dairy*, para. 107.

<sup>463</sup> Appellate Body Report, *Canada – Periodicals*, p. 34. Although the Appellate Body in *Canada – Periodicals* relied on the GATT panel report in *US – Malt Beverages*, I consider that report to be of limited relevance as it was issued before the coming into force of the SCM Agreement, in general, and the definition of a subsidy set out in Article 1.1 of the SCM Agreement, in particular.

<sup>464</sup> Appellate Body Report, *Canada – Dairy*, para. 108. (emphasis added)

<sup>465</sup> Panel Reports, para. 7.85.

<sup>466</sup> Emphasis added.

<sup>467</sup> Appellate Body Report, *Canada – Periodicals*, pp. 33-34.

<sup>468</sup> Emphasis added.

the non-exhaustive nature of the list, I do not consider that this text can be divorced from the context of one specific example in Article III:8(b) and be regarded as an independent and stand-alone requirement that definitively delimits the scope of Article III:8(b) and applies to all instances of "payment of subsidies" that could possibly fall within the scope of that provision. In particular, subsidies provided through the foregoing of government revenue that is otherwise due, such as tax exemptions, are, by definition, not "derived from the proceeds of internal taxes or charges", thereby rendering the first example of limited relevance in such cases.

5.131. Instead of regarding the textual reference in the first example set out in Article III:8(b) as controlling under all circumstances, a proper understanding of the scope of Article III:8(b) ought to be grounded in the interpretation of the term "payment of subsidies" in accordance with the customary international rules of treaty interpretation.

5.132. As for the contextual relevance of Article III:2 of the GATT 1994, I am not entirely convinced that interpreting "payment of subsidies" as including "revenue foregone" would necessarily render the prohibition against tax discrimination in Article III:2 meaningless. In this regard, I note that Article 1.1(a)(1)(ii) of the SCM Agreement provides that there is a "financial contribution" by a government, sufficient to fulfil that element in the definition of a subsidy, where "government revenue that is *otherwise due* is foregone or not collected (e.g. fiscal incentives such as tax credits)."<sup>469</sup> The Appellate Body has explained that:

[T]he "*foregoing*" of revenue "*otherwise due*" implies that less revenue has been raised by the government than would have been raised in a different situation, or, that is, "*otherwise*". Moreover, the word "*foregone*" suggests that the government has given up an entitlement to raise revenue that it could "*otherwise*" have raised. This cannot, however, be an entitlement in the abstract, because governments, in theory, could tax *all* revenues.<sup>470</sup>

According to the Appellate Body, there must therefore be "some defined, normative benchmark against which a comparison can be made between the revenue actually raised and the revenue that would have been raised 'otherwise'".<sup>471</sup> In *US – FSC*, the Appellate Body agreed with the panel that "the basis of comparison must be the tax rules applied by the Member in question."<sup>472</sup>

5.133. The Appellate Body's interpretation of Article 1.1(a)(1)(ii) of the SCM Agreement therefore suggests that the notion of financial contribution in the form of "revenue foregone" that is "otherwise due" is narrower than just *any* form of discriminatory taxation which may be prohibited under Article III:2, in the abstract. In particular, revenue foregone must be "otherwise due" under the tax rules applied by the Member in question. I consider that a scheme applying discriminatory taxes to imported products and like domestic products would not constitute "revenue foregone" in as much as the lesser tax burden on domestic products would not, in and of itself, suggest that the government would have given up an entitlement to raise revenue that it could "otherwise" have raised as there would be no such entitlement under the tax rules in the first place. Seen in this light, "revenue foregone" is a narrower concept than tax discrimination in general, such that not all tax discrimination would *ipso facto* amount to "revenue foregone" and would thereby not be justified under Article III:8(b).

5.134. Therefore, far from rendering the prohibition against discriminatory taxation in Article III:2 redundant, an interpretation of the term "payment of subsidies" as including revenue foregone gives meaning and effect to the terms of both Articles III:2 and III:8(b), while at the same time respecting the carefully negotiated balance of rights and obligations under the SCM Agreement. As the majority correctly notes, the fact that a measure qualifies as the "payment of subsidies exclusively to domestic producers" and the resulting inconsistency with the national treatment obligation under Article III is therefore justified under Article III:8(b) does not suggest that such a measure would not be subject to the other relevant provisions of the GATT 1994 and the SCM Agreement. This was confirmed by the Appellate Body in *US – Tax Incentives*, where it explained that "even if the *granting of a subsidy* is exempt from the GATT national treatment obligation by virtue of it being paid exclusively to domestic producers within the meaning of Article III:8(b) of the GATT 1994, it may

<sup>469</sup> Emphasis added; fn omitted.

<sup>470</sup> Appellate Body Report, *US – FSC*, para. 90. (emphasis original)

<sup>471</sup> Appellate Body Report, *US – FSC*, para. 90.

<sup>472</sup> Appellate Body Report, *US – FSC*, para. 90.

still be found to be contingent upon the use by those producers of domestic over imported goods under Article 3.1(b) of the SCM Agreement."<sup>473</sup> Thus, in my view, the payment of subsidies exclusively to domestic producers through a reduction or exemption of internal taxes, though covered by the exception under Article III:8(b), would continue to be subject to the other relevant provisions of the GATT 1994 and the SCM Agreement.

5.135. The GATT 1994 and the SCM Agreement are both a part of a single treaty, namely, the WTO Agreement. The Appellate Body in *Korea – Dairy* explained that:

In light of the interpretive principle of effectiveness, it is the duty of any treaty interpreter to "read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously". An important corollary of this principle is that a treaty should be interpreted as a whole, and, in particular, its sections and parts should be read as a whole. Article II:2 of the WTO Agreement expressly manifests the intention of the Uruguay Round negotiators that the provisions of the WTO Agreement and the Multilateral Trade Agreements included in its Annexes 1, 2 and 3 must be read as a whole.<sup>474</sup>

To me, the restrictive interpretation of "payment of subsidies" as excluding "revenue foregone" arrived at by the majority denies effect to the key legal terms of the SCM Agreement.

5.136. As discussed, with the establishment of the WTO, the relevant provisions of the GATT 1994 and the SCM Agreement together define and reflect the whole package of rights and obligations of WTO Members with respect to subsidies.<sup>475</sup> The object and purpose of the SCM Agreement includes strengthening and improving the GATT disciplines relating to the use of both subsidies and countervailing measures, while, recognizing at the same time, the *right of Members to impose such measures under certain conditions*.<sup>476</sup> The SCM Agreement does not prohibit all subsidies, but instead contains detailed and intricate rules disciplining their use.<sup>477</sup> While some subsidies are "prohibited" under Part II of the Agreement, Part III makes it clear that others are only "actionable" and must be withdrawn (or their "adverse effects" removed), if they are "specific", within the meaning of Article 2 of the SCM Agreement, and when they cause "adverse effects"<sup>478</sup> to the interests of other Members.<sup>479</sup> In contrast to the detailed provisions of the SCM Agreement that, in disciplining the use of "actionable" subsidies, including revenue foregone, take into account the trade effects of the alleged subsidization, Article III:2 of the GATT 1994 sets out the national treatment obligation with respect to internal taxes and charges. Under Article III:2 any tax, however small, that is borne by products imported into the territory of a WTO Member, but not by the domestic like products would, without more, lead to a breach of that obligation.<sup>480</sup> Importantly, it is well established that the actual effects of such differential tax burden on imports are irrelevant to the analysis under Article III:2 of the GATT 1994.<sup>481</sup> The focus on the trade effects of subsidization, including through revenue foregone, which pervades the SCM Agreement disciplines concerning the use of "actionable" subsidies is therefore absent in the context of Article III:2 of the GATT 1994.

5.137. An interpretation of "payment of subsidies" in Article III:8(b) as excluding revenue foregone would undermine, inconsistently with Article 3.2 of the DSU as well as the fundamental principle of

<sup>473</sup> Appellate Body Report, *US – Tax Incentives*, para. 5.16. (emphasis added)

<sup>474</sup> Appellate Body Report, *Korea – Dairy*, para. 81. See also Appellate Body Report, *Argentina – Footwear (EC)*, para. 81.

<sup>475</sup> See Appellate Body Report, *Brazil – Desiccated Coconut*, p. 17.

<sup>476</sup> Appellate Body Report, *US – Softwood Lumber IV*, para. 64. The Appellate Body went on to note that "[i]t is in furtherance of this object and purpose that Article 1.1(a)(1)(iii) recognizes that subsidies may be conferred, not only through monetary transfers, but also by the provision of non-monetary inputs." (Ibid.)

<sup>477</sup> In *Canada – Aircraft (Article 21.5 – Brazil)*, the Appellate Body found it "worth recalling that the granting of a subsidy is not, in and of itself, prohibited under the SCM Agreement. Nor does granting a 'subsidy', without more, constitute an inconsistency with that Agreement. The universe of subsidies is vast. Not all subsidies are inconsistent with the SCM Agreement. The only 'prohibited' subsidies are those identified in Article 3 of the SCM Agreement." (Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 47)

<sup>478</sup> Article 5 of the SCM Agreement defines "adverse effects" as including "injury" to the domestic industry of another WTO Member, "nullification or impairment" of benefits accruing to other Members, and "serious prejudice" to the interests of another Member.

<sup>479</sup> See e.g. Panel Report, *US – Offset Act (Byrd Amendment)*, para. 7.106.

<sup>480</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 23, DSR 1996:I, p. 97; see also Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 112.

<sup>481</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 16-17, DSR 1996:I, pp. 109-110.



effectiveness in treaty interpretation, the careful balance of rights and obligations under the SCM Agreement with respect to an entire category of measures that are expressly included within the definition of a subsidy in Article 1.1, namely, the foregoing of government revenue that is otherwise due. In other words, the majority's interpretation of the term "payment of subsidies" in Article III:8(b) would fundamentally alter the carefully constructed balance of rights and obligations under the SCM Agreement and the GATT 1994 with respect to subsidies and would risk rendering redundant the actionable subsidies disciplines of the SCM Agreement insofar as subsidies in the form of the foregoing of revenue are concerned.

5.138. For the above reasons, I am of the view that the term "payment of subsidies" in Article III:8(b) refers to the provision by a WTO Member, whether through monetary or non-monetary transfers having an equivalent effect, of a subsidy, as defined in Article 1.1 of the SCM Agreement. In my view, this is the only interpretation that, consistently with the customary rules of treaty interpretation, gives meaning and effect to the precise terms of Article III:8(b), while at the same time respecting the carefully negotiated balance of rights and obligations under the SCM Agreement, which forms part of the single package under the WTO Agreement. Insofar as they constitute the "payment of subsidies exclusively to domestic producers"<sup>482</sup>, the measures at issue in this dispute, as well as any conditions for eligibility for the payment of subsidies that define the class of eligible "domestic producers" by reference to their activities in the subsidized products' markets, would, in my view, be justified under Article III:8(b).

### 5.3 Article 3.1(a) of the SCM Agreement

#### 5.3.1 Article 1.1(a)(1)(ii) of the SCM Agreement: PEC and RECAP programmes

##### 5.3.1.1 Introduction

5.139. We now turn to consider Brazil's claim on appeal that the Panel erred in finding that the tax suspensions granted under the PEC programme and the RECAP programme are subsidies within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement and are contingent upon export performance under Article 3.1(a) of the SCM Agreement.<sup>483</sup>

5.140. Brazil contends that the Panel erred in the application of Article 1.1(a)(1)(ii) of the SCM Agreement by failing to use the tax treatment of companies that are structural tax accumulators as the benchmark treatment.<sup>484</sup> Brazil argues, in particular, that, "[i]nstead of examining the principles and structure of Brazil's taxation regime and identifying what constitutes 'comparably situated taxpayers', the Panel erroneously focused on identifying a 'general rule of taxation' and its potential exemptions."<sup>485</sup> In the event that we were to conclude that the Panel did not err in its identification of the relevant benchmark treatment, Brazil submits three alternative claims of error. First, Brazil claims that the Panel erred in its comparison of the selected benchmark treatment with the challenged treatment under the PEC and RECAP programmes by "arbitrarily distinguish[ing] between taxpayers situated within the benchmark".<sup>486</sup> Second, Brazil submits that the Panel erred in concluding that the possible cash availability and implicit interest income that the Brazilian Government could generate, had the tax been paid in advance and not offset, constitute "government revenue that is otherwise due" under Article 1.1(a)(1)(ii) of the SCM Agreement.<sup>487</sup> Finally, Brazil contends that the Panel failed to make an objective assessment of the matter before it pursuant to Article 11 of the DSU by "misreading" and disregarding data in a table submitted by Brazil.<sup>488</sup>

<sup>482</sup> As correctly noted by the majority, in addition to the scope of "payment of subsidies", the focus of inquiry under Article III:8(b) is also on whether the domestic entity at issue is a *producer* of the product with respect to which a violation of the national treatment obligation arising from the "payment of subsidies" is alleged.

<sup>483</sup> Brazil's Notice of Appeal, para. 26; Brazil's appellant's submission, para. 307.

<sup>484</sup> Brazil's appellant's submission, paras. 309 and 324.

<sup>485</sup> Brazil's appellant's submission, para. 316.

<sup>486</sup> Brazil's appellant's submission, para. 327. (emphasis omitted)

<sup>487</sup> Brazil's appellant's submission, para. 333

<sup>488</sup> Brazil's appellant's submission, paras. 345, 351, and 360. Specifically, Brazil argues that, "[i]n direct contradiction to Brazil's explanation that the study was elaborated with data 'from all companies', the Panel found that the study 'appears to reflect the situation of 22 companies'." (Ibid., para. 351)



5.141. The European Union and Japan request that we reject Brazil's claims.<sup>489</sup> With respect to the Panel's identification of a benchmark for comparison, the European Union and Japan argue that the Panel did not try to identify a "general rule"<sup>490</sup>, as suggested by Brazil, but instead was examining "the structure of [Brazil's] domestic tax regime and its organising principles".<sup>491</sup> With respect to Brazil's alternative claims, the European Union and Japan first submit that the Panel did not disregard the treatment of a particular group of taxpayers (i.e. those that normally offset tax credits during the same taxation period) within the benchmark when making a comparison.<sup>492</sup> Instead, the Panel weighed "all the scenarios to conclude that there was revenue foregone or not collected in the 'rather frequent scenario' where taxpayers cannot offset their tax credits within the same taxation period".<sup>493</sup> Second, the European Union and Japan contend that the Panel did not make an error in considering that the cash availability and implicit interest income that the Brazilian Government foregoes or does not collect by virtue of tax suspensions under the PEC and RECAP programmes amount to a financial contribution under Article 1.1(a)(1)(ii) of the SCM Agreement.<sup>494</sup> Finally, the European Union and Japan assert that Brazil has failed to show that the Panel made an error under Article 11 of the DSU in assessing the table submitted by Brazil.<sup>495</sup>

5.142. We begin with an overview of the relevant aspects of the PEC and RECAP programmes. We also include a summary of the relevant Panel findings and our understanding of Article 1.1(a)(1)(ii) of the SCM Agreement.

### 5.3.1.2 PEC and RECAP programmes

5.143. With respect to the programmes at issue, the Panel explained that, under the PEC programme, the IPI tax and the PIS/PASEP, COFINS, PIS/PASEP-Importation, and COFINS-Importation contributions are suspended with respect to raw materials, intermediate goods, and packaging materials purchased by predominantly exporting companies.<sup>496</sup> The tax suspension applies either at the time when the product leaves the industrial establishment (for purchases in the domestic market) or at the time of the customs clearance (for imports).<sup>497</sup> The suspension expires and the tax becomes definitively non-due upon exportation or sale in the domestic market of the final good incorporating the raw materials, intermediate goods, and packaging materials for which the taxes were suspended.<sup>498</sup>

5.144. For purposes of the IPI tax suspension under the PEC programme, a predominantly exporting company is a legal person whose gross revenue derived from exports to other countries during the calendar year immediately prior to the year of purchase of the covered products, exceeded 50% of its total gross revenue from the sales of goods and services over the same period, after taxes and other contributions levied on sales.<sup>499</sup>

5.145. For purposes of the suspensions of the PIS/PASEP, COFINS, PIS/PASEP-Importation, and COFINS-Importation contributions under the PEC programme, a predominantly exporting company

<sup>489</sup> European Union's appellee's submission, para. 369; Japan's appellee's submission, para. 126.

<sup>490</sup> European Union's appellee's submission, para. 398; Japan's appellee's submission, para. 133.

<sup>491</sup> European Union's appellee's submission, para. 398 (quoting Appellate Body Report, *US – Large Civil Aircraft* (2<sup>nd</sup> complaint), para. 815); Japan's appellee's submission, para. 133.

<sup>492</sup> European Union's appellee's submission, para. 409; Japan's appellee's submission, para. 135.

<sup>493</sup> European Union's appellee's submission, para. 412.

<sup>494</sup> European Union's appellee's submission, para. 428; Japan's appellee's submission, para. 137.

<sup>495</sup> European Union's appellee's submission, para. 439; Japan's appellee's submission, para. 138.

<sup>496</sup> Panel Reports, paras. 2.148 and 2.150 (referring to Law 10,637/2002 (Panel Exhibits JE-94 and BRA-100), Article 29, section 1.II (for IPI tax); Law 10,865/2004 (Panel Exhibit JE-181), Article 40 (for PIS/PASEP and COFINS contributions)).

<sup>497</sup> Panel Reports, para. 2.151 (referring to Normative Instruction (*Instrução Normativa*) RFB 948 of 15 June 2009 (Normative Instruction RFB 948/2009) (Panel Exhibit JE-191), Articles 12 and 13; Normative Instruction SRF 595 of 27 December 2005 (Normative Instruction SRF 595/2005) (Panel Exhibit JE-193), Article 8; and Decree 6,759 of 5 February 2009 governing the administration of customs activities and the inspection, control and taxation of foreign trade operations (Decree 6,759/2009) (Panel Exhibit JE-8), Article 247).

<sup>498</sup> Panel Reports, para. 2.152 (referring to Law 10,637/2002 (Panel Exhibits JE-94 and BRA-100), Article 29, section I.II; Law 10,865/2004 (Panel Exhibit JE-181), Article 40; Normative Instruction RFB 948/2009 (Panel Exhibit JE-191), Article 20; Normative Instruction SRF 595/2005 (Panel Exhibit JE-193), Article 9).

<sup>499</sup> Panel Reports, paras. 2.156 and 7.1136 (referring to Law 10,637/2002 (Panel Exhibits JE-94 and BRA-100), Article 29, section 3).

is a legal person whose gross revenue from exports, in the calendar year immediately prior to the year of purchase of the covered products, was equal to or greater than 50% of its total gross revenue from the sale of goods and services in the same period, after taxes and other contributions levied on sales.<sup>500</sup>

5.146. Under the RECAP programme, the PIS/PASEP, COFINS, PIS/PASEP-Importation, and COFINS-Importation contributions are suspended with respect to purchases of new machinery, tools, apparatus, instruments, and equipment by predominantly exporting companies.<sup>501</sup> As the Panel explained, "[t]he suspension becomes a zero rate once the export commitments have been achieved."<sup>502</sup>

5.147. For purposes of the RECAP programme, a predominantly exporting company is a legal person whose gross revenue from exports, in the calendar year immediately before the year in which it became a member of the programme, was equal to or greater than 50% of its total gross revenue from the sale of goods and services over the same period, and who commits to maintaining that percentage of exports for a period of two calendar years.<sup>503</sup>

### **5.3.1.3 Whether the Panel erred in the application of Article 1.1(a)(1)(ii) of the SCM Agreement in determining the benchmark treatment**

5.148. Brazil claims that the Panel erred in finding that the tax suspensions granted under the PEC and RECAP programmes are subsidies within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement. As a first ground of its appeal, Brazil considers that the Panel erred in its determination of the benchmark for comparison. In the event that we uphold the Panel's benchmark determination, Brazil submits three alternative claims. As noted above, Brazil argues that the Panel: (i) erred in its comparison of the selected benchmark treatment with the challenged treatment under the PEC and RECAP programmes; (ii) erred in finding that the possible cash availability and implicit interest income constitute "government revenue that is otherwise due"; and (iii) failed to make an objective assessment of the matter before it pursuant to Article 11 of the DSU by disregarding certain evidence submitted by Brazil.<sup>504</sup>

5.149. We recall that, in its analysis, the Panel first examined whether the tax suspensions granted under the PEC and RECAP programmes constituted financial contributions in the form of government revenue that is otherwise due, which is foregone or not collected.

5.150. The Panel noted that the challenged tax treatment comprised the following categories: (i) the IPI tax suspensions on purchases of raw materials, intermediate goods, and packaging materials (for purposes of the PEC programme); (ii) the suspensions of the PIS/PASEP and COFINS contributions, or PIS/PASEP-Importation and COFINS-Importation contributions, on purchases of raw materials, intermediate goods, and packaging materials (for purposes of the PEC programme); and (iii) the suspensions of the PIS/PASEP and COFINS contributions, or PIS/PASEP-Importation and COFINS-Importation contributions, on purchases of new machinery, apparatus, instruments, and equipment incorporated into the fixed assets of the accredited company (for purposes of the RECAP programme).<sup>505</sup> The Panel found that there was "evidence demonstrating that the objective reasons

<sup>500</sup> Panel Reports, paras. 2.157 and 7.1137 (referring to Law 10,865/2004 (Panel Exhibit JE-181), Article 40, section 1). In addition, companies that are just starting activities in Brazil, or that have not achieved the export percentage required in the previous year, may be entitled to the PIS/PASEP and COFINS contribution suspensions if they commit to reach and maintain the required export level for a period of three calendar years. (Ibid., paras. 2.158 and 7.1137 (referring to Normative Instruction SRF 595/2005 (Panel Exhibit JE-193), Article 3, section 1))

<sup>501</sup> Panel Reports, paras. 2.163 and 7.1138.

<sup>502</sup> Panel Reports, para. 7.1138.

<sup>503</sup> Panel Reports, paras. 2.170 and 7.1139. Companies that are starting activities in Brazil, or that have not reached the export percentage required in the previous year, may be entitled to the suspensions if they commit to reach and maintain the required export level for a period of three calendar years. (Ibid., para. 2.171 (referring to Law 11,196 of 21 November 2005 establishing the special scheme for the acquisition of capital goods for exporting companies (RECAP) (Law 11,196/2005) (Panel Exhibit JE-182), Article 13, section 2)).

<sup>504</sup> Brazil's appellant's submission, paras. 326-327, 333, 345, 351, and 361.

<sup>505</sup> Panel Reports, para. 7.1156.

behind the tax treatment [are] to tackle the problem of credit-accumulation, and in so doing to increase the competitiveness of Brazilian companies".<sup>506</sup>

5.151. In its identification of the benchmark treatment for each of the three categories of the identified tax treatments, the Panel rejected Brazil's argument that tax suspensions are the benchmark treatment for structurally credit-accumulating companies, including the predominantly exporting companies.<sup>507</sup> The Panel agreed with Brazil that there are other companies, in addition to predominantly exporting companies, that are entitled to the suspension of relevant taxes.<sup>508</sup> The Panel considered, however, that nothing in the evidence on the record seemed to suggest that "other companies to which the tax suspensions apply are structural credit accumulators, or that the tax suspensions ... were created to tackle the problem of structural credit accumulation for these companies."<sup>509</sup>

5.152. The Panel further noted that there are producers of low-taxed products, which are more likely to accumulate tax credits, that are not entitled to tax suspensions, on the one hand, and producers of higher taxed products, which are less likely to accumulate tax credits, that *are* entitled to such tax suspensions, on the other hand.<sup>510</sup> The Panel found, with respect to the three categories of tax treatment, that "the benchmarks to be applied are the economy-wide tax treatments from which the suspensions are taken or, in other words, the tax treatment applicable to non-accredited companies."<sup>511</sup>

5.153. The Panel then compared the challenged treatment with the "rather frequent" scenario, in which companies are not able to offset their credits and have to request compensation or reimbursement.<sup>512</sup> The Panel considered that, "under the challenged treatment, the Government will never be able to benefit from the cash availability and implicit interest income, which could have lasted from the moment of importation (in the case of imported products) or from one taxation period (in the case of domestic products) to 360 days after the request for compensation or reimbursement, under the benchmark treatment."<sup>513</sup> The Panel thus concluded, with respect to the three categories of tax treatment at issue, that, "under this rather frequent scenario, the Government is foregoing revenue in the form of the implicit interest on the tax revenue collected where the offsetting credits have not (yet) been used."<sup>514</sup> The Panel also concluded that the subsidies at issue confer a benefit and that they thus constitute subsidies within the meaning of Article 1 of the SCM Agreement.<sup>515</sup> Subsequently, the Panel found that the subsidies granted under the PEC and RECAP programmes are contingent upon export performance within the meaning of Article 3.1(a) of the SCM Agreement, and thus prohibited under Articles 3.1(a) and 3.2 of the SCM Agreement.<sup>516</sup>

5.154. We start by addressing Brazil's claim that the Panel erred in determining the benchmark for comparison. In Brazil's view, the Panel erroneously rejected the tax treatment of structural credit accumulators as a benchmark for comparison and instead concluded that the proper benchmark was the treatment applicable to purchases by non-accredited companies, i.e. the obligation to pay the full amount of the applicable tax.<sup>517</sup> Brazil submits that "[t]he Panel erroneously sought to ascertain whether a 'general rule' of taxation existed under Brazilian law pursuant to which all suspensions

<sup>506</sup> Panel Reports, para. 7.1162.

<sup>507</sup> Panel Reports, paras. 7.1171, 7.1186, and 7.1199.

<sup>508</sup> Panel Reports, para. 7.1167 (referring to Law 10,637/2002 (Panel Exhibit JE-94) and to Brazil's response to Panel question No. 21). See also Panel Reports, para. 7.1183 (referring to Brazil's response to Panel question No. 21).

<sup>509</sup> Panel Reports, para. 7.1167.

<sup>510</sup> Panel Reports, paras. 7.1168, 7.1184, and 7.1199.

<sup>511</sup> Panel Reports, para. 7.1164. See also paras. 7.1172, 7.1187, and 7.1200.

<sup>512</sup> Panel Reports, paras. 7.1174, 7.1189, and 7.1202. The Panel explained that "[i]t is fairly common that companies are not able to offset the full amount of their credits and have to request compensation or reimbursement, so this scenario seems rather frequent." (Ibid. (referring to Brazil's first written submission, para. 758 (DS472) and para. 691 (DS497))). In this case, "the Brazilian Government will retain the amount of tax paid by the seller until the non-accredited company buying the products is able to offset it (during subsequent taxation periods); or until the Brazilian Government compensates or reimburses the face amount of the credit, without interest, to the non-accredited company buying the products (within 360 days of the date of the request for compensation or reimbursement)." (Panel Reports, paras. 7.1175, 7.1190, and 7.1203)

<sup>513</sup> Panel Reports, paras. 7.1179, 7.1194, and 7.1207. (fns omitted)

<sup>514</sup> Panel Reports, paras. 7.1179, 7.1194, and 7.1207.

<sup>515</sup> Panel Reports, paras. 7.1212 and 7.1223.

<sup>516</sup> Panel Reports, para. 7.1237.

<sup>517</sup> Brazil's appellant's submission, paras. 307 and 309.

and exemptions of taxes on inputs and capital goods relate to the problem of structural credit accumulation"<sup>518</sup>, despite the Appellate Body's reservations, expressed in *US – FSC (Article 21.5 – EC)* and *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, about panels trying to identify such a "general rule of taxation".<sup>519</sup> Brazil recalls that, "in identifying the relevant benchmark treatment, a panel is required to 'develop an understanding of the tax structure and principles that best explains that Member's tax regime, and to provide a reasoned basis for identifying what constitutes comparable income of comparably situated taxpayers.'"<sup>520</sup>

5.155. Brazil also maintains that, in order to avoid structural accumulation of indirect taxes, it created "an alternative taxation method for the income of structural credit accumulators", which applies "to companies of many different sectors of the economy which have no or low taxation on their sales".<sup>521</sup> In particular, Brazil points out that Article 29 of the Law 10,637/2002 "exempts from the payment of taxes on inputs a wide variety of sectors of the Brazilian economy whose products are subject to low or no taxation, including producers of animal and vegetable products and oils, foodstuffs, chemicals, footwear, auto and aircraft parts, informatics products, and predominantly exporting companies".<sup>522</sup> In Brazil's view, the appropriate benchmark treatment for comparison is the tax treatment afforded to other structural credit accumulators.<sup>523</sup>

5.156. The European Union and Japan contend that the Panel properly applied the test developed by the Appellate Body in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)* to determine the benchmark treatment.<sup>524</sup> They also submit that, contrary to Brazil's allegations, the Panel did not attempt to identify a "general rule" of taxation pursuant to which all suspensions and exemptions of taxes on inputs and capital goods would relate to a problem of structural credit accumulation, but rather was addressing Brazil's own argument about the existence of such a rule.<sup>525</sup>

5.157. We recall that, before the Panel, as well as on appeal, Brazil has argued that the appropriate benchmark for comparison with the tax suspensions and exemptions under the PEC and RECAP programmes is the treatment granted to companies that tend to structurally accumulate credits.<sup>526</sup> In its analysis of the benchmark treatment with respect to the IPI tax suspensions<sup>527</sup>, "[t]he Panel agree[d] with Brazil that there are other companies, in addition to the companies accredited or registered as predominantly exporting companies, which are entitled to the IPI tax suspension on the purchase of raw materials, intermediate goods and packaging materials."<sup>528</sup> Specifically, the Panel noted that, pursuant to Article 29 of Law 10,637/2002, the tax suspension also applies to: (i) establishments dedicated primarily to the manufacture of products classified in chapters 2, 3, 4, 7, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 20, 23, 28, 29, 30, 31, and 64 (21 chapters in total) of the Industrial Goods Tax Classification Table, as well as under codes 2209.00.00 and 2501.00.00, and at positions 21.01 to 21.05.00 of the Industrial Goods Tax Classification Table; (ii) industrial establishments that primarily manufacture components, chassis, bodies, parts, and pieces of automotive products; (iii) industrial establishments that primarily manufacture parts and pieces intended for the aerospace industry; and (iv) industrial establishments that primarily manufacture the goods benefiting from the Informatics programme.<sup>529</sup> Moreover, the Panel observed that "[t]he suspension also applies to companies qualified under the Special Regime for the Brazilian Aerospace Industry [(RETAERO)] and the Special Regime to Incentive Computers for Educational Use (REIMCOMP)".<sup>530</sup>

<sup>518</sup> Brazil's appellant's submission, para. 309 (quoting Panel Reports, paras. 7.1167, 7.1169, and 7.1183). (fn omitted; emphasis omitted)

<sup>519</sup> Brazil's appellant's submission, para. 310 (referring to Appellate Body Reports, *US – FSC (Article 21.5 – EC)*, para. 91; *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 815).

<sup>520</sup> Brazil's appellant's submission, para. 310 (quoting Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 813). (emphasis omitted)

<sup>521</sup> Brazil's appellant's submission, para. 312.

<sup>522</sup> Brazil's appellant's submission, para. 313.

<sup>523</sup> Brazil's appellant's submission, para. 315.

<sup>524</sup> European Union's appellee's submission, para. 395; Japan's appellee's submission, para. 129.

<sup>525</sup> European Union's appellee's submission, para. 398; Japan's appellee's submission, para. 133.

<sup>526</sup> Panel Reports, para. 7.1165; Brazil's second written submission to the Panel, para. 216; Brazil's appellant's submission, para. 309.

<sup>527</sup> We recall that the Panel subsequently applied this analysis to other categories of the tax treatment.

<sup>528</sup> Panel Reports, para. 7.1167.

<sup>529</sup> Panel Reports, para. 7.1167.

<sup>530</sup> Panel Reports, para. 7.1167 (referring to Brazil's response to Panel question No. 21).

5.158. The Panel, however, considered that the selection of companies entitled to the tax suspensions "d[id] not seem to be directly linked to the problem of credit-accumulation, so as to create a general rule for structurally or predominantly credit accumulating companies".<sup>531</sup> In the Panel's view, the evidence on the record did not demonstrate that companies to which the suspension applied were structural credit accumulators.<sup>532</sup> The Panel observed that, on the one hand, there are producers of low-taxed products, which are more likely to accumulate tax credits, that are not entitled to tax suspensions and, on the other hand, producers of higher taxed products, which are less likely to do so, that were entitled to the suspensions.<sup>533</sup> The Panel further referred to Japan's observation that "companies that export products but do not reach the 50% threshold of gross revenue derived from exports can be credit accumulators and yet cannot benefit from the tax suspensions", which, in the Panel's view, "puts further into question the existence of a general rule for credit accumulators".<sup>534</sup> The Panel was "not convinced" that the availability of suspensions for other companies, in addition to the predominantly exporting companies, was "sufficient to prove the existence of a general rule for structurally or predominantly credit accumulating companies".<sup>535</sup> The Panel thus found that Brazil has not demonstrated that the tax suspensions were the benchmark treatment for structurally credit-accumulating companies and, instead, defined the benchmark as "the treatment applicable to purchases by non-accredited companies of raw materials, intermediate goods and packaging materials used in the manufacture of their products".<sup>536</sup>

5.159. The Panel subsequently relied on these findings in determining the benchmark for comparison with the suspensions of the PIS/PASEP and COFINS contributions and PIS/PASEP-Importation and COFINS-Importation contributions on purchases of raw materials, intermediate goods, and packaging materials (for purposes of PEC)<sup>537</sup>, as well as the suspensions of the PIS/PASEP and COFINS contributions and PIS/PASEP-Importation and COFINS-Importation contributions on purchases of new machinery, apparatus instruments, and equipment (for purposes of RECAP).<sup>538</sup> For these two categories of treatment, the Panel also determined the benchmark to be the treatment applicable to purchases by non-accredited companies, i.e. the obligation to pay the full amount of the applicable tax.<sup>539</sup>

5.160. On appeal, the participants disagree as to whether, in determining the benchmark treatment, the Panel erroneously sought to ascertain the existence of a "general rule of taxation" instead of examining the organizing principles and structure of Brazil's taxation regime and identifying what constitutes comparable income of comparably situated taxpayers.<sup>540</sup>

<sup>531</sup> Panel Reports, para. 7.1167.

<sup>532</sup> Panel Reports, para. 7.1167.

<sup>533</sup> Panel Reports, para. 7.1168. The Panel observed that "an examination of the products for which the IPI tax is suspended or exempted pursuant to Article 29 of Law 10,637/2002 indicates that there is no pattern of suspending the IPI tax only for products with no or low taxation." (Ibid.) In particular, the Panel noted that "many of the products that are subject to special regimes are subject to a tax rate of 5%, 10%, 20% and even 30% and, for instance, Chapters 50 to 54 of the [Table of Application of the Tax on Industrialised Products (TIPI)] are subject to 0% rate and are not covered by Article 29 of Law 10,637/2002." (Ibid. (referring to European Union's response to Panel question No. 41, para. 156))

<sup>534</sup> Panel Reports, para. 7.1169.

<sup>535</sup> Panel Reports, para. 7.1170.

<sup>536</sup> Panel Reports, para. 7.1172.

<sup>537</sup> Panel Reports, paras. 7.1181-7.1187.

<sup>538</sup> Panel Reports, paras. 7.1197-7.1200.

<sup>539</sup> Panel Reports, paras. 7.1186-7.1187 and 7.1200. With respect to the suspension of PIS/PASEP and COFINS contributions and their importation equivalents on purchases of new machinery, apparatus, instruments, and equipment (for purposes of PEC), the Panel observed that "the selection by the Brazilian Government of companies entitled to the suspensions of PIS/PASEP and COFINS contributions, or PIS/PASEP-Importation and COFINS-Importation contributions, does not seem to be directly linked to the problem of credit-accumulation, so as to create a general rule for structurally or predominantly credit accumulating companies." (Ibid., para. 7.1183) With respect to the suspension of PIS/PASEP and COFINS contributions and their importation equivalents on purchases of new machinery, apparatus, instruments, and equipment (for purposes of RECAP), the Panel observed that "the accredited and non-accredited companies purchasing the new machinery, apparatus, instruments and equipment used to manufacture products are identically situated, except for the fact of accreditation." (Ibid., para. 7.1200)

<sup>540</sup> Brazil's appellant's submission, paras. 309-310, 317, and 323; European Union's appellee's submission, para. 398; Japan's appellee's submission, para. 128.

5.161. Article 1.1(a)(1)(ii) of the SCM Agreement provides:

- 1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:
- (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
    - ...
    - (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)[.]<sup>541</sup>

5.162. The Appellate Body has previously explained that a panel examining a claim under Article 1.1(a)(1)(ii) of the SCM Agreement must: (i) identify the tax treatment that applies to the income of the alleged subsidy recipients<sup>542</sup>; (ii) identify a benchmark for comparison<sup>543</sup>; and (iii) compare the challenged tax treatment and the reasons for it with the benchmark tax treatment.<sup>544</sup> The Appellate Body has also expressed reservations about a panel seeking to identify a general rule and exception relationship in determining the existence of a revenue otherwise due that is foregone or not collected under Article 1.1(a)(1)(ii). The Appellate Body explained that, "[g]iven the variety and complexity of domestic tax systems, it will usually be very difficult to isolate a 'general' rule of taxation and 'exceptions' to that 'general' rule"<sup>545</sup>, and that an examination under Article 1.1(a)(1)(ii) "must be sufficiently flexible to adjust to the complexities of a Member's domestic rules of taxation".<sup>546</sup> In fact, "a domestic tax system may be so replete with exceptions" that the rate applicable to the general category of income would no longer represent a general rule but, rather, an exception.<sup>547</sup> In seeking to identify a general rule and an exception, "a panel might artificially create a rule and an exception where no such distinction exists."<sup>548</sup>

5.163. The determination of a benchmark for comparison entails, instead, identifying "the tax treatment of comparable income of comparably situated taxpayers".<sup>549</sup> This exercise "involves an examination of the structure of the domestic tax regime and its organizing principles" and requires the panel "to develop an understanding of the tax structure and principles that best explains that Member's tax regime".<sup>550</sup> Such an examination must be conducted on the basis of the "rules of taxation that each Member, by its own choice, establishes for itself".<sup>551</sup> In its identification of a benchmark, a panel must be aware of the limitations inherent in identifying and comparing a general rule of taxation and an exception from that rule since such an approach "could result in a finding that government revenue otherwise due has been foregone anytime the tax rate applicable to a recipient is lowered".<sup>552</sup>

5.164. In addressing Brazil's contention that the suspension of taxes for credit-accumulating companies, including the predominantly exporting companies, is the benchmark treatment, the Panel agreed with Brazil that there were other companies, in addition to those accredited or registered as predominantly exporting companies, for which the IPI tax was suspended.<sup>553</sup> We recall the Panel's finding that those were companies referred to in Article 29 of the Law 10,637/2002 and

<sup>541</sup> Fn omitted.

<sup>542</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 812. The Appellate Body has observed that "[i]dentifying such tax treatment will entail consideration of the objective reasons behind that treatment and, where it involves a change in a Member's tax rules, an assessment of the reasons underlying that change." (Ibid.)

<sup>543</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 813.

<sup>544</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 814. The Appellate Body has explained that "[s]uch a comparison will enable a panel to determine whether, in the light of the treatment of the comparable income of comparably situated taxpayers, the government is foregoing revenue that is otherwise due in relation to the income of the alleged recipients." (Ibid.)

<sup>545</sup> Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 91.

<sup>546</sup> Appellate Body Report, *US – FSC (Article 21.5 – EC)*, fn 66 to para. 91.

<sup>547</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 815.

<sup>548</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 815.

<sup>549</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 813.

<sup>550</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 813.

<sup>551</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 813 (quoting Appellate Body Report, *US – FSC*, para. 90).

<sup>552</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 815.

<sup>553</sup> Panel Reports, para. 7.1167.

under the RETAERO<sup>554</sup> and REIMCOMP regimes.<sup>555</sup> We note that, pursuant to Article 29 of the Law 10,637/2002, tax suspensions apply to companies that are dedicated primarily to the manufacture of products classified under 21 chapters and codes 2209.00.00 and 2501.00.00, and positions 21.01 to 21.05.00 of the Industrial Classification Table, as well as companies that primarily manufacture: (i) components, chassis, bodies, parts, and pieces of automotive products; (ii) parts and pieces intended for the aerospace industry; and (iii) goods benefiting from the Informatics programme.<sup>556</sup>

5.165. Notwithstanding this observation, the Panel rejected the treatment of companies that are subject to tax suspensions as a benchmark because, in its view, "the IPI tax suspensions d[id] not seem to be directly linked to the problem of credit-accumulation, so as to create a *general rule* for structurally or predominantly credit accumulating companies."<sup>557</sup> In reaching this conclusion, the Panel found that there were: (i) producers of low-taxed products, which are more likely to accumulate tax credits, that were not entitled to the suspensions; and (ii) producers of higher taxed products, which are less likely to accumulate tax credits, that were entitled to the suspensions.<sup>558</sup> Thus, the fact that, on the one hand, not all actual or potential credit accumulators were entitled to the suspensions and, on the other hand, some of the companies entitled to the suspensions were unlikely to accumulate credits, confirmed the Panel's view that there was no "general rule"<sup>559</sup> for structurally or predominantly credit-accumulating companies. The Panel further mentioned Brazil's argument that "it is not possible to predict as a *general rule* and for all situations when a company that accumulates credits becomes a structurally credit accumulating company."<sup>560</sup> Having said that, the Panel concluded again that it was "not convinced" that the availability of tax suspensions for other companies, in addition to the predominantly exporting companies, was "sufficient to prove the existence of a *general rule* for structurally or predominantly credit accumulating companies".<sup>561</sup>

5.166. In its analysis, the Panel sought to determine the existence of a "general rule" for companies that structurally accumulate credits.<sup>562</sup> The Panel considered that such a general rule would exist if the tax suspensions were to apply to all the actual or potential credit accumulators and were not to apply to companies that do not or are unlikely to accumulate credits. The Panel rejected the tax suspensions as the benchmark treatment because it considered that some companies to which the tax suspensions applied were not actual or potential credit accumulators, and because some companies to which the suspensions did not apply were accumulating credits. As a result, the Panel could not establish the existence of a "general rule" of taxation.

5.167. However, as noted, in determining a benchmark for comparison, a panel must be cognizant of the limitations inherent in seeking to identify a general rule of taxation and an exception from that rule, because such an approach may lead to an overly narrow conception of which rules are relevant in identifying a benchmark.<sup>563</sup> It is not sufficient, once a general rule of taxation has been identified, to conduct an analysis limited to the determination that, but for the challenged measure, a higher tax liability would have attached by virtue of a general rule.<sup>564</sup> Rather, even if scrutiny of a Member's tax regime indicates the presence of a general rule and an exception relationship, a panel would be expected "to further examine the structure of the domestic tax regime and its organising principles"<sup>565</sup> in order to determine what is "the tax treatment of comparable income of comparably

<sup>554</sup> Before the Panel, Brazil explained that RETAERO is aimed at addressing the issue of credit accumulation within suppliers of aerospace inputs by providing a zero rate or suspension of indirect taxes for such inputs. (Brazil's first written submission to the Panel, para. 768 (DS472))

<sup>555</sup> Panel Reports, para. 7.1167. Brazil explained before the Panel that REIMCOMP was aimed at avoiding tax credit accumulation by computer-equipment manufacturers that win the public bidding process required to sell computers to public schools. (Brazil's first written submission to the Panel, para. 770 (DS472)).

<sup>556</sup> Panel Reports, para. 7.1167 (referring to Law 10,637/2002 (Panel Exhibit JE-94)).

<sup>557</sup> Panel Reports, para. 7.1167. (emphasis added)

<sup>558</sup> Panel Reports, paras. 7.1168-7.1169.

<sup>559</sup> Panel Reports, paras. 7.1167 and 7.1169-7.1170.

<sup>560</sup> Panel Reports, para. 7.1170 (quoting Brazil's response to Panel question No. 21). (emphasis added)

<sup>561</sup> Panel Reports, para. 7.1170. (emphasis added) In the similar vein, in its analysis of the benchmark treatment for the suspensions of the PIS/PASEP and COFINS contributions and their importation equivalents, the Panel observed that the selection of companies entitled to the tax suspensions did not seem to be directly linked to the problem of structural credit accumulation, so as to create a general rule for structurally or predominantly credit-accumulating companies. (Panel Reports, para. 7.1183)

<sup>562</sup> Panel Reports, paras. 7.1167 and 7.1169-7.1170.

<sup>563</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, paras. 815 and 818.

<sup>564</sup> Appellate Body Reports, *US – FSC*, para. 91; *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, paras. 815 and 818.

<sup>565</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 815.

situated taxpayers".<sup>566</sup> The Panel commenced its analysis with an examination of Brazil's domestic tax regime by identifying categories of companies subject to tax suspensions. The Panel determined, in this respect, that there were other companies, in addition to those qualified as predominantly exporting companies, that were entitled to the relevant tax suspensions. Having done so, however, the Panel ultimately limited its analysis to seeking to identify the existence of a general rule of taxation to which the challenged treatment would be an exception. By doing so, the Panel effectively predetermined a finding of the existence of the revenue otherwise due that is foregone or not collected under Article 1.1(a)(1)(ii) of the SCM Agreement.

5.168. In our view, instead of seeking to determine the existence of a general rule whereby the tax suspensions would only apply to companies structurally accumulating credits, the Panel should have determined the tax treatment of comparably situated taxpayers.

5.169. We recall, with respect to the IPI tax suspensions, that Article 29 of the Law 10,637/2002, which grants tax suspensions to predominantly exporting companies, also provides for tax suspensions for several other categories of companies.<sup>567</sup> The range of companies covered by Article 29 is wide, given that the tax suspensions apply, in particular, to companies that primarily manufacture: (i) products classified under 21 chapters of the Industrial Classification Table; (ii) components, chassis, bodies, parts, and pieces of automotive products; (iii) parts and pieces intended for the aerospace industry; and (iv) goods benefiting from the Informatics programme.<sup>568</sup> In addition, as the Panel found, the IPI tax suspensions apply to companies accredited under the RETAERO and REIMCOMP regimes.<sup>569</sup> Likewise, with respect to the suspensions of PIS/PASEP and COFINS contributions and their importation equivalents for the purposes of the PEC programme, the Panel found that, in addition to the predominantly exporting companies, such suspensions also apply to other companies. These are the companies that: (i) manufacture certain products when such products are destined for direct public administration bodies; (ii) are accredited under PADIS and PATVD; and (iii) are qualified under the REPES, RETAERO, RETID, and REIMCOMP regimes.<sup>570</sup>

5.170. Thus, the companies that are entitled, or potentially entitled, to the suspension of taxes fall into many categories, each covering a broad number of entities. In our view, the Panel should have considered in detail the treatment of these categories of companies to determine whether they are comparably situated to the predominantly exporting companies rather than seeking to identify the existence of a general rule of taxation for structurally credit-accumulating companies.

5.171. The European Union and Japan argue that the Panel did not seek to establish the existence of a general rule for credit-accumulating companies, but rather was responding to Brazil's own argument that there was a "rule" for credit-accumulating companies providing for the tax suspensions on their supplies.<sup>571</sup> We note, in this respect, that the Panel is not bound by the arguments raised by a party and can use those arguments freely to develop its own legal reasoning to support its findings and conclusions in the matter under consideration. Moreover, if the panel's analysis was shaped solely by the parties' arguments, the panel may not be able to conduct an objective assessment of the matter, as required under Article 11 of the DSU.<sup>572</sup> It was therefore incumbent upon the Panel to identify the benchmark for comparison in accordance with the legal

<sup>566</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 813.

<sup>567</sup> Panel Reports, para. 7.1167 (referring to Law 10,637/2002 (Panel Exhibit JE-94)).

<sup>568</sup> Panel Reports, para. 7.1167 (referring to Law 10,637/2002 (Panel Exhibit JE-94)). Similarly, in its determination of the benchmark treatment for the suspensions of the PIS/PASEP and COFINS contributions, or PIS/PASEP-Importation and COFINS-Importation contributions on purchases of raw materials, intermediate goods, and packaging materials for purposes of the PEC programme, the Panel observed that, in addition to the predominantly exporting companies, the relevant suspensions or exemptions apply to: (i) manufacturers of certain products when such products are destined for direct public administration bodies; (ii) companies accredited under PADIS and PATVD; (iii) companies qualified under the Special Tax Regime for the Exportation Platform of Information Technology Services (REPES); (iv) companies qualified under the RETAERO; (v) companies qualified under the Special Regime for the Defense Industry (RETID); and (vi) companies qualified under the REIMCOMP. (Panel Reports, para. 7.1183 (referring to Brazil's response to Panel question No. 21))

<sup>569</sup> Panel Reports, para. 7.1167.

<sup>570</sup> Panel Reports, para. 7.1183 (referring to Brazil's response to Panel question No. 21).

<sup>571</sup> European Union's appellee's submission, para. 398; Japan's appellee's submission, para. 133.

<sup>572</sup> Appellate Body Reports, *EC – Hormones*, para. 156; *Korea – Dairy*, para. 139; *US – Certain EC Products*, para. 123.



standard under Article 1.1(a)(1)(ii) of the SCM Agreement, regardless of how Brazil had presented its arguments on this issue.<sup>573</sup>

5.172. In light of the above, we reverse the Panel's conclusions, in paragraphs 7.1171 and 7.1172 of the Panel Reports, that "Brazil has not demonstrated that the tax suspensions are the benchmark treatment for structurally credit-accumulating companies"<sup>574</sup> and that "the treatment applicable to purchases by non-accredited companies of raw materials, intermediate goods and packaging materials ... can be considered as the benchmark treatment or normal rule of general application."<sup>575</sup> We recall that the Panel relied on its reasoning and findings concerning the IPI tax suspensions in identifying the benchmark treatment for the remaining two categories of the challenged tax treatment.<sup>576</sup> We therefore also reverse the Panel's findings, in paragraphs 7.1186-7.1187 and 7.1199-7.1200 of the Panel Reports, that Brazil has not demonstrated that the tax suspensions are the benchmark for comparison and that the appropriate benchmark is, instead, the treatment applicable to purchases by non-accredited companies of the relevant products. As a result, we also reverse the Panel's findings, in paragraphs 7.1211, 7.1223, and 7.1238, as well as in paragraphs 8.7 and 8.18, of the Panel Reports, that the tax suspensions granted to registered or accredited companies under the PEC and RECAP programmes constitute financial contributions in the form of government revenue otherwise due that is foregone or not collected and are hence subsidies within the meaning of Article 1.1 of the SCM Agreement that are contingent upon export performance under Article 3.1(a) of the SCM Agreement.

5.173. Having reversed the Panel's findings concerning the identification of the benchmark for comparison, we do not need to further address Brazil's alternative claims concerning the application of Article 1.1(a)(1)(ii) of the SCM Agreement and the Panel's assessment of evidence under Article 11 of the DSU.

5.174. We now turn to consider whether we can complete the analysis in finding whether the tax suspensions granted to registered or accredited companies under the PEC and RECAP programmes constitute a financial contribution in the form of government revenue otherwise due that is foregone or not collected under Article 1.1(a)(1)(ii) of the SCM Agreement. We recall that, in previous disputes, the Appellate Body has completed the analysis with a view to facilitating the prompt settlement and effective resolution of the dispute<sup>577</sup> and has completed the analysis where the factual findings in the panel report and undisputed facts on the panel record provided it with a sufficient basis for conducting its own analysis.<sup>578</sup> The Appellate Body has declined to complete the analysis in light of the complexity of issues, the absence of full exploration of the issues before the panel, and considerations pertaining to the parties' due process rights.<sup>579</sup>

5.175. We recall that the Panel's assessment under Article 1.1(a)(1)(ii) of the SCM Agreement was based on the benchmark that the Panel considered to be correct, i.e. the treatment applicable to purchases by non-accredited companies. Thus, we first have to determine whether we can complete

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<sup>573</sup> We also note that the main point of Brazil's arguments before the Panel was that "an appropriate comparison under Article 1.1(a)(1)(ii) should be made between the fiscal treatment of predominantly exporting companies and other companies that tend to structurally accumulate credits." (Brazil's second written submission to the Panel, para. 216)

<sup>574</sup> Panel Reports, para. 7.1171.

<sup>575</sup> Panel Reports, para. 7.1172.

<sup>576</sup> We recall that these are: (i) the suspensions of the PIS/PASEP and COFINS contributions, or PIS/PASEP-Importation and COFINS-Importation contributions, on purchases of raw materials, intermediate goods, and packaging materials (for purposes of PEC); and (ii) the suspensions of the PIS/PASEP and COFINS contributions, or PIS/PASEP-Importation and COFINS-Importation contributions, on purchases of new machinery, apparatus, instruments, and equipment incorporated into the fixed assets of the accredited company (for purposes of RECAP). (Panel Reports, paras. 7.1181-7.1187 and 7.1197-7.1200)

<sup>577</sup> See Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 1178; *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1351; *EC – Asbestos*, para. 78.

<sup>578</sup> See Appellate Body Reports, *Australia – Salmon*, paras. 241 and 255; *Korea – Dairy*, para. 102; *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 653; *US – Section 211 Appropriations Act*, para. 343; *EC – Asbestos*, para. 78; *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.135; *US – Anti-Dumping Methodologies (China)*, paras. 5.163-5.164.

<sup>579</sup> See Appellate Body Reports, *Korea – Dairy*, para. 102; *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.224; *EC – Seal Products*, paras. 5.63 and 5.69; *US – Anti-Dumping Methodologies (China)*, para. 5.178.

the analysis and determine for ourselves the benchmark treatment for the three categories of the tax treatment under the PEC and RECAP programmes identified by the Panel.

5.176. We note that the Panel acknowledged that there are other companies, in addition to the predominantly exporting companies, that are entitled to the tax suspensions.<sup>580</sup> The Panel, however, did not examine in detail and did not make specific findings concerning the conditions of eligibility for the tax exemptions of these other companies and their operation. Moreover, in their arguments on appeal, the participants focused on whether the Panel erroneously determined the benchmark by focusing on identifying the general rule of taxation, rather than on the identification of the correct benchmark. In these circumstances, we cannot complete the analysis to find whether there exists a financial contribution in the form of government revenue otherwise due that is foregone or not collected within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement. Accordingly, we are unable to complete the analysis to find whether the tax suspensions granted under the PEC and RECAP programmes constitute subsidies under Article 1.1 of the SCM Agreement.

#### 5.4 Article 3.1(b) the SCM Agreement

##### 5.4.1 Article 1.1(a)(1)(ii) of the SCM Agreement: ICT programmes

###### 5.4.1.1 Introduction

5.177. We now turn to consider Brazil's claim on appeal that the Panel erred in finding that the tax treatment of intermediate products and inputs under the ICT programmes constitutes a subsidy under Article 1.1 of the SCM Agreement.<sup>581</sup> Brazil contends that the Panel erred in finding that the "implicit interest income" with respect to intermediate products and inputs constitutes government revenue otherwise due that is foregone under Article 1.1(a)(1)(ii) of the SCM Agreement for two reasons. First, Brazil claims that "the Panel failed to compare the treatment accorded to the *group* of taxpayers in the benchmark treatment with the *group* of taxpayers under the challenged treatment."<sup>582</sup> Second, Brazil contends that "the Panel erroneously found that the 'implicit interest income' that Brazil purportedly 'foregoes' in respect of intermediate products and inputs under the ICT programmes constitutes 'government revenue' that is otherwise 'due' under Article 1.1(a)(1)(ii) of the SCM Agreement."<sup>583</sup> At the oral hearing, Brazil stated that it also takes issue with the Panel's determination of the benchmark treatment for the comparison with the challenged treatment of intermediate products and inputs.<sup>584</sup>

5.178. The European Union and Japan submit that the Panel did not err in finding the existence of a financial contribution under Article 1.1(a)(1)(ii) of the SCM Agreement for certain categories of the tax treatment under the ICT programmes.<sup>585</sup> In particular, the European Union and Japan note that the Panel did not disregard within the benchmark the treatment of a group of taxpayers that normally offset tax credits within the same taxation period.<sup>586</sup> Rather, the Panel took, according to the European Union, a "balanced approach" and weighed "all the scenarios that may arise under the normal operation of Brazil's tax system and notably the credit-debit mechanism to conclude that there was revenue foregone or not collected in the 'rather frequent scenario' where taxpayers cannot offset their tax credits within the same taxation period".<sup>587</sup> The European Union and Japan further disagree with Brazil's claim that the Panel erred in the interpretation and application of

<sup>580</sup> Panel Reports, paras. 7.1167 and 7.1183 (referring to Brazil's response to Panel question No. 21).

<sup>581</sup> Brazil's appellant's submission, para. 177.

<sup>582</sup> Brazil's appellant's submission, para. 180. (emphasis original)

<sup>583</sup> Brazil's appellant's submission, para. 180. Should we agree with Brazil and reverse the relevant findings, Brazil requests that we also reverse the Panel's consequential finding that "the exemption, reduction and suspension of taxes on sales of intermediate goods and on purchases of raw materials, intermediate goods, packaging materials, inputs, capital goods and computational tools under the ICT programmes confer a 'benefit' on the recipient under Article 1.1(b) of the SCM Agreement." (Ibid., para. 242) Brazil further requests that we reverse the Panel's ultimate finding that the relevant tax reductions and exemptions constitute subsidies under Article 1 of the SCM Agreement and declare moot and of no legal effect the Panel's recommendation under Article 4.7 of the SCM Agreement that Brazil withdraw the ICT programmes in 90 days. (Ibid., paras. 242-244 (referring to Panel Reports, paras. 7.489-7.490, 7.493-7.495, 7.500, 8.5.e, 8.11, 8.16.f, and 8.22))

<sup>584</sup> Brazil's response to questioning at the oral hearing.

<sup>585</sup> Panel Reports, para. 7.406.d-h.

<sup>586</sup> European Union's appellee's submission, para. 279; Japan's appellee's submission, para. 90.

<sup>587</sup> European Union's appellee's submission, para. 282. See also Japan's appellee's submission, paras. 92-94.

Article 1.1(a)(1)(ii) of the SCM Agreement in finding that the possible cash availability and implicit interest income that the Brazilian Government could earn (had the tax been paid in advance and not offset) constitute revenue otherwise "due" by the taxpayer.<sup>588</sup>

#### 5.4.1.2 Panel's findings

5.179. At the outset of its analysis, the Panel recalled the Appellate Body's statement in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)* that, in order to determine whether there is a financial contribution in the form of government revenue otherwise due that is foregone or not collected under Article 1.1(a)(1)(ii) of the SCM Agreement, a panel must: (i) identify the treatment applicable to the alleged recipients of the subsidy and the objective reasons behind it; (ii) identify a benchmark for comparison; and (iii) compare the challenged treatment, and its reasons, to the benchmark treatment.<sup>589</sup>

5.180. First, the Panel identified the challenged tax treatment applicable to the accredited companies and the objective reasons behind that treatment.<sup>590</sup> The Panel noted that "each of the examined programmes provides a different package of exemptions, reductions, and/or suspensions from one or more particular types of tax."<sup>591</sup> The Panel then classified the different tax treatments at issue on the basis of: (i) the tax at issue; (ii) whether the tax treatment is on the purchase of products by accredited companies or on their sale of incentivized products; and (iii) the degree of transformation of the incentivized products. Based on these criteria, the Panel grouped the tax treatments into ten categories.<sup>592</sup>

5.181. The Panel then identified a benchmark for each category of tax treatment. In every instance, the Panel found that "the benchmarks to be applied are the economy-wide tax treatments from which the exemptions, reductions and suspensions are taken."<sup>593</sup> Having compared the challenged tax treatments to the benchmark treatments, the Panel concluded that each of the challenged tax reductions, exemptions, and suspensions granted to accredited companies on the sales of: (i) finished goods that they produce (under the Informatics, PATVD, and Digital Inclusion programmes); (ii) intermediate goods that they produce (under the Informatics and PADIS programmes); and (iii) raw materials, intermediate goods, and packaging materials (under the Informatics programme) and inputs, capital goods, and computational tools (under the PADIS and PATVD programmes) constitutes financial contributions where "government revenue that is otherwise due is foregone or not collected."<sup>594</sup>

5.182. In its analysis with respect to the various tax exemptions and reductions on the sales of the intermediate goods and raw materials, intermediate goods and packaging materials and inputs, and capital goods and computational goods, the Panel followed the same analytical approach for all the challenged categories of tax treatment.<sup>595</sup>

5.183. In particular, regarding the IPI tax exemptions and reductions on sale of incentivized intermediate goods (for purposes of the Informatics and PADIS programmes), the Panel observed that, under the benchmark treatment, the non-accredited company selling the non-incentivized product would charge the relevant tax to the buyer and would transmit it to the Federal Revenue Service, while the buyer would accrue a credit that it would be allowed to use to offset its IPI debits during the same (i.e. when it pays its monthly liabilities on the twenty-fifth day of the month following the transaction) or subsequent taxation periods. If the buyer is not able to offset the credit after three taxation periods, it could ask the Brazilian Government for compensation with other

<sup>588</sup> European Union's appellee's submission, paras. 266 and 289; Japan's appellee's submission, para. 99.

<sup>589</sup> Panel Reports, paras. 7.394-7.395 (referring to Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, paras. 812-815).

<sup>590</sup> Panel Reports, para. 7.401.

<sup>591</sup> Panel Reports, para. 7.406.

<sup>592</sup> Panel Reports, para. 7.406.a-j. On appeal, Brazil takes issue with the Panel's analysis under para. 7.406.d-h. (Brazil's appellant's submission, para. 185 (referring to Panel Reports, paras. 7.430-7.475))

<sup>593</sup> Panel Reports, para. 7.414.

<sup>594</sup> Panel Reports, paras. 7.488-7.490. We thus set out the summary of the Panel's findings with respect to the IPI tax exemptions and reductions on the sale of incentivized intermediate goods (for purposes of the Informatics and PADIS programmes) as an example.

<sup>595</sup> Panel Reports, paras. 7.430-7.475.

federal debits or reimbursement.<sup>596</sup> The Panel noted that "[i]t is fairly common that companies are not able to offset the full amount of their credits and have to request compensation or reimbursement, so this scenario seems rather frequent."<sup>597</sup>

5.184. The Panel observed that, "under the best case scenario for the buyer of the non-incentivized intermediate products, the Government will receive the full amount of IPI tax due from the non-accredited company selling the non-incentivized intermediate products and the buyer ... will be able to offset the amount of IPI tax paid during the same taxation period."<sup>598</sup> The Panel further observed that, when the buyer of the non-incentivized products is unable to offset the credit during the same taxation period, the Brazilian Government will retain the amount of the tax paid by the non-accredited company selling the non-incentivized product until the buyer is able to offset it or until the Brazilian Government compensates or reimburses the face amount of the credit, without interest, to the buyer. The Panel considered that, under the second scenario (i.e. the scenario under which the buyer is unable to offset the tax credit during same taxation period), the Brazilian Government would "hold the advantage of cash availability or cash flow, along with the associated implicit interest income (revenue) that could be generated on the full amount of that tax that it has collected from the seller".<sup>599</sup> The cash availability and implicit interest could last from one taxation period (i.e. one month) to 360 days. If the reimbursement is made to the buyer within 360 days after the request, the Brazilian Government does not have to pay any interest on the use of the buyer's money.<sup>600</sup>

5.185. By contrast, the Panel noted that, under the challenged treatment, the accredited seller would not charge the tax to the buyer and would not remit it to the Brazilian Government, while the buyer would not accrue any tax credits.<sup>601</sup> The Panel considered that, in the scenario where the tax is paid to the Brazilian Government and offset during the same taxation period, there would be no revenue foregone for the Brazilian Government. However, in the Panel's view, in the "rather frequent scenario" when the buyer is not able to offset the tax credit during the same taxation period, the Brazilian Government would forego revenue in the form of the implicit interest on the tax revenue collected where the offsetting credits have not been used.<sup>602</sup> The Panel noted that, even though ultimately the Brazilian Government would collect the same nominal amount of tax, this would not diminish or eliminate the advantage that the buyer of the incentivized intermediate products, rather than the Brazilian Government, would enjoy in the form of cash availability and the implicit interest income due to not having to pay the tax.<sup>603</sup>

5.186. The Panel further recalled that several panels had previously concluded that, whenever there is revenue foregone by the government, a benefit is conferred.<sup>604</sup> Thus, having concluded that the tax treatments at issue constituted financial contributions where "government revenue that is otherwise due is foregone or not collected", the Panel also concluded that the tax measures at issue conferred a benefit because the buyers of the incentivized products under the relevant programmes are better off with the exemptions and reductions than in the benchmark scenario.<sup>605</sup> The Panel thus concluded that the measures at issue constitute subsidies within the meaning of Article 1 of the SCM Agreement.<sup>606</sup>

<sup>596</sup> Panel Reports, para. 7.432. See also Panel Reports, paras. 7.440, 7.449, 7.458, and 7.468.

<sup>597</sup> Panel Reports, para. 7.432. (fn omitted) See also Panel Reports, paras. 7.440, 7.449, 7.458, and 7.468.

<sup>598</sup> Panel Reports, para. 7.433. See also Panel Reports, paras. 7.441, 7.450, 7.459, and 7.469.

<sup>599</sup> Panel Reports, para. 7.433. (fn omitted) See also Panel Reports, paras. 7.441, 7.450, 7.459, and 7.469. The Panel remarked that, "[a]ccording to the European Union, the benchmark rate of the ... Central Bank [of Brazil] ... was, at the time of writing of its first written submission, 13.25%." (Panel Reports, fn 790 to para. 7.433 (referring to European Union's first written submission to the Panel, fn 883 to para. 1201))

<sup>600</sup> Panel Reports, para. 7.433. See also Panel Reports, paras. 7.441, 7.450, 7.459, and 7.469.

<sup>601</sup> Panel Reports, para. 7.434. See also Panel Reports, paras. 7.442, 7.451, 7.461, and 7.471.

<sup>602</sup> Panel Reports, para. 7.436. See also Panel Reports, paras. 7.444, 7.454, 7.463, and 7.473.

<sup>603</sup> Panel Reports, para. 7.437. See also Panel Reports, paras. 7.445, 7.455, 7.464, and 7.474.

<sup>604</sup> Panel Reports, para. 7.491 (referring to Panel Reports, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, paras. 7.169-7.171; *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, fn 509 to para. 7.271; *US – FSC*, para. 7.103; *US – FSC (Article 21.5 – EC)*, paras. 8.44-8.48; Appellate Body Reports, *US – FSC*, para. 140; *US – FSC (Article 21.5 – EC)*, para. 198).

<sup>605</sup> Panel Reports, paras. 7.493-7.494.

<sup>606</sup> Panel Reports, para. 7.495.

#### 5.4.1.3 The Panel's benchmark determination

5.187. Before turning to address Brazil's claims regarding the Panel's comparison of the benchmark treatment with the challenged treatment, we address Brazil's statement, made at the oral hearing, that it takes issue with the Panel's determination of the benchmark in the context of its analysis under the ICT programmes. We recall that, in its Notice of Appeal, Brazil did not expressly raise a claim concerning the Panel's determination of the benchmark treatment as relevant to its findings under Article 3.1(b) of the SCM Agreement.<sup>607</sup> Furthermore, in its appellant's submission, Brazil has argued that "[t]he Panel ... correctly held that the appropriate benchmark treatment is 'the treatment applicable to sales ... by non-accredited companies'".<sup>608</sup> In response to questioning at the oral hearing, however, Brazil stated that it takes issue with the Panel's identification of the benchmark for comparison with the challenged treatment of intermediate goods and inputs under the ICT programmes.<sup>609</sup> The European Union responded that, since this claim was not raised by Brazil in its Notice of Appeal and its appellant's submission, we should dismiss it.<sup>610</sup>

5.188. We recall, in this respect, that Rule 20(2)(d) and Rule 21(2)(b) of the Working Procedures set out the requirements for the Notice of Appeal and the appellant's submission, respectively. In particular, in accordance with Rule 20(2)(d), the Notice of Appeal "shall include" a brief statement of the nature of the appeal, comprising: (i) "identification of the alleged errors in the issues of law covered in the panel report and legal interpretations developed by the panel"; (ii) "a list of the legal provision(s) of the covered agreements that the panel is alleged to have erred in interpreting or applying"; and (iii) "an indicative list of the paragraphs of the panel report containing the alleged errors".<sup>611</sup> Pursuant to the Rule 21(2)(b)(i) of the Working Procedures, the appellant's submission "shall" set out, *inter alia*, "a precise statement of the grounds for the appeal, including the specific allegations of errors in the issues of law covered in the panel report and legal interpretations developed by the panel, and the legal arguments in support thereof".<sup>612</sup>

5.189. Rule 20(2)(d) of the Working Procedures serves an important due process function as it helps to ensure the balance "that must be maintained between the right of Members to exercise the right of appeal meaningfully and effectively, and the right of appellees to receive notice through the Notice of Appeal of the findings under appeal, so that they may exercise their right" to respond.<sup>613</sup> The Appellate Body has also cautioned that, if a particular claim of error is not raised by the appellant in the Notice of Appeal, then that claim is "not properly within the scope of the appeal, and the Appellate Body will not make findings thereon".<sup>614</sup> With regard to the appellant's submission, the Appellate Body has stated that, compared to the Notice of Appeal, this submission "must be more specific", in that it "must be precise as to the grounds of appeal, the legal arguments which support it, and the provisions of the covered agreements and other legal sources upon which the appellant relies".<sup>615</sup>

<sup>607</sup> Brazil's Notice of Appeal, para. 16. We recall that, by contrast, Brazil raised a claim concerning the Panel's determination of benchmark treatment under the PEC and RECAP programmes. See section 5.3 of these Reports.

<sup>608</sup> Brazil's appellant's submission, para. 186.

<sup>609</sup> Brazil's response to questioning at the oral hearing.

<sup>610</sup> European Union's response to questioning at the oral hearing.

<sup>611</sup> Working Procedures, Rule 20(2)(d).

<sup>612</sup> Working Procedures, Rule 21(2)(b)(i).

<sup>613</sup> Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 62.

<sup>614</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 582 (referring to Appellate Body Reports, *US – Countervailing Measures on Certain EC Products*, para. 72; *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 285; *Japan – Apples*, paras. 124-128).

<sup>615</sup> Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 59.

5.190. We recall that Brazil's Notice of Appeal provides, in relevant part:

The Panel erred in finding that the tax exemptions, suspensions and reductions granted under the ICT programmes both on the sales of intermediate goods and on the purchases of raw materials, intermediate goods, packaging materials, inputs, capital goods and computational tools constitute financial contributions, in the form of government revenue otherwise due that is foregone or not collected, within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement; **[\*]**<sup>616</sup>

**[\*fn original]**<sup>11</sup> See Panel Report[s], paras. 7.432-7.433; 7.444-7.445; 7.454-7.455; 7.463-7.464; 7.473-7.474; and 7.495.

5.191. In its Notice of Appeal, Brazil thus framed its claim under Article 1.1(a)(1)(ii) of the SCM Agreement in broad terms by stating that "[t]he Panel erred in finding that [the tax treatments at issue] constitute financial contributions, in the form of government revenue otherwise due that is foregone or not collected." We note, however, that the indicative list of paragraphs in the Panel Reports containing the alleged errors provided by Brazil in footnote 11 of its Notice of Appeal does not refer to paragraphs in which the Panel addressed the benchmark determination. Moreover, we note that, in its appellant's submission, Brazil stated, in several instances, that it agreed with the Panel's determination of the benchmark treatment. In particular, Brazil affirmed that "the Panel began by correctly stating, in broad terms, the appropriate benchmark for comparison."<sup>617</sup> Brazil also stated, to the same effect, that the Panel "correctly held that the appropriate benchmark treatment is 'the treatment applicable to sales ... by non-accredited companies, i.e. the obligation to pay the full amount of the applicable tax'".<sup>618</sup>

5.192. Thus, in its Notice of Appeal, Brazil formulated its claim under Article 1.1(a)(1)(ii) of the SCM Agreement in broad terms, which, in principle, could include the Panel's identification of the benchmark treatment. However, in its appellant's submission, which is supposed to be "more specific" and "precise as to the grounds of appeal"<sup>619</sup>, Brazil clearly indicated that it agreed with the Panel's identification of the benchmark treatment. Accordingly, Brazil's Notice of Appeal, read together with Brazil's appellant's submission, demonstrates that, until the oral hearing, Brazil did not raise a claim regarding the Panel's benchmark determination as it related to its findings under Article 3.1(b) of the SCM Agreement. Moreover, at the oral hearing, Brazil did not develop argumentation in support of that claim.

5.193. In these circumstances, we consider that Brazil's claim that the Panel erred in its determination of the benchmark in the context of its analysis under the ICT programmes was not properly raised before us and hence is not within the scope of this appeal. We thus proceed to address the claims that Brazil has properly raised on appeal.

#### **5.4.1.4 Whether the Panel erred in its comparison of the benchmark treatment with the challenged treatment**

5.194. Brazil claims that the Panel erred in its comparison of the treatment of intermediate goods and inputs under the ICT programmes with the benchmark treatment by "arbitrarily distinguish[ing] between taxpayers situated within the benchmark".<sup>620</sup> Specifically, Brazil points out that "the Panel failed to compare the treatment accorded to the *group* of taxpayers in the benchmark treatment with the *group* of taxpayers under the challenged treatment."<sup>621</sup> In Brazil's view, the Panel "dismissed as a mere 'best case scenario' the treatment"<sup>622</sup> applicable to the companies offsetting the entire amount of taxes paid during the same taxation period and opted to compare the challenged treatment to a small group of taxpayers within the benchmark, i.e. those that are unable to offset the full amount of tax credits during the same taxation period.<sup>623</sup> Brazil considers that the comparison that the Panel should have undertaken is analogous to the assessment of less favourable

<sup>616</sup> Brazil's Notice of Appeal, para. 16 and fn 11 thereto.

<sup>617</sup> Brazil's appellant's submission, para. 185.

<sup>618</sup> Brazil's appellant's submission, para. 186 (quoting Panel Reports, paras. 7.430, 7.438, 7.447, 7.456, and 7.466).

<sup>619</sup> Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 59.

<sup>620</sup> Brazil's appellant's submission, para. 189. (emphasis omitted)

<sup>621</sup> Brazil's appellant's submission, para. 180. (emphasis original)

<sup>622</sup> Brazil's appellant's submission, para. 188.

<sup>623</sup> Brazil's appellant's submission, para. 189.

treatment under Article III:4 of the GATT 1994.<sup>624</sup> Specifically, Brazil contends that, "[i]n order to establish that the ICT programmes involved the foregoing of revenue otherwise due, the Panel was required to compare the treatment of the *group* of taxpayers under those programmes with the *group* of taxpayers in the benchmark treatment."<sup>625</sup>

5.195. The European Union and Japan submit that the Panel did not commit an error in comparing the treatment provided under the ICT programmes with the tax treatment granted to the non-accredited companies.<sup>626</sup> Rather, as the European Union explains, the Panel conducted an "overall assessment of the tax treatment provided to similarly situated taxpayers, i.e. including those more frequently accumulating tax credits".<sup>627</sup> Japan adds that the Panel "made a carefully considered determination that, *at least in some factual situations*, accredited companies ... are better off than those within the benchmark, and the Brazilian Government, by contrast, is foregoing revenue that would be otherwise due".<sup>628</sup>

5.196. The foregoing (or non-collection) of revenue otherwise due under Article 1.1(a)(1)(ii) of the SCM Agreement implies that less (or no) revenue has been raised by the government than would have been raised in a different situation.<sup>629</sup> As noted above, the Appellate Body has previously explained that a panel should follow a three-step test in order to determine whether the revenue that is otherwise due is foregone or not collected under Article 1.1(a)(1)(ii) of the SCM Agreement.<sup>630</sup> Specifically, a panel examining a claim under Article 1.1(a)(1)(ii) of the SCM Agreement must: (i) identify the tax treatment that applies to the income of the alleged subsidy recipients<sup>631</sup>; (ii) identify a benchmark for comparison<sup>632</sup>; and (iii) compare the challenged treatment and reasons for it with the benchmark tax treatment.<sup>633</sup> Brazil takes issue with the Panel's analysis under the third step of the test, i.e. the comparison of the challenged treatment and its reasons with the benchmark tax treatment.<sup>634</sup> We recall that the Appellate Body observed, in this respect, that "[s]uch a comparison will enable a panel to determine whether, in the light of the treatment of the comparable income of comparably situated taxpayers, the government is foregoing revenue that is otherwise due in relation to the income of the alleged recipients."<sup>635</sup>

5.197. We note that the structure and operation of the tax exemptions and suspensions under the various categories of the tax treatments identified by the Panel are similar. Moreover, the Panel's comparison of the benchmark treatment follows the same logic and structure for all the relevant

<sup>624</sup> Brazil's appellant's submission, para. 190 (referring to Appellate Body Report, *EC – Asbestos*, para. 100).

<sup>625</sup> Brazil's appellant's submission, para. 191. (emphasis original)

<sup>626</sup> European Union's appellee's submission, para. 284; Japan's appellee's submission, para. 95.

<sup>627</sup> European Union's appellee's submission, para. 284.

<sup>628</sup> Japan's appellee's submission, para. 94.

<sup>629</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 806 (referring to Appellate Body Report, *US – FSC*, para. 90).

<sup>630</sup> See paragraph 5.162 above.

<sup>631</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 812. The Appellate Body has observed that "[i]dentifying such tax treatment will entail consideration of the objective reasons behind that treatment and, where it involves a change in a Member's tax rules, an assessment of the reasons underlying that change." (Ibid.)

<sup>632</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 813.

<sup>633</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 814.

<sup>634</sup> Brazil's appellant's submission, para. 191.

<sup>635</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 814.



categories of tax treatment of intermediate products and inputs.<sup>636</sup> We thus review the Panel's analysis with respect to the IPI tax exemptions and reductions on the sales of the incentivized intermediate goods under the Informatics and PADIS programmes as an example.<sup>637</sup>

5.198. We recall that, having identified the benchmark treatment as the treatment of non-accredited companies, the Panel proceeded to examine how the relevant general rules of taxation operate with respect to the non-accredited companies. The Panel explained that, under the benchmark treatment, the buyer of the non-incentivized product would pay the tax to the non-accredited seller, who would transmit it to the Brazilian Government. The buyer, in turn, would accrue a tax credit, which it would be able to offset against its future tax liabilities, i.e. tax debits. It would be able to do so within the same taxation period or within three months since the date of the transaction. If the company is unable to do so, it could request the Brazilian Government to compensate or reimburse the taxes that could not be offset. The Brazilian Government has 360 days to respond to such a request, and if it does not do so within that time, the buyer of the non-incentivized products will be entitled to compensation or reimbursement and the interest generated.<sup>638</sup> The Panel then noted that "[i]t is fairly common that companies are not able to offset the full amount of their credits and have to request compensation or reimbursement, so this scenario seems rather frequent."<sup>639</sup>

5.199. In comparing "the challenged treatment with the best case scenario for the buyer of the non-incentivized products at issue under the benchmark treatment" (i.e. the scenario where the tax is paid to the Brazilian Government and offset during the same taxation period), the Panel found that "there would be no revenue forgone by the Brazilian Government, as the government would not earn the implicit interest on unused credits."<sup>640</sup>

5.200. By contrast, the Panel noted that, under the "rather frequent scenario", the buyer of the non-incentivized products would not be able to offset the tax credit it has accrued during the same taxation period in which the tax is paid.<sup>641</sup> According to the Panel, in this scenario, the Brazilian Government would retain the amount of tax paid by the non-accredited company until the buyer is able to offset it during the subsequent taxation periods, or until the Brazilian Government compensates or reimburses the amount of the credit to the buyer within 360 days from the request for compensation or reimbursement.<sup>642</sup> Having compared this scenario to the challenged treatment, the Panel concluded that, "under this rather frequent scenario, the Brazilian Government is foregoing revenue in the form of the implicit interest on the tax revenue collected where the offsetting credits have not (yet) been used."<sup>643</sup>

5.201. In Brazil's view, the Panel "dismissed as a mere 'best case scenario' the treatment generally applicable to taxpayers in the benchmark", i.e. offsetting the entire amount of taxes paid during the same taxation period, and "opted to compare" the tax treatment at issue with what it considered to

<sup>636</sup> Panel Reports, paras. 7.430-7.475. We recall that Brazil takes issue with the Panel's analysis with respect to the following categories of the tax treatment: (i) the IPI tax exemptions (including through zero rates) and reductions granted to accredited companies on their sales of the incentivized intermediate goods that they produce (for purposes of the Informatics and PADIS programmes); (ii) the exemptions (through zero rates) of the PIS/PASEP and COFINS contributions granted to accredited companies on their sales of the incentivized intermediate goods that they produce (for purposes of the PADIS programme); (iii) the IPI tax suspensions on purchases of raw materials, intermediate goods, and packaging materials (for purposes of the Informatics programme) and IPI tax exemptions (through zero rates) on purchases of inputs (for purposes of the PADIS and PATVD programmes) used to manufacture the incentivized products; (iv) the exemptions (through zero rates) of the PIS/PASEP and COFINS contributions or PIS/PASEP-Importation and COFINS-Importation contributions on purchases of inputs (for purposes of the PADIS and PATVD programmes) used to manufacture the incentivized products; and (v) the exemptions (through zero rates) of the PIS/PASEP and COFINS contributions or PIS/PASEP-Importation and COFINS-Importation contributions on purchases of certain capital goods and computational tools (for purposes of the PADIS and PATVD programmes) used to manufacture the incentivized products that will be incorporated into the fixed assets of the accredited company. (Brazil's appellant's submission, para. 185)

<sup>637</sup> Panel Reports, paras. 7.431-7.437.

<sup>638</sup> Panel Reports, para. 7.432.

<sup>639</sup> Panel Reports, para. 7.432 (referring to Brazil's first written submission to the Panel, para. 758 (DS472) and para. 691 (DS497); Exporters 2014 study on Brazilian exports – delays in refunds (Panel Exhibit JE-186), p. 55; European Union's first written submission to the Panel, fn 849 to para. 1172).

<sup>640</sup> Panel Reports, para. 7.436.

<sup>641</sup> Panel Reports, paras. 7.432-7.433.

<sup>642</sup> Panel Reports, para. 7.433.

<sup>643</sup> Panel Reports, para. 7.436.



be the "rather frequent" scenario".<sup>644</sup> By doing so, in Brazil's view, the Panel "arbitrarily distinguish[ed] between taxpayers situated *within* the benchmark".<sup>645</sup>

5.202. We disagree with Brazil's characterization of the Panel's approach to comparing the challenged treatment to the selected benchmark treatment. As we see it, the Panel did not treat only one subset of taxpayers (i.e. those that are unable to offset the amount of the tax paid during the same taxation period) as the benchmark for the purposes of comparison. Rather, having explained in detail how the mechanism of credits and debits under the principle of non-accumulation works, the Panel concluded that, under the normal rule of general application of Brazil's tax system, there are two possible factual scenarios: one in which the buyer of non-incentivized products will be able to offset the amount of the tax paid during the same taxation period, and the other one when this would not be possible. The Panel then reached a conclusion as to whether the Brazilian Government overall foregoes revenue otherwise due based on both scenarios.

5.203. In our view, the Panel did not "dismiss", as Brazil argues, the scenario in which the buyer of non-incentivized products is able to offset the amount of the tax paid during the same taxation period. Rather, the Panel made an express finding that, under this scenario, "there would be no revenue forgone by the Brazilian Government."<sup>646</sup> We consider that, in comparing the challenged tax treatment to the benchmark treatment, the Panel correctly examined both possible factual scenarios that result from the application of the normal rules of Brazil's tax system.

5.204. Brazil also takes issue with the Panel's characterization of the scenario in which the buyer is not able to offset the amount of the tax paid during the same taxation period as a "rather frequent scenario".<sup>647</sup> Brazil points out that "normally" taxpayers offset the taxes paid during the same taxation period and that the group of taxpayers that does not is "exceedingly small".<sup>648</sup> According to Brazil "between 18.5 and 22.5% of *exporting* companies tend to accumulate credits."<sup>649</sup> We understand credit accumulation to occur when the tax liability is very low or subject to a zero rate, so that companies that have acquired tax credits by purchasing inputs and components would not have sufficient tax debits to offset them.<sup>650</sup>

5.205. As we see it, the Panel's finding that "[i]t is fairly common that companies are not able to offset the full amount of their credits and have to request compensation or reimbursement"<sup>651</sup> was based on the evidence on the record, including that submitted by Brazil. In particular, the Panel explained that:

Brazil acknowledges that "many sectors of the economy have their products subject to low or no taxation, reflecting the selective nature and the extra-fiscal character of indirect taxes in Brazil. These sectors tend to accumulate tax credits, as the tax debits due are lower than the credit acquired in the previous step of the production chain."<sup>652</sup>

5.206. Indeed, before the Panel, Brazil explained that, while normally companies offset their tax credits within the same taxation period, "many sectors" of the economy "tend to accumulate" them.<sup>653</sup> Brazil made this statement in the context of the PEC and RECAP programmes, which were challenged under Article 3.1(a) of the SCM Agreement. In that context, Brazil argued that certain sectors of the Brazilian economy tend to accumulate credits. However, we consider that this

<sup>644</sup> Brazil's appellant's submission, para. 188.

<sup>645</sup> Brazil's appellant's submission, para. 189. (emphasis original)

<sup>646</sup> Panel Reports, para. 7.436.

<sup>647</sup> Panel Reports, para. 7.432.

<sup>648</sup> Brazil's appellant's submission, para. 192 and fn 128 thereto.

<sup>649</sup> Brazil's appellant's submission, fn 128 to para. 192. (emphasis original)

<sup>650</sup> For example, as Brazil explained before the Panel, in the context of its claims under Article 3.1(a) of the SCM Agreement, the national defence sector accumulates credits because industrial defence products and services are subject to zero PIS/COFINS rates when destined for use by the army. (Brazil's first written submission to the Panel, para. 769 (DS472))

<sup>651</sup> Panel Reports, para. 7.432.

<sup>652</sup> Panel Reports, fn 789 to para. 7.432. Footnote 789 continues: "Also, for instance, according to a 2014 Study by the Brazilian Industry Confederation, 'a little more than one third of the surveyed exporting companies (34.3%) possess tax credits under PIS/COFINS, IPI and/or ICMS accumulated and not refunded for a period over three months.' (22.5% of the companies possess tax credits under the PIS/COFINS contributions and 18.5% possess tax credits under the IPI tax)." See Exporters 2014 study on Brazilian exports – delays in refunds (Panel Exhibit JE-186), p. 55; European Union's first written submission, fn 849.

<sup>653</sup> Brazil's first written submission to the Panel, para. 758 (DS472) and para. 691 (DS497).

statement is also relevant to the ICT programmes. This is because structural accumulation may occur whenever taxes on added value are lower than those on inputs or intermediate products, with the effect that the buyer would not owe enough taxes to make use of its accumulated tax credits.

5.207. We further note Brazil's argument that the Panel should have undertaken a comparison akin to the assessment of less favourable treatment under Article III:4 of the GATT 1994. Specifically, Brazil refers to the Appellate Body Report in *EC – Asbestos*, in which the Appellate Body stated that, in assessing the existence of less favourable treatment, imported products as a group must be compared to the group of like domestic products.<sup>654</sup>

5.208. We do not see how this legal test, used for determining less favourable treatment under Article III:4 of the GATT 1994, could be transplanted into the analysis under Article 1.1(a)(1)(ii) of the SCM Agreement. We recall that, under Article III:4 of the GATT 1994, the less favourable treatment must affect the group of imported products, as compared to the group of like domestic products. There is an inconsistency under Article III:4 only if imported products from the complaining Member, as a group, are treated less favourably than the group of like domestic products.<sup>655</sup>

5.209. By contrast, a subsidy is always conferred upon certain recipients. The Appellate Body has observed that, in determining the existence of the revenue otherwise due that is foregone under Article 1.1(a)(1)(ii), "like will be compared with like", and that it is important to ensure that the examination under Article 1.1(a)(1)(ii) "involves a comparison of the fiscal treatment of the relevant income for taxpayers in comparable situations".<sup>656</sup> Thus, to determine whether the revenue that is otherwise due is foregone, the challenged treatment must be compared to an objectively identifiable benchmark. This does not presuppose, however, that such a comparison should necessarily be made between the group of the entities that allegedly benefits from a subsidy, on the one hand, and the group of *all* the other entities, on the other hand. Accordingly, even if not all taxpayers in the benchmark group are paying the full amount of the relevant tax, this would not necessarily mean that there is no revenue foregone with respect to the taxpayers benefiting from a subsidy.

5.210. Thus, while both the analysis of less favourable treatment under Article III:4 and the examination under Article 1.1(a)(1)(ii) involve comparisons, this does not mean that the same analytical framework that applies to the examination of less favourable treatment under Article III:4 of the GATT 1994 is also applicable *mutatis mutandis* to the comparison of the benchmark tax treatment and the challenged tax treatment for purposes of determining whether revenue foregone under Article 1.1(a)(1)(ii) of the SCM Agreement exists.

5.211. In any event, comparing the fiscal treatment of taxpayers in comparable situations is exactly what the Panel did by comparing the treatment applicable to sales by non-accredited companies of non-incentivized products to that of the accredited companies. The fact that some non-accredited companies are able to offset their tax credits while others are not stems from the application of the normal rules of the Brazilian tax system, including the functioning of the credit-debit mechanism. We see nothing improper with the manner in which the Panel addressed both possible scenarios in its analysis.

#### **5.4.1.5 Whether the Panel erred in finding that cash availability and implicit interest constitute revenue "otherwise due"**

5.212. Brazil claims that "the Panel failed to give adequate meaning to the terms 'government revenue' and 'otherwise due' in Article 1.1(a)(1)(ii) of the SCM Agreement" by considering that the cash availability and the implicit interest on unused credits that the Brazilian Government earns in the situations when tax credits were not offset within the same taxation period fall under the scope of these terms.<sup>657</sup> Brazil contends that "the alleged 'implicit interest' is not a form of 'government

<sup>654</sup> Brazil's appellant's submission, para. 190 (referring to Appellate Body Report, *EC – Asbestos*, para. 100).

<sup>655</sup> Appellate Body Report, *EC – Asbestos*, para. 100.

<sup>656</sup> Appellate Body Report, *US – FSC (Article 21.5 – EC)*, paras. 90 and 92.

<sup>657</sup> Brazil's appellant's submission, para. 195.

revenue' that is 'due' to the Brazilian government by the taxpayer."<sup>658</sup> In Brazil's view, due to the functioning of the credit-debit mechanism, the Brazilian Government is not due to benefit from any cash availability or any implicit interest income in relation to the time when the tax is collected.<sup>659</sup>

5.213. In response, the European Union and Japan submit that Brazil's narrow interpretation of the "government revenue ... otherwise due [that] is foregone or not collected" should be rejected. The European Union considers that the foregoing of the cash availability and implicit interest by the Brazilian Government is akin to tax deferrals, which constitute the revenue foregone.<sup>660</sup> The European Union points out that "paragraph (e) in Annex I to the SCM Agreement explicitly contemplates the 'deferral' of direct taxes or social welfare charges as an illustration of what can amount to an export *subsidy*."<sup>661</sup> Japan submits that it sees "no basis" for Brazil's argument that the interest foregone by the Brazilian Government, even if implicit, "is not ... a form of current or future revenue".<sup>662</sup>

5.214. The United States, as a third participant, recalls that the Appellate Body stated in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)* that "'the foregoing of revenue otherwise due implies that less revenue has been raised by the government than would have been raised in a different situation,' and that 'the word "foregone" suggests that the government has given up an entitlement to raise revenue that it could "otherwise" have raised.'"<sup>663</sup> To the United States, "if a measure *exempts* taxes that would otherwise have to be paid but for the measure, a financial contribution has been provided: government revenue, otherwise due, is clearly foregone."<sup>664</sup> Likewise, "if a measure *suspends* taxes that are later paid further down the production chain, a financial contribution has still been provided: at the time in which government revenue would otherwise be due, it is foregone (albeit temporarily)."<sup>665</sup>

5.215. Turning to Brazil's claim, we recall that, in conducting its comparison of the challenged treatment to the benchmark treatment, the Panel considered that, under a "rather frequent" scenario<sup>666</sup>, non-accredited companies will not be able to offset the full amount of their tax credits during the same taxation period and would have to: (i) offset them during the subsequent taxation periods; or (ii) request compensation or reimbursement from the government.<sup>667</sup> As the Panel observed, in these circumstances, the government "will retain the amount of tax paid by the non-accredited company selling the non-incentivized intermediate product until the buyer of the non-incentivized products is able to offset it (during subsequent taxation periods); or until the Brazilian Government compensates or reimburses the face amount of the credit, without interest, to the buyer of the non-incentivized products".<sup>668</sup>

5.216. By contrast, when the challenged tax exemptions and reductions apply, the buyer of the intermediate products or raw and packaging materials, inputs, capital goods, or computational tools does not pay the IPI tax and does not obtain a tax credit, while the seller does not transmit any money to the Brazilian Government. Only after the industrialized finished or intermediate product is sold to the wholesaler will the industrial establishment transfer the amount of tax to the Brazilian Government.<sup>669</sup>

5.217. In the scenario when a non-accredited company is not able to offset its tax credits during the same taxation period, the key difference between the situation when the tax exemptions and reductions apply and the benchmark treatment is the *time* when the Brazilian Government obtains

<sup>658</sup> Brazil's appellant's submission, para. 199. Brazil also points out that "[g]overnments are not akin to financial institutions and do not recognize 'float' interest that accrues between the time of collection and payment of taxes as a revenue against which public expenses are met." (Ibid., para. 198)

<sup>659</sup> Brazil's appellant's submission, para. 200.

<sup>660</sup> European Union's appellee's submission, paras. 289-291 (referring to Panel Report, *US – FSC*, para. 7.98; Appellate Body Report, *US – FSC*, para. 90).

<sup>661</sup> European Union's appellee's submission, para. 290. (emphasis original)

<sup>662</sup> Japan's appellee's submission, para. 99.

<sup>663</sup> United States' third participant's submission, para. 25 (quoting Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 806).

<sup>664</sup> United States' third participant's submission, para. 25. (emphasis original)

<sup>665</sup> United States' third participant's submission, para. 25. (emphasis original)

<sup>666</sup> Panel Reports, para. 7.432. (fn omitted)

<sup>667</sup> Panel Reports, paras. 7.432-7.433.

<sup>668</sup> Panel Reports, para. 7.433.

<sup>669</sup> Panel Reports, paras. 7.434, 7.442, 7.452, 7.461, and 7.471.

the tax from the seller of the product. Under the benchmark treatment, this would be at the beginning of the industrialization process, i.e. when the non-accredited seller transmits the tax to the Brazilian Government. By contrast, when the taxes are exempted or reduced, the Brazilian Government would receive the applicable amount of the tax when the industrialized product is sold to the wholesaler.

5.218. Under the credit-debit mechanism pursuant to the principle of non-accumulation, the amount of the tax paid by the non-accredited company ultimately will be offset either against its tax debits (within three taxation periods) or compensated or reimbursed by the Brazilian Government within 360 days (or later, in which case interest will apply).<sup>670</sup> In the meantime, however, the Brazilian Government will retain the amount of the tax transmitted to it. The Panel explained, with respect to the position of the Government in these circumstances, the following:

[T]he Brazilian Government thus will hold the advantage of cash availability or cash flow, along with the associated implicit interest income (revenue) that could be generated on the full amount of that tax that it has collected from the seller. This cash availability and associated implicit interest can last from one taxation period (if the buyer is able to offset the credit during the second taxation period) to 360 days after the request for compensation or reimbursement (if the buyer has to request it). During this period, the government is able to make use of the taxes received (i.e., "earning" implicit interest). So long as the compensation or reimbursement is made to [the] buyer of the non-incentivized products within 360 days after the request, the Brazilian Government will not have to pay the buyer of the non-incentivized products any interest on the use of the buyer's money during that period. Only if 360 days are surpassed is the government obligated to compensate or repay to the buyer of the non-incentivized products not just the face amount of the credit but also the associated interest. Thus, it is only after 360 days that the government would no longer enjoy the implicit interest revenue from the free use of the buyer's money that is blocked in the form of its credit.<sup>671</sup>

5.219. Indeed, as the Panel explained, under the benchmark treatment, the Brazilian Government will collect the tax and retain the amount of the tax paid for a period that can last from one month to 360 days. During this period of time, the Brazilian Government will be able to use it and generate interest on it until the non-accredited company is able to offset its tax credits or until the Brazilian Government compensates or reimburses the amount of the tax paid. In this respect, the amount of the tax and the potential implicit interest that could be generated constitutes what is "due" to the Brazilian Government under the benchmark treatment. We note that, in its analysis, the Panel referred to the European Union's observation that the benchmark interest rate of the Central Bank of Brazil was, at the time of writing of its first written submission to the Panel, 13.25%, a rate that appears to be significant.<sup>672</sup> As noted, while the amount of the tax that is collected by the Brazilian Government under the challenged treatment and under the benchmark scenario may nominally be the same, the timing of the tax collection will differ. When the relevant taxes are exempted or reduced, the payment of the tax will be postponed until the final stage of the production chain, when the industrialized product is sold to the wholesaler.

5.220. A government foregoes or does not collect the "revenue that is otherwise due" in a situation where it gives up or relinquishes its entitlement to collect revenue that is owed or payable in other circumstances.<sup>673</sup> In the present dispute, when the tax exemptions and reductions apply, the Brazilian Government does not collect in full the tax revenue when it normally would, or collects it in part. The fact that, ultimately, the amount of the tax collected under the benchmark treatment and the challenged treatment may nominally be the same does not detract from the fact that, under the benchmark treatment, in the scenario when non-accredited companies are unable to offset their credits immediately, the Brazilian Government would collect and retain, for a certain period, the amount of tax payable to it. During this period of time, the Brazilian Government can enjoy the cash

<sup>670</sup> Panel Reports, para. 7.433.

<sup>671</sup> Panel Reports, para. 7.433. (fns omitted)

<sup>672</sup> Panel Reports, fn 790 to para. 7.433 (referring to the European Union's first written submission to the Panel, fn 883 to para. 1201).

<sup>673</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 806 (referring to Appellate Body Report, *US – FSC*, para. 90).

available to it and earn interest on it.<sup>674</sup> By contrast, when tax exemptions and reductions are applied, the Brazilian Government collects the tax later in time and does not enjoy the availability of cash as it otherwise would under the benchmark treatment. Thus, under the challenged treatment, the Brazilian Government would not collect the tax at the time it normally would under the benchmark treatment. By doing so, in our view, the Brazilian Government would not collect the revenue that would be otherwise due to it.<sup>675</sup>

5.221. Accordingly, in the scenario where the buyer is unable to offset the credit during the same taxation period, the non-collection of the tax revenue by the Brazilian Government at the time when it normally would do so amounts to "government revenue that is otherwise due" being "foregone or not collected" within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement.

5.222. On the basis of the above, we do not consider that the Panel erred in finding that the tax treatment of intermediate products and inputs under the ICT programmes constitutes a subsidy under Article 1.1 of the SCM Agreement. We thus uphold the Panel's findings, in paragraphs 7.436, 7.444, 7.454, 7.463, 7.473, 7.489-7.490, and 7.495 of the Panel Reports, that each of the challenged tax exemptions, reductions, and suspensions granted to accredited companies on (i) the sales of intermediate goods that they produce, and (ii) the purchases of raw materials, intermediate goods, and packaging materials (under the Informatics programme) and inputs, capital goods, and computational goods (under the PADIS and PATVD programmes) constitutes financial contributions where "government revenue that is otherwise due is foregone or not collected" under Article 1.1(a)(1)(ii) of the SCM Agreement.

## 5.4.2 Article 3.1(b) the SCM Agreement – import substitution

### 5.4.2.1 Introduction

5.223. We now turn to consider Brazil's claim on appeal that the Panel erred in finding that the PPBs and other production-step requirements under the four ICT programmes (Informatics, PADIS, PATVD, and Digital Inclusion programmes) are contingent upon the use of domestic goods, inconsistently with Article III:4 of the GATT 1994, and that they also constitute a contingency on the use of domestic over imported goods within the meaning of Article 3.1(b) of the SCM Agreement.<sup>676</sup>

5.224. Brazil submits that the Panel's findings under Article III:4 of the GATT 1994 imply that "whenever the requirement to perform certain manufacturing steps in Brazil as a condition to receive the subsidy involves the production of a specific input, part or component that could have been sourced from foreign producers, there would be *ipso facto*, and without further examination, discrimination within the meaning of Article III:4."<sup>677</sup> Moreover, Brazil considers that the Panel found that the ICT programmes are inconsistent with Article 3.1(b) simply because the subsidy at issue is contingent upon production in Brazil. In this respect, Brazil contends that the Panel's reasoning is inconsistent with the Appellate Body's findings under Article 3.1(b) of the SCM Agreement in *US – Tax Incentives*.<sup>678</sup> In Brazil's view, the Panel "simply presumed that because PPBs can result in the production of inputs and components and that some of the production steps can be outsourced, the subsidy granted under the ICT programmes will always be *de jure* conditioned upon the use of domestic over imported goods, despite the fact that the PPBs do not contain any language requiring, either in explicit terms or by necessary implication ... the use of products, whether domestic or imported".<sup>679</sup> Brazil underscores that the PPBs and similar production-step requirements relate to

<sup>674</sup> We recall, in this respect, the Panel's observation that, according to the European Union, the benchmark interest rate of the Central Bank of Brazil was, at the time of the first written submission to the Panel, 13.25%. (Panel Reports, fn 790 to para. 7.433)

<sup>675</sup> Taxes are deferred when they are collected later in time than they would normally be. We note that paragraph (e) of Annex I to the SCM Agreement refers to "[t]he full or partial exemption remission, or deferral specifically related to exports, of direct taxes or social welfare charges paid or payable by industrial or commercial enterprises" as an example of what could constitute an export subsidy.

<sup>676</sup> Brazil's appellant's submission, paras. 157 and 240.

<sup>677</sup> Brazil's appellant's submission, para. 159.

<sup>678</sup> In Brazil's view, the statements of the Appellate Body in that dispute "apply with equal force in the context of Article III:4 of the GATT 1994". (Brazil's appellant's submission, para. 163)

<sup>679</sup> Brazil's appellant's submission, para. 220.

the location of certain manufacturing steps in Brazil and do not prevent the possibility of using imported products.<sup>680</sup>

5.225. The European Union and Japan respond that the Panel's analysis under Article III:4 focused on the "conditions for companies to obtain accreditation and thereby be eligible for the tax exemptions, reductions or suspensions under the programmes".<sup>681</sup> With respect to Brazil's claim that the Panel erred in finding that the tax exemptions and reductions granted under the ICT programmes constitute prohibited subsidies under Article 3.1(b) of the SCM Agreement, the European Union and Japan submit that the Panel did not base its findings on the effects of the subsidies, but on the conditions of eligibility for them, which impose the use of domestic components under the guise of production-step requirements.<sup>682</sup> In the European Union's view, by doing so, the Panel correctly applied the legal standard under Article 3.1(b) as elaborated by the Appellate Body in *US – Tax Incentives*. The European Union notes that, in *US – Tax Incentives*, the Appellate Body observed that "the term 'use' may also refer to incorporating a component into a separate good and that it may refer to any type of good that may be used by the subsidy recipient, including parts or components that are incorporated into another good."<sup>683</sup> In the European Union's view, this is exactly the situation in the present case. For its part, Japan considers that what the Panel found to be problematic was not the outsourcing of the production steps, but the structure of accreditation under which PPBs and other production-step requirements condition the receipt of the subsidies on the use of domestic over imported goods under Article 3.1(b) of the SCM Agreement.<sup>684</sup>

5.226. Before addressing the issues raised on appeal, we provide a summary of the relevant Panel findings and set out the legal standard under Article 3.1(b) of the SCM Agreement.

#### 5.4.2.2 Panel's findings

5.227. Before the Panel, the European Union and Japan raised claims under Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement in relation to the four ICT programmes. In particular, the complainants claimed that the ICT programmes: (i) introduce regulatory discrimination against imported inputs, in the form of incentives to use domestically produced components and subassemblies in the production of finished or intermediate products, inconsistently with Article III:4 of the GATT 1994; and (ii) constitute prohibited subsidies contingent upon the use of domestic over imported products, inconsistent with Article 3.1(b) of the SCM Agreement.<sup>685</sup>

5.228. The European Union and Japan explained before the Panel that, to receive the relevant tax benefits under the ICT programmes, manufacturers must comply with certain production-step requirements. According to the complainants, the process of complying with each required production step specified in PPBs or otherwise results in the creation of an "input" good that then must be "used" in an ensuing step or steps in the production of the incentivized finished or intermediate product.<sup>686</sup> The complainants made this argument regardless of whether a single company itself performs all of the production steps and thus itself creates the inputs in question (the "in-house" scenario), or instead outsources some production steps to third parties, by acquiring from

<sup>680</sup> Brazil's appellant's submission, para. 222.

<sup>681</sup> European Union's appellee's submission, para. 259 (quoting Panel Reports, para. 7.193) (emphasis omitted). The European Union notes that the Panel found that the PPBs are a set of product-specific production steps that must be performed in Brazil in order for a company to benefit from the tax incentives with respect to that product. (Ibid.) See also Japan's appellee's submission, para. 79 (referring to Panel Reports, para. 7.313).

<sup>682</sup> European Union's appellee's submission, para. 320; Japan's appellee's submission, paras. 103 and 108. The European Union recalls, in particular, the Panel's finding that any accredited company has to comply with production steps "in order to obtain accreditation and then [to] obtain the relevant tax benefits". (European Union's appellee's submission, para. 319 (quoting Panel Reports, para. 7.277) (emphasis omitted)) The European Union also notes that the Panel focused on the element of contingency when examining the nested PPBs. (Ibid.)

<sup>683</sup> European Union's appellee's submission, para. 321 (referring to Appellate Body Report, *US – Tax Incentives*, paras. 5.8-5.9). (fns omitted)

<sup>684</sup> Japan's appellee's submission, para. 102.

<sup>685</sup> Panel Reports, paras. 7.2, 7.271, and 7.366.

<sup>686</sup> Panel Reports, para. 7.271. The complainants considered that "'the requirement to perform certain manufacturing steps in Brazil [in all cases] is tantamount to requiring the incorporation of domestic content into the finished product', whenever the performance of those manufacturing steps results in the creation of a product." (Ibid., para. 7.272 (quoting Japan's first written submission to the Panel, para. 296; referring to European Union's first written submission to the Panel, para. 600))

them the outputs of those production steps, which it then incorporates as inputs into its production of the incentivized product (the "outsourcing" scenario).<sup>687</sup>

5.229. The Panel observed that a finding that the alleged requirement to use domestic goods exists would "lead *ipso facto* to the further finding of inconsistency with Article III:4 of the GATT 1994"<sup>688</sup>, and would also constitute a finding of contingency in the sense of Article 3.1(b) of the SCM Agreement.<sup>689</sup>

5.230. The Panel noted that all four ICT programmes refer to production-step requirements contained in PPBs or in other legal instruments.<sup>690</sup> Depending on the PPB, certain production steps must be performed by the accredited company producing the incentivized finished or intermediate product at issue, while others may be performed by "third parties" based in Brazil.<sup>691</sup> The Panel examined how PPBs operate in practice in the ICT programmes, including through two illustrative examples<sup>692</sup>, namely, the PPB for Optical Splice Closures and the one for Speed Alarms, Tracking and Control, which it considered "broadly representative of how the PPBs as a whole operate".<sup>693</sup>

5.231. With respect to the PPB for Optical Splice Closures, the Panel observed that Article 1 of that PPB requires that all of the relevant steps "must be undertaken in Brazil".<sup>694</sup> The Panel observed that the envisaged production processes "consist of fundamental manufacturing from basic inputs", as opposed to simple assembly of components and subassemblies, which would not satisfy the PPB.<sup>695</sup> Similarly, the Panel noted that all of the steps outlined in Article 1 of the PPB for Speed Alarms, Tracking and Control must be undertaken in Brazil. The Panel underscored that "these are not mere assembly operations but fundamental manufacturing processes from basic inputs."<sup>696</sup> The Panel further observed that the PPB for Speed Alarms, Tracking and Control contains an additional element, "namely a PPB within a PPB (a so-called 'nested PPB')", according to which "at least 90% of the GSM modules used to produce any of the products for speed alarms, tracking and control listed in the Annex to the PPB must be produced in compliance with their own PPB."<sup>697</sup> According to the Panel, a nested PPB is analytically similar to that of the production-step requirements, with the key difference from main PPBs being that there is "an implicit presumption that the products that are subject to the nested PPBs [would] be outsourced".<sup>698</sup>

5.232. The Panel noted that "in every case the PPBs allow the accredited company to outsource at least some of the required production steps to third parties, so long as those third parties themselves comply with the requirements of the PPB in respect of the steps they perform."<sup>699</sup> Thus, a producer of a given incentivized product does not necessarily have to perform all the steps by itself in order to retain its accreditation, although it "takes responsibility for all of the production steps required in

<sup>687</sup> Panel Reports, para. 7.271.

<sup>688</sup> Panel Reports, para. 7.258 (referring to Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 220; GATT Panel Reports, *Canada – FIRA*, paras. 5.7-5.11; *Italy – Agricultural Machinery*, para. 13).

<sup>689</sup> Panel Reports, para. 7.259. The Panel also noted, in footnote 646 of its Reports, that, although its discussion of the alleged imposition under PPBs or other similar requirements of an obligation to use domestic inputs in the production of the incentivized products is limited to issues related to Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement, this did not mean that such discussion would not also be relevant to the claims under Article 2.1 of the TRIMs Agreement. (*Ibid.*, fn 646 to para. 7.256)

<sup>690</sup> Panel Reports, para. 7.279. A PPB is defined as "the minimum set of operations, in a manufacturing establishment, which characterizes the effective industrialization of [a] given product". (*Ibid.*, para. 7.280 (referring to Decree 5,906/2006 (Panel Exhibit JE-7), Article 16))

<sup>691</sup> Panel Reports, para. 7.281.

<sup>692</sup> Panel Reports, paras. 7.286-7.287 and 7.289. We reproduce the text of these PPBs in paras. 5.264-5.265.

<sup>693</sup> Panel Reports, para. 7.286 (referring to Interministerial Implementing Order (*Portaria*) 93 of 1 April 2013 establishing a Basic Production Process for optical splice closures produced in Brazil (Interministerial Implementing Order 93/2013) (Panel Exhibit JE-31); Interministerial Implementing Order (*Portaria*) 103 of 2 April 2013 on the Basic Production Process for products for speed alarms, tracking and control produced in Brazil (Interministerial Implementing Order 103/2013) (Panel Exhibit JE-32)).

<sup>694</sup> Panel Reports, para. 7.288.

<sup>695</sup> Panel Reports, para. 7.288.

<sup>696</sup> Panel Reports, para. 7.290.

<sup>697</sup> Panel Reports, para. 7.291. (fn omitted)

<sup>698</sup> Panel Reports, para. 7.295. (fn omitted)

<sup>699</sup> Panel Reports, para. 7.292. (fn omitted)

the respective PPB, and correspondingly ... receives the tax advantages in respect of that incentivized product".<sup>700</sup>

5.233. In examining the Informatics programme, the Panel noted that there seemed to be "no theoretical disagreement among the parties that at least in the case in which a company is required, when it acquires a product from an outside source, to only acquire a domestic product, there would be a requirement to use domestic goods in the sense covered by Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement."<sup>701</sup> The Panel considered that, given these views of the parties, it would be "useful to separately analyse the two possible scenarios for compliance with the PPBs": the in-house scenario and the outsourcing scenario.<sup>702</sup>

5.234. The Panel first examined the outsourcing scenario with respect to main PPBs that contain nested PPBs, and began by recalling its earlier finding that the products that are the subject of the challenged measures are "domestic products".<sup>703</sup> On this basis, the Panel found that the incentivized products produced in accordance with nested PPBs, which are used as components and subassemblies in the production of the products covered by the main PPBs, constituted Brazilian domestic products in their own right.<sup>704</sup> The Panel further noted that, because components and subassemblies that are the subject of nested PPBs are in most cases outsourced rather than produced "in-house", the requirements that at least a certain proportion of products subject to nested PPBs comply with their respective PPBs constituted "explicit requirements to use domestic goods", in the sense of Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement.<sup>705</sup> Therefore, according to the Panel, whenever a producer of a product covered by a main PPB obtained components or subassemblies covered by their own nested PPB, it was obtaining "domestic goods".<sup>706</sup> Furthermore, according to the Panel, because nested PPBs imposed a mandatory minimum amount of such "domestic goods" to be used in producing the product subject to the main PPB, the only way to satisfy the requirement, when outsourcing, is to acquire and use domestic goods.<sup>707</sup> Thus, the Panel concluded that "every PPB with a nested PPB inside contains an explicit requirement to use domestic goods in the cases where the goods covered by the nested PPB are outsourced."<sup>708</sup>

5.235. The Panel further observed that "[t]his analysis also holds true for the basic production step requirements of all PPBs under the Informatics programme, which typically are set forth in the PPBs' Article 1."<sup>709</sup> The Panel elaborated that all PPBs "contain outsourcing provisions that require that outsourced production steps comply with the respective requirements of the PPBs, and in every case at least some of those outsourcing provisions apply to production steps for the creation of manufactured components or subassemblies from basic components and raw materials which, as the Panel has found, are for that reason domestic products".<sup>710</sup> The Panel considered that, similarly to nested PPBs, the outsourcing provisions under the main PPBs give rise to a requirement to use domestic goods under Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement.<sup>711</sup>

5.236. The Panel added that, even if certain PPBs contain "alternative options to compliance with certain production-steps in the PPBs", the "mere existence of options for compliance that are potentially WTO-consistent could not preclude a finding of inconsistency in respect of the PPBs as a whole", so that the existence of alternative, potentially WTO-consistent options, would not "alter[]

<sup>700</sup> Panel Reports, para. 7.292.

<sup>701</sup> Panel Reports, para. 7.297.

<sup>702</sup> Panel Reports, para. 7.298.

<sup>703</sup> Panel Reports, para. 7.299 (referring to Panel Reports, para. 7.117). The Panel considered that the "manufacturing process, starting with basic materials and resulting in an intermediate or finished good to be sold on the market", which must take place in Brazil, "leaves no doubt that these products are Brazilian domestic products". (Ibid., para. 7.117) The Panel thus found that "all products produced in accordance with a PPB are, as such, Brazilian domestic products, by virtue of having been produced in Brazil from basic raw materials and other inputs through a specified mandatory manufacturing process." (Ibid., para. 7.299)

<sup>704</sup> Panel Reports, para. 7.299.

<sup>705</sup> Panel Reports, para. 7.299.

<sup>706</sup> Panel Reports, para. 7.300.

<sup>707</sup> Panel Reports, para. 7.300.

<sup>708</sup> Panel Reports, para. 7.300.

<sup>709</sup> Panel Reports, para. 7.301.

<sup>710</sup> Panel Reports, para. 7.301.

<sup>711</sup> Panel Reports, para. 7.301.



the inconsistency ... of an option that requires the use of domestic products over imported products".<sup>712</sup>

5.237. The Panel applied this reasoning to the other three ICT programmes. With respect to the PATVD programme, the Panel concluded, for the same reasons, that "the PPBs in the PATVD programme require the use of domestic goods in the sense covered by Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement."<sup>713</sup> In the case of the PADIS programme, the Panel found that a company seeking accreditation had to comply with different production-step requirements depending on the type of products, and that for certain products, no PPBs have been adopted yet.<sup>714</sup> In this respect, the Panel noted that "to the extent that any future PPBs adopted under the PADIS programme contain outsourcing provisions or nested PPBs in respect of manufactured components and subassemblies that operate in the same manner as those in the Informatics and PATVD programmes, such PPBs would require the use of domestic goods."<sup>715</sup> With respect to the existing production-step requirements, the Panel concluded, for the same reasons as under the Informatics programme, that they require the use of domestic goods under Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement.<sup>716</sup>

5.238. With respect to the Digital Inclusion programme, the Panel noted that it is different from other ICT programmes in that, under this programme, "the tax benefits are in respect of sales of certain products by retailers, rather than in respect of production of certain products by producers."<sup>717</sup> Under the Digital Inclusion programme, retailers that sell in Brazil certain digital consumer goods produced in accordance with their respective PPBs qualify for certain tax benefits.<sup>718</sup> Having recalled its earlier finding that all products produced in accordance with PPBs are Brazilian domestic products, the Panel concluded that the only goods eligible for the tax benefits under the Digital Inclusion programme would be domestic goods.<sup>719</sup> Thus, for the same reasons as under other ICT programmes, the Panel found that the Digital Inclusion programme is inconsistent with Article III:4 of the GATT 1994 and that it involves a contingency on the use of domestic over imported goods within the meaning of Article 3.1(b) of the SCM Agreement.<sup>720</sup>

5.239. The Panel thus concluded that the PPBs and other production-step requirements of the ICT programmes "accord to imported products treatment less favourable than that accorded to like domestic products, inconsistently with Article III:4 of the GATT 1994" and that "the same aspects of these programmes give rise to contingency on the use of domestic over imported goods in the sense of Article 3.1(b) of the SCM Agreement."<sup>721</sup>

#### 5.4.2.3 Article 3.1(b) of the SCM Agreement

5.240. Article 3.1(b) of the SCM Agreement reads:

Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:

...

- (b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.

Article 3.2 adds that "[a] Member shall neither grant nor maintain subsidies referred to in paragraph 1."

<sup>712</sup> Panel Reports, para. 7.303.

<sup>713</sup> Panel Reports, para. 7.308.

<sup>714</sup> Panel Reports, paras. 7.309 and 7.312.

<sup>715</sup> Panel Reports, para. 7.312.

<sup>716</sup> Panel Reports, para. 7.311.

<sup>717</sup> Panel Reports, para. 7.316.

<sup>718</sup> Panel Reports, para. 7.315.

<sup>719</sup> Panel Reports, para. 7.316 (referring to Panel Reports, para. 7.299).

<sup>720</sup> Panel Reports, para. 7.317.

<sup>721</sup> Panel Reports, para. 7.319.

5.241. Article 3.1(b) of the SCM Agreement prohibits subsidies the granting of which is "contingent ... upon the use of domestic over imported goods". The legal standard for establishing the existence of "contingency" under Article 3.1(b) is the same as under Article 3.1(a) of the SCM Agreement.<sup>722</sup> Since the ordinary meaning of "'contingent' is 'conditional' or 'dependent for its existence on something else'", a subsidy would be prohibited under Article 3.1(b) if it is "conditional" or "dependent for its existence" on the use of domestic over imported goods.<sup>723</sup> Therefore, a subsidy would be "contingent" upon the use of domestic over imported goods where the use of those goods is a condition, in the sense of a requirement<sup>724</sup>, for receiving the subsidy.<sup>725</sup>

5.242. The Appellate Body in *US – Tax Incentives* noted that the term "use" in Article 3.1(b) refers to the action of using or employing something<sup>726</sup> and "may, depending on the particular circumstances, refer to consuming a good in the process of manufacturing, but may also refer to, for instance, incorporating a component into a separate good, or serving as a tool in the production of a good".<sup>727</sup> The Appellate Body also noted that the term "goods" in Article 3.1(b) is qualified by the adjectives "domestic" and "imported", which implies that the "goods" concerned should be at least potentially tradable.<sup>728</sup> Finally, the term "over" expresses a preference between two things and, in the context of the phrase "contingent ... upon the use of domestic over imported goods", refers to the use of domestic goods in preference to, or instead of, imported goods.<sup>729</sup>

5.243. The term "contingency" under Article 3.1(b) covers contingency both in law and in fact. The legal standard expressed by the term "contingent" is the same for both.<sup>730</sup> The Appellate Body has said that a subsidy will be *de jure* contingent upon the use of domestic over imported goods "when the existence of that condition can be demonstrated on the basis of the very words of the relevant legislation, regulation or other legal instrument constituting the measure", or can "be derived by necessary implication from the words actually used in the measure".<sup>731</sup> The existence of *de facto* contingency "must be *inferred* from the total configuration of the facts constituting and surrounding the granting of the subsidy, none of which on its own is likely to be decisive in any given case".<sup>732</sup> The Appellate Body has observed that proving *de facto* contingency "is a much more difficult task".<sup>733</sup>

5.244. Where an analysis of contingency does not yield a finding of inconsistency under Article 3.1(b) on the basis of the words actually used in the measure, or any necessary implication therefrom, the existence of a requirement to use domestic over imported goods may still be found *de facto* on the basis of the factual circumstances that form part of the total configuration of the

<sup>722</sup> Appellate Body Report, *Canada – Autos*, para. 123.

<sup>723</sup> Appellate Body Report, *Canada – Autos*, para. 123 (referring to Appellate Body Report, *Canada – Aircraft*, para. 166).

<sup>724</sup> For instance, the Appellate Body observed in *Canada – Autos* that the measure at issue in that case would be inconsistent with Article 3.1(b) if "the use of domestic goods [was] a necessity and thus ... required as a *condition* for eligibility" under the measure. (Appellate Body Report, *Canada – Autos*, para. 130 (emphasis original))

<sup>725</sup> Appellate Body Report, *Canada – Autos*, para. 126. The link between "contingency" and "conditionality" is also borne out by the text of Article 3.1(b), which states that import substitution contingency can be either the sole or "one of several other *conditions*". (Appellate Body Report, *Canada – Aircraft*, para. 166 (emphasis added by the Appellate Body)) As with Article 3.1(a), this "relationship of conditionality or dependence" lies at the "very heart" of the legal standard in Article 3.1(b) of the SCM Agreement. (Appellate Body Reports, *Canada – Aircraft*, para. 171; *Canada – Aircraft (Article 21.5 – Brazil)*, para. 47)

<sup>726</sup> Appellate Body Report, *US – Tax Incentives*, para. 5.8 (referring to Appellate Body Report, *US – Carbon Steel (India)*, para. 4.374 and fn 1009 thereto, in turn referring to *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 3484).

<sup>727</sup> Appellate Body Report, *US – Tax Incentives*, para. 5.8.

<sup>728</sup> Appellate Body Report, *US – Tax Incentives*, para. 5.9. The Appellate Body explained that this term may refer to any type of good that may be used by the subsidy recipient, including parts or components that are incorporated into another good, material, or substance that are consumed in the production process of another good, or tools or instruments that are used in the production process. (Ibid.)

<sup>729</sup> Appellate Body Report, *US – Tax Incentives*, para. 5.11.

<sup>730</sup> Appellate Body Reports, *Canada – Aircraft*, para. 167; *Canada – Autos*, para. 143.

<sup>731</sup> Appellate Body Report, *Canada – Autos*, paras. 100 and 123. (fn omitted)

<sup>732</sup> Appellate Body Report, *Canada – Aircraft*, para. 167. (emphasis original) Factors that may be relevant in this regard include the design and structure of the measure granting the subsidy, the modalities of operation set out in such a measure, and the relevant factual circumstances surrounding the granting of the subsidy that provide the context for understanding the measure's design, structure, and modalities of operation. (Appellate Body Report, *US – Tax Incentives*, para. 5.12 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1046))

<sup>733</sup> Appellate Body Report, *Canada – Aircraft*, para. 167.

facts constituting and surrounding the granting of the subsidy.<sup>734</sup> The Appellate Body in *US – Tax Incentives* noted that the analysis of *de jure* and *de facto* contingency under Article 3.1(b), in light of the above-mentioned factors and circumstances, should be understood as a continuum, and a panel should conduct a holistic assessment of all relevant elements and evidence on the record.<sup>735</sup>

5.245. Accordingly, Article 3.1(b) prohibits those subsidies that are *de jure* or *de facto* contingent such that they require the use of domestic goods in preference to, or instead of, imported goods as a condition for receiving the subsidy. While the distinction between *de jure* and *de facto* contingency lies in the "evidence [that] may be employed to prove" that a subsidy is contingent upon the use of domestic over imported goods<sup>736</sup>, in both its *de jure* and *de facto* analyses, a panel assesses the consistency of the granting of a subsidy under Article 3.1(b) with the same obligation and against a single legal standard of contingency.

5.246. The Appellate Body in *US – Tax Incentives* further observed that, insofar as, by its terms, Article 3.1(b) does not prohibit the subsidization of domestic "production" *per se*, but rather the granting of subsidies contingent upon the use of domestic over imported goods, subsidies that relate to domestic production are not, for that reason alone, prohibited under Article 3 of the SCM Agreement.<sup>737</sup> In particular, such subsidies can ordinarily be expected to increase the supply of the subsidized domestic goods in the relevant market, thereby increasing the use of these goods downstream and adversely affecting imports, without necessarily requiring the use of domestic over imported goods as a condition for granting the subsidy.<sup>738</sup>

5.247. With regard to the relevance of Article III:8(b) of the GATT 1994, we note that this provision excepts from the national treatment obligation in Article III "the payment of subsidies exclusively to domestic producers", and thus makes clear that the provision of subsidies only to domestic producers, and not to foreign producers, does not in itself constitute a breach of Article III.<sup>739</sup> The Appellate Body in *US – Tax Incentives* observed that, while Article III:8(b) of the GATT 1994 comports with a reading of Article 3.1(b) of the SCM Agreement under which something more than mere subsidization of domestic production is required for finding an import substitution subsidy, a subsidy excepted from the Article III national treatment obligation by virtue of it being paid exclusively to domestic producers within the meaning of Article III:8(b) of the GATT 1994 may still be found to be contingent upon the use by those producers of domestic over imported goods under Article 3.1(b) of the SCM Agreement.<sup>740</sup>

5.248. As the Appellate Body observed in *US – Tax Incentives*, the relevant question in determining the existence of contingency under Article 3.1(b) is not whether the eligibility requirements under a subsidy may *result* in the use of more domestic and fewer imported goods. Rather, the question is whether *a condition requiring* the use of domestic over imported goods can be discerned from the terms of the measure itself or inferred from its design, structure, modalities of operation, and the relevant factual circumstances constituting and surrounding the granting of the subsidy that provide context for understanding the operation of these factors.<sup>741</sup>

<sup>734</sup> Appellate Body Report, *US – Tax Incentives*, para. 5.13. In that report, the Appellate Body mentioned that, for instance, factual circumstances potentially relevant to an assessment of whether a subsidy is *de facto* contingent may include the existence of a multi-stage production process, the level of specialization of the subsidized inputs, or the level of integration of the production chain in the relevant industry. (Ibid., fn 49 to para. 5.13)

<sup>735</sup> Appellate Body Report, *US – Tax Incentives*, para. 5.13.

<sup>736</sup> Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, fn 46 to para. 47 (quoting Appellate Body Report, *Canada – Aircraft*, para. 167).

<sup>737</sup> Appellate Body Report, *US – Tax Incentives*, para. 5.15 (referring to Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 47).

<sup>738</sup> Appellate Body Report, *US – Tax Incentives*, para. 5.15.

<sup>739</sup> See Appellate Body Report, *US – Tax Incentives*, para. 5.16.

<sup>740</sup> Appellate Body Report, *US – Tax Incentives*, para. 5.16.

<sup>741</sup> Appellate Body Report, *US – Tax Incentives*, para. 5.18. The Appellate Body further explained that, to the extent that no condition requiring the use of domestic over imported goods exists, but the effect of the subsidy is to displace or impede, or otherwise cause adverse effects to imports, those effects are disciplined under Part III of the SCM Agreement. (Ibid.)

#### 5.4.2.4 Whether the Panel erred in finding that the PPBs and other production-step requirements under the ICT programmes are inconsistent with Article 3.1(b) of the SCM Agreement and Article III:4 of the GATT 1994

5.249. On appeal, Brazil takes issue with the Panel's finding that the PPBs or analogous production-step requirements in the ICT programmes are explicitly contingent upon the use of domestic goods, within the meaning of Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement.<sup>742</sup> Brazil argues that the Panel erroneously considered that "whenever the requirement to perform certain manufacturing steps in Brazil as a condition to receive the subsidy involves the production of a specific input, part or component that could have been sourced from foreign producers, there would be *ipso facto*, and without further examination, discrimination within the meaning of Article III:4."<sup>743</sup> In a similar vein, with respect to the Panel's finding under Article 3.1(b), Brazil submits that the PPBs and other production-step requirements "establish the production process of specific products and leave no doubt that the tax incentives under the ICT programmes are contingent on *domestic production*"<sup>744</sup>, which, according to the Appellate Body in *US – Tax Incentives*, is "*insufficient* to establish a prohibited import substitution subsidy under Article 3.1(b) of the SCM Agreement".<sup>745</sup> Thus, in Brazil's view, the Panel erroneously equated a condition that certain production activities take place domestically with a contingency on the use of domestic over imported goods.<sup>746</sup>

5.250. In addition, Brazil contends that the Panel made "a sweeping finding" that all ICT programmes are contingent upon the use of domestic over imported goods despite the fact that not all of these measures require compliance with production steps as a necessary condition for payment of subsidies.<sup>747</sup> Brazil submits that this is particularly the case with respect to the PADIS and PATVD programmes, both of which allow accreditation for companies regardless of whether they comply with PPBs.<sup>748</sup>

5.251. The European Union and Japan contend that the Panel did not err in its findings under Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement. The European Union disagrees with Brazil's contention that "the Panel based its findings on the effects of the subsidies, or on the fact that accredited companies would likely use more domestic products in their downstream production activities."<sup>749</sup> Rather, in the European Union's view, "[t]he Panel focused on the conditions of eligibility for the subsidies, and found that those conditions impose the use of domestic components and subassemblies, under the guise of production step[] requirements, in order to obtain the subsidy."<sup>750</sup>

5.252. Japan submits that, "because of the very structure of the measure involved, the requirements that covered ICT products be produced in accordance with PPBs can only be satisfied if the final products are domestic, and certain inputs are domestic as well", which "means that the use of ... imported inputs can disqualify a final product for eligibility under the ICT programmes".<sup>751</sup> Japan agrees with the proposition that "granting subsidies to firms so long as they engage in domestic production activities, without more, should not be equated to making those subsidies contingent on the use of domestic over imported goods and hence prohibited."<sup>752</sup> However, in Japan's view, in the present case, the ICT programmes are not mere production subsidies because they condition the receipt of the tax advantages upon use of domestic over imported goods through production-step requirements.<sup>753</sup>

<sup>742</sup> Panel Reports, paras. 7.313 and 7.317.

<sup>743</sup> Brazil's appellant's submission, para. 159.

<sup>744</sup> Brazil's appellant's submission, para. 221. (emphasis original)

<sup>745</sup> Brazil's appellant's submission, para. 221 (referring to Appellate Body Report, *US – Tax Incentives*, para. 5.16). (emphasis original)

<sup>746</sup> Brazil's opening statement at the oral hearing.

<sup>747</sup> Brazil's opening statement at the oral hearing.

<sup>748</sup> Brazil's opening statement at the oral hearing.

<sup>749</sup> European Union's appellee's submission, para. 295.

<sup>750</sup> European Union's appellee's submission, para. 295.

<sup>751</sup> Japan's appellee's submission, para. 78.

<sup>752</sup> Japan's appellee's submission, para. 79 (quoting Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.785).

<sup>753</sup> Japan's appellee's submission, para. 79.

5.253. We recall that the Panel addressed the question whether the ICT programmes contain a requirement to use domestic goods in the section of the Panel Reports addressing the complainants' claims under Article III:4 and subsequently referred to this analysis in its examination under Article 3.1(b).<sup>754</sup> The Panel considered that a finding that the production-step requirements listed in PPBs and other legal instruments required the use of domestic components and subassemblies in the manufacturing of incentivized products as a condition to obtain a subsidy would entail an inconsistency under Article III:4 of the GATT 1994 and would satisfy the contingency element under Article 3.1(b) of the SCM Agreement.<sup>755</sup>

5.254. We note that the legal standard under Article 3.1(b) of the SCM Agreement is not the same as that under Article III:4 of the GATT 1994. In order to establish an inconsistency with Article 3.1(b) of the SCM Agreement, a measure must be "contingent ... upon the use of the domestic over imported goods". By contrast, to find an inconsistency with Article III:4 of the GATT, it is sufficient that the measure at issue alters the conditions of competition to the detriment of the imported products by providing an incentive to use domestic goods. Establishing the existence of a contingency requirement to use domestic over imported products under Article 3.1(b) of the SCM Agreement is thus a more demanding standard than demonstrating that an incentive to use domestic goods exists under Article III:4 of the GATT 1994. Accordingly, while establishing that a measure provides an incentive to producers to use domestic goods would be sufficient to find an inconsistency with Article III:4 of the GATT 1994, it would not suffice to also find that the same measure is contingent upon the use of domestic over imported goods under Article 3.1(b) of the SCM Agreement.

5.255. Nevertheless, we consider that the Panel's reliance on its findings of inconsistency of the ICT programmes with Article III:4 of the GATT 1994 to find the existence of the requirement to use domestic over imported goods within the meaning of Article 3.1(b) of the SCM Agreement is not necessarily, for that reason alone, incorrect. This is so if the findings under Article III:4, on which the Panel relied in its analysis under Article 3.1(b), establish the existence of a contingency requirement to use domestic over imported goods. In other words, as long as the Panel made findings of inconsistency with Article III:4 due to the existence of a contingency *requirement*, as opposed to a mere incentive, to use domestic goods, it could rely on these findings as a basis for its findings of inconsistency with Article 3.1(b) of the SCM Agreement. However, if we were to find that the Panel relied in its analysis under Article 3.1(b) on findings it made under Article III:4 that merely establish the existence of an *incentive* to favour domestic over imported goods, such reliance would be incorrect.<sup>756</sup>

5.256. Brazil has set out its claims of error regarding the Panel's findings that the ICT programmes require the use of domestic components and subassemblies in the sense of Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement in separate subsections of its appellant's submission. The essence of Brazil's arguments with respect to both claims of error is, however, the same and concerns whether the Panel correctly found that the PPBs and similar production-step requirements require accredited producers to use domestic goods. Moreover, Brazil's arguments under both provisions rely preponderantly on the Appellate Body's findings in *US – Tax Incentives*. In our assessment, we will focus on whether the Panel was correct in finding that the PPBs and other production-step requirements of the four ICT programmes establish a requirement to use domestic over imported goods in the sense of Article 3.1(b) of the SCM Agreement. To the extent that they do, this would also be inconsistent with Article III:4 of the GATT 1994. If, however, we establish that the Panel made a finding of inconsistency under Article 3.1(b) merely because it considered that the relevant measures provide an incentive to use domestic over imported goods, this would not be consistent with the legal standard under Article 3.1(b) of the SCM Agreement.

5.257. As noted, the European Union and Japan contend that the Panel correctly found that the PPBs and other production-step requirements explicitly require the use of domestic over imported goods.<sup>757</sup> By contrast, Brazil considers that the Panel equated a production requirement with the requirement to use domestic over imported goods.<sup>758</sup> All the participants refer, in their

<sup>754</sup> Panel Reports, paras. 7.313, 7.319, and 7.386.

<sup>755</sup> Panel Reports, paras. 7.258-7.259.

<sup>756</sup> We recall, in this respect, that the Panel found that imported products alleged to be discriminated against are similar to the domestic products at issue. (Panel Reports, para. 7.269) This finding is not challenged on appeal.

<sup>757</sup> European Union's appellee's submission, para. 295; Japan's appellee's submission, paras. 78-79.

<sup>758</sup> Brazil's appellant's submission, paras. 159 and 221.

argumentation, to the Appellate Body Report in *US – Tax Incentives*. We recall that, in that report, the Appellate Body explained that both import substitution subsidies and other subsidies that relate to domestic production may have detrimental effects with respect to imported goods. Subsidies contingent upon import substitution, by their nature, adversely affect the competitive conditions of imported goods. Yet also subsidies that relate to the production of certain goods in a Member's domestic territory can ordinarily be expected to increase the supply of the subsidized goods in the relevant market, which would have the consequence of increasing the use of subsidized domestic goods downstream and adversely affecting imports. However, while such subsidies may foster the use of subsidized domestic goods and affect imported goods, such effects do not, in and of themselves, demonstrate the existence of a requirement to use domestic over imported goods.<sup>759</sup> As observed, the relevant question in determining the existence of contingency under Article 3.1(b) is not whether conditions for eligibility and access to the subsidy may *result* in the use of more domestic and fewer imported goods, but whether the measure reflects *a condition requiring* the use of domestic over imported goods.<sup>760</sup>

5.258. We note that the Panel did not expressly indicate whether it conducted a *de jure* or a *de facto* analysis of inconsistency with Article 3.1(b) of the SCM Agreement.<sup>761</sup> We understand the Panel, however, to have made a *de jure* finding of inconsistency. First, the Panel relied on the text of the relevant legal instruments and its own understanding of the operation of the PPBs and other production-step requirements. The Panel did not examine the factual circumstances surrounding the granting of the subsidy. Second, the Panel stated that it was analysing "the specific provisions of the PPBs" and that the PPBs contain "an explicit requirement to use domestic goods".<sup>762</sup> Finally, in response to questions at the oral hearing, the participants agreed that the Panel made a finding of *de jure* inconsistency with Article 3.1(b) of the SCM Agreement with respect to the ICT programmes.<sup>763</sup>

5.259. In setting out its understanding of Article 3.1(b) of the SCM Agreement, the Panel noted that "a subsidy is 'contingent upon the use of domestic over imported goods', and thus, prohibited under Article 3.1(b) of the SCM Agreement, if the use of domestic goods is *required* or *necessary* in order to receive the subsidy."<sup>764</sup> We thus consider that the Panel understood the legal standard under Article 3.1(b) correctly and sought to determine, in its analysis, whether the PPBs and other production-step requirements require the use of domestic goods. Indeed, the Panel concluded that certain aspects of the ICT programmes are inconsistent with Article 3.1(b) of the SCM Agreement precisely because, in its view, they constitute requirements to use domestic goods, and not because it considered that they condition the receipt of the subsidy upon production in Brazil.

#### 5.4.2.4.1 Informatics programme

5.260. We start our examination of Brazil's claims of error concerning the Panel's findings under the Informatics programme by recalling the relevant aspects of the Panel's analysis that led it to reach the finding that the PPBs and other production-step requirements in the ICT programmes require the use of domestic over imported goods. We note that the Panel's description of the operation of PPBs and other production-step requirements is not challenged on appeal.

5.261. The Panel started by setting out the relevant factual aspects of "the PPBs and other production step requirements themselves".<sup>765</sup> As noted above, the Panel explained that "a PPB is essentially a set of product-specific production steps that must be performed in Brazil, in order for a company to benefit from the tax incentives in respect of that product under the relevant

<sup>759</sup> Appellate Body Reports, *US – Tax Incentives*, para. 5.49; *EC and certain member States – Large Civil Aircraft* (Article 21.5 – US), para. 5.65.

<sup>760</sup> Appellate Body Reports, *US – Tax Incentives*, para. 5.18; *EC and certain member States – Large Civil Aircraft* (Article 21.5 – US), para. 5.65.

<sup>761</sup> Panel Reports, paras. 7.285 and 7.300.

<sup>762</sup> Panel Reports, paras. 7.285 and 7.300.

<sup>763</sup> Brazil's, the European Union's, and Japan's responses to questioning at the oral hearing.

<sup>764</sup> Panel Reports, para. 7.261. (emphasis original)

<sup>765</sup> Panel Reports, para. 7.274.

programme(s)."<sup>766</sup> The Panel also found that all products produced in accordance with PPBs are Brazilian domestic products.<sup>767</sup> Brazil does not challenge this finding on appeal.<sup>768</sup>

5.262. The Panel further noted that not all production-step requirements are contained in PPBs. In particular, there are no PPBs for some of the products covered by the PADIS programme; instead there are "production-step details".<sup>769</sup> Under the PATVD programme, the tax benefits can be obtained either by complying with the production steps in the PPBs, or by meeting the criteria for the product to be considered "developed in Brazil".<sup>770</sup> Finally, the Panel specified that "not all PPBs or other production step requirements are relevant under all of the ICT programmes."<sup>771</sup>

5.263. The Panel did not analyse in detail each of the numerous PPBs and other relevant production-step requirements under the ICT programmes in addressing the complainants' claims. Instead, the Panel summarized the details of each PPB and other production-step requirements in the Appendix to the Panel Reports<sup>772</sup> and, "by way of example", examined the PPB for Optical Splice Closures and the PPB for Speed Alarms, Tracking and Control, which, in the Panel's view, "are broadly representative of how the PPBs as a whole operate".<sup>773</sup>

5.264. The Panel reproduced the wording of the two PPBs. The PPB for Optical Splice Closures provides, in relevant part:

Article 1. Establishes the following Basic Production Process for **OPTICAL SPLICE CLOSURES**:

- I - manufacture of the moulds for the injection of the plastic parts;
- II - injection of the plastic parts;
- III - stamping of the metal parts;
- IV - assembly of the air valve and closure kit sub-assemblies and base items;
- V - final integration of the product; and
- VI - product impermeability test.

Sole Paragraph. Provided that the Basic Production Process is complied with, the activities or operations required in the production stages may be carried out by third parties in Brazil, except with regard to stages V and VI which may not be conducted by third parties.

Article 2. Whenever duly corroborated technical or economic factors so determine, any stage of the Basic Production Process may be temporarily suspended or changed through a joint Implementing Order issued by the Ministers of State for Development, Industry and Foreign Trade and Science, Technology and Innovation.<sup>774</sup>

5.265. In turn, the PPB for Speed Alarms, Tracking and Control provides, in relevant part:

Article 1. The Basic Production Process for **PRODUCTS FOR SPEED ALARMS, TRACKING AND CONTROL** industrialized in Brazil, as set out in the Annex to

<sup>766</sup> Panel Reports, para. 7.280.

<sup>767</sup> Panel Reports, paras. 7.115 and 7.299. The Panel explained that, "to qualify as an incentivized product, the production process, all of which must be carried out in Brazil, starts with basic raw materials and components unassembled and in many cases unmanufactured." (Ibid., para. 7.116) The Panel explained that, because the "manufacturing process, starting with basic materials and resulting in an intermediate or finished good to be sold on the market, must take place in Brazil", there is "no doubt that these products are Brazilian domestic products". (Ibid., para. 7.117)

<sup>768</sup> Brazil's response to questioning at the oral hearing.

<sup>769</sup> Panel Reports, para. 7.276.

<sup>770</sup> Panel Reports, para. 7.282.

<sup>771</sup> Panel Reports, para. 7.283. The Panel noted that "a large number of PPBs are relevant under the Informatics programme, and a subset of these is relevant under the Digital Inclusion programme. Other PPBs are relevant, respectively, under the PADIS and PATVD programmes. In addition, only PADIS has production step requirements that are not contained in separate PPBs." (Ibid.)

<sup>772</sup> Panel Reports, paras. 9.1-9.323.

<sup>773</sup> Panel Reports, para. 7.286.

<sup>774</sup> Panel Reports, para. 7.287. (emphasis original)

Interministerial Implementing Order MDIC/MCT No 14 of 22 January 2007, shall now read as follows:

I - stamping, cutting, folding and surface treatment of metal parts, when applicable;  
 II - injection of the housing's plastic parts, when applicable;  
 III - manufacture of the printed circuits from laminate;  
 IV - assembly and soldering, or equivalent process, of all components on the printed circuit boards;  
 V - assembly of the electrical and mechanical parts, totally separated, at a basic component level; and  
 VI - integration of the printed circuit boards and the electrical and mechanical parts in the formation of the final product, in accordance with indents I to V above.

§ 1 Provided that the Basic Production Process is complied with, the activities or operations required in the production stages may be carried out by third parties, except with regard to the stage set out in indent VI which may not be conducted by third parties.

§ 2 Liquid crystal, plasma and other display technologies are temporarily exempted from assembly.

§ 3 The following assembled modules and sub-assemblies are temporarily exempted from compliance with the stages set out in indents III and IV, of the header paragraph to this Article:

I - Frequency Modulation (FM) communication modules;  
 II - Pager communication modules;  
 III - Global Positioning System (GPS) communication modules;  
 IV - satellite communication modules;  
 V - thermal printer mechanisms; and  
 VI - Code Division Multiple Access (CDMA) communication modules.

Article 2. 90% of the total number of Global System for Mobile Communications (GSM) communication modules used in the production of PRODUCTS FOR SPEED ALARMS, TRACKING AND CONTROL as set out in the Annex to this Implementing Order shall be produced in accordance with their respective Basic Production Process in the calendar year.<sup>775</sup>

5.266. With respect to both PPBs, the Panel noted that all of the production steps outlined in Article 1 must be undertaken in Brazil. According to the Panel, these steps are not mere assembly operations, but "fundamental manufacturing" processes from basic inputs, and a product produced through simple assembly of components and subassemblies would not satisfy the conditions of the PPBs.<sup>776</sup> We have reservations with respect to the Panel's unqualified statement that all the steps outlined in Article 1 of these PPBs are not assembly operations, but fundamental manufacturing processes. It is not clear whether certain of the steps listed in these PPBs constitute manufacturing or assembly operations (for example, the injection of the plastic parts in the process of manufacturing the optical splice closures, and the injection of the housing's plastic parts and assembly and soldering, or equivalent process, of all components on the printed circuit boards in the production of speed alarms, tracking and control products). More generally, we have reservations as to whether a clear line can be drawn between manufacturing and assembly, and as to its relevance to the question whether a measure requires the use of domestic over imported goods.

5.267. Notwithstanding, we recall that, in order to find a *de jure* inconsistency with Article 3.1(b) "a condition requiring the use of domestic over imported goods [must] be discerned from the terms of the measure itself", or by necessary implication therefrom.<sup>777</sup> Thus, for purposes of analysis, the distinction between manufacturing and assembly, while instructive, is not determinative. What

<sup>775</sup> Panel Reports, para. 7.289. (emphasis original)

<sup>776</sup> Panel Reports, paras. 7.288 and 7.290.

<sup>777</sup> Appellate Body Report, *US – Tax Incentives*, para. 5.18. (emphasis original)



matters, instead, is whether the measure reflects a condition requiring the use of domestic over imported goods.

5.268. The Panel also noted that both PPBs allow for outsourcing of some production steps to the third parties.<sup>778</sup> However, unlike the PPB for Optical Splice Closures, the PPB for Speed Alarms, Tracking and Control contains an additional feature, "a PPB within a PPB", which the Panel termed a "nested PPB".<sup>779</sup> Specifically, Article 2 of that PPB provides that at least 90% of the GSM modules used to produce any of the products for speed alarms, tracking and control listed in the Annex to the PPB must be produced in compliance with their own PPB. The Panel explained that this means that a separate PPB exists for GSM modules, and that this separate PPB must be complied with for at least 90% of the GSM modules used in production of speed alarms, tracking and control products listed in the Annex.<sup>780</sup>

5.269. In its analysis in the context of the Informatics programme, the Panel separately addressed the case of the "main" PPBs that contain nested PPBs and the case of basic production-step requirements for all PPBs. With respect to the nested PPBs, the Panel first noted that all products produced in accordance with PPBs, including those that are produced in accordance with nested PPBs, are domestic products. Moreover, the Panel recalled that at least some proportion of the components and subassemblies covered by the nested PPBs must be produced in accordance with those nested PPBs. Finally, the Panel recalled that, in most cases, the components and subassemblies subject to the nested PPBs will be outsourced.<sup>781</sup> On this basis, the Panel arrived at the conclusion that, "where products subject to nested PPBs are outsourced, the requirements that (at least a certain proportion of) such products comply with their respective PPBs thus constitute explicit requirements to use domestic goods – the components and subassemblies covered by the nested PPBs – in the sense covered by Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement."<sup>782</sup> The Panel then elaborated that:

[W]henever a producer of a product covered by a main PPB obtains components or subassemblies covered by their own nested PPB it is obtaining domestic goods. Because the nested PPB imposes a mandatory minimum amount of such domestic goods to be used in producing the product subject to the main PPB, the only way to satisfy this requirement, when outsourcing, is by acquiring and using domestic goods. Thus, every PPB with a nested PPB inside contains an explicit requirement to use domestic goods in the cases where the goods covered by the nested PPB are outsourced.<sup>783</sup>

According to the Panel, the same analysis holds true for the basic production-step requirements of all PPBs, all of which contain outsourcing provisions. The Panel concluded that "the outsourcing of production steps for the manufacture in Brazil of components and subassemblies from basic components and raw materials gives rise to a requirement to use domestic goods in the sense covered by Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement."<sup>784</sup>

5.270. We recall that PPBs are defined as a "minimum set of operations performed at a manufacturing facility that characterizes the *actual industrialization of a given product*".<sup>785</sup> The Panel characterized the PPBs as "a set of product-specific production steps that must be performed in Brazil, in order for a company to benefit from the tax incentives".<sup>786</sup> In other words, to obtain tax incentives under the relevant ICT programmes, a company has to manufacture a given product in accordance with the requirements of the PPBs or other production-step requirements.

<sup>778</sup> The PPB for Optical Splice Closures allows an accredited producer to outsource steps I-IV, i.e. manufacture the injection moulds, inject the plastic parts, stamp the metal parts, and assemble the air valve and closure kit subassemblies and base items. Under PPB for Speed Alarms, Tracking and Control, the accredited producer can outsource all of the production steps other than the final step of integrating the printed circuit boards, and all of the electrical and mechanical parts to form the final product. (Panel Reports, para. 7.293)

<sup>779</sup> Panel Reports, para. 7.291. (fn omitted)

<sup>780</sup> Panel Reports, para. 7.291.

<sup>781</sup> Panel Reports, para. 7.299.

<sup>782</sup> Panel Reports, para. 7.299.

<sup>783</sup> Panel Reports, para. 7.300.

<sup>784</sup> Panel Reports, para. 7.301.

<sup>785</sup> Panel Reports, para. 2.62. (emphasis added)

<sup>786</sup> Panel Reports, para. 7.280.

5.271. The Panel started its analysis by examining the "nested" PPBs, i.e. those PPBs that contain an additional PPB within a main PPB. As the Panel observed, "the main PPBs that contain nested PPBs require that at least some minimum proportion of the components and subassemblies of the type covered by the nested PPBs must have been produced in accordance with those nested PPBs."<sup>787</sup> We understand the Panel to have seen "nested" PPBs as an explicit manifestation of the requirement to use domestic goods over imported products. For example, Article 2 of the PPB for Speed Alarms, Tracking and Control requires that "90% of the total number of Global System for Mobile Communications (GSM) communication modules used in the production of PRODUCTS FOR SPEED ALARMS, TRACKING AND CONTROL ... shall be produced in accordance with their respective [PPB]."<sup>788</sup> The PPB for GSM communication modules is thus "nested" into the main PPB for Speed Alarms, Tracking and Control.

5.272. The main PPB mandates that 90% of the GSM communication modules used in the production of products for speed alarms, tracking and control be produced in accordance with their own (nested) PPB. Pursuant to the Panel's findings that are not contested on appeal, goods produced in accordance with PPBs are Brazilian domestic goods.<sup>789</sup> The GSM communication modules manufactured in line with their respective PPBs will thus be Brazilian domestic products. Accordingly, it follows that 90% of the GSM communication modules used in the production of products for speed alarms, tracking and control "shall be"<sup>790</sup> Brazilian domestic goods. Thus, by requiring that 90% of the GSM communication modules used in the production of products for speed alarms, tracking and control be produced in accordance with their respective PPBs, the PPB at issue effectively requires that 90% of GSM communication modules used in the production of speed alarms, tracking and control be of domestic origin.

5.273. We recall that a subsidy is *de jure* contingent upon the use of domestic over imported goods when the existence of that condition can be demonstrated on the basis of the very words of the measure, or can be derived by necessary implication from them.<sup>791</sup> The above-mentioned example demonstrates that, the nested PPBs within the main PPBs, by their very words, or at least by necessary implication therefrom, require that a certain percentage of inputs used in the production steps performed in accordance with the main PPB be sourced domestically. Thus, the use of domestic components and subassemblies, for which there is a nested PPB, in the production of the products covered by the main PPB will not be merely incidental.<sup>792</sup> Rather, it is a condition that must be fulfilled in order for the relevant product to benefit from the tax incentives under the ICT programmes.

5.274. The main PPBs that incorporate a nested PPB thus contain a condition requiring the use of domestic over imported goods in the sense of Article 3.1(b) of the SCM Agreement that stems from the very text of the nested PPBs, or at least by necessary implication therefrom. As a consequence of that condition, the nested PPBs also provide less favourable treatment to imported goods than to like domestic products within the meaning of Article III:4 of the GATT 1994.

5.275. We thus agree with the Panel's conclusion that the main PPBs that incorporate nested PPBs contain a requirement to use domestic goods, i.e. the components and subassemblies covered by the nested PPBs, in the sense of Article 3.1(b) of the SCM Agreement and Article III:4 of the GATT 1994.<sup>793</sup> Accordingly, we uphold the Panel's findings, in paragraphs 7.299-7.300, 7.302, 7.313, 7.319, 8.5.b, 8.5.e, 8.16.c, and 8.16.f of the Panel Reports, that the main PPBs that incorporate nested PPBs under the Informatics programme are inconsistent with Article 3.1(b) of the SCM Agreement and Article III:4 of the GATT 1994.

<sup>787</sup> Panel Reports, para. 7.299.

<sup>788</sup> Panel Reports, para. 7.289 (quoting PPB for Products for Speed Alarms, Tracking and Control).

<sup>789</sup> Panel Reports, paras. 7.117 and 7.299.

<sup>790</sup> Panel Reports, para. 7.289 (quoting PPB for Products for Speed Alarms, Tracking and Control).

<sup>791</sup> Appellate Body Report, *Canada – Autos*, paras. 100 and 123.

<sup>792</sup> As the Appellate Body observed in *US – Tax Incentives*, production subsidies "can ordinarily be expected to increase the supply of the subsidized domestic goods in the relevant market, thereby increasing the use of these goods downstream and adversely affecting imports". This, however, does not necessarily indicate the existence of a requirement to use domestic over imported goods as a condition for granting the subsidy. (Appellate Body Report, *US – Tax Incentives*, para. 5.15)

<sup>793</sup> Panel Reports, para. 7.299.

5.276. We now turn to examine the main PPBs that do not contain nested PPBs.<sup>794</sup> We recall that PPBs are defined as the "minimum set of operations, in a manufacturing establishment, which characterizes the effective industrialization of [a] given product".<sup>795</sup> The PPBs prescribe "a set of product-specific production steps that must be performed in Brazil, in order for a company to benefit from the tax incentives in respect of that product under the relevant programme(s)".<sup>796</sup> In its analysis, the Panel observed that all PPBs "contain outsourcing provisions that require that outsourced production steps comply with the respective requirements of the PPBs, and in every case at least some of those outsourcing provisions apply to production steps for the creation of manufactured components or subassemblies from basic components and raw materials which, as the Panel has found, are for that reason domestic products".<sup>797</sup> The Panel considered that "the outsourcing of production steps for the manufacture in Brazil of components and subassemblies from basic components and raw materials gives rise to a requirement to use domestic goods".<sup>798</sup> Thus, to the Panel, the possibility to outsource the production of components and subassemblies in Brazil under the PPBs amounted to a requirement to use domestic over imported goods under Article 3.1(b) of the SCM Agreement.

5.277. We recall that a subsidy is said to be *de jure* contingent upon the use of domestic over imported goods "when the existence of that condition can be demonstrated on the basis of the very words of the relevant legislation, regulation or other legal instrument constituting the measure".<sup>799</sup> A requirement to use domestic over imported products that is not set out expressly in the relevant legislation may nevertheless be derived by necessary implication if it results inevitably from the words actually used in the legislation, or if any other interpretation would be unreasonable.<sup>800</sup> In addition, while production subsidies "can ordinarily be expected to increase the supply of the subsidized domestic goods in the relevant market, thereby increasing the use of these goods downstream and adversely affecting imports", this does not necessarily indicate the existence of a requirement to use of domestic over imported goods as a condition for granting the subsidy.<sup>801</sup>

5.278. The Panel considered that compliance with the PPBs is possible by either outsourcing the performance of production steps to a third party in Brazil or by performing such production steps in-house in Brazil.<sup>802</sup> In the Panel's view, the possibility to outsource the production of components and subassemblies in Brazil under the PPBs "g[ave] rise to a requirement to use domestic goods"<sup>803</sup> under Article 3.1(b). We disagree with the Panel that the mere possibility of outsourcing under PPBs of production steps to be performed by a third party in Brazil, in and of itself, gives rise to a requirement to use domestic over imported goods under Article 3.1(b) of the SCM Agreement. Instead, the Panel should have explored, when establishing whether there was *de jure* inconsistency with Article 3.1(b), how the text of the PPBs gives rise to a requirement to use domestic over imported goods or how such a requirement can be derived from the text of the PPBs by necessary implication.

5.279. Moreover, in reaching its conclusion, the Panel observed that, "when an accredited company outsources components and subassemblies it can only comply with the PPB in question if the production step requirements for those components and subassemblies are respected, and respecting those requirements in turn means that those components and subassemblies must be

<sup>794</sup> We note that the Panel refers to them also as "basic production step requirements". (Panel Reports, para. 7.301)

<sup>795</sup> Panel Reports, para. 7.280 (referring to Decree 5,906/2006 (Panel Exhibit JE-7), Article 16).

<sup>796</sup> Panel Reports, para. 7.280.

<sup>797</sup> Panel Reports, para. 7.301.

<sup>798</sup> Panel Reports, para. 7.301.

<sup>799</sup> Appellate Body Report, *Canada – Autos*, para. 100.

<sup>800</sup> The panel in *US – Tax Incentives* explained that, for the purpose of the *de jure* determination, including by necessary implication, the relevant facts are therefore the text of the legislation at issue and any additional facts that can assist the Panel in understanding the meaning of the terms as used in that legislation. For example, such facts could include relevant context within the legislation itself, or other clarifications of legal meaning within the domestic legal system in question (such as the interpretation of pertinent terms by domestic courts, or administrative regulations directly implementing the legislation). However, any such facts would serve to illuminate the meaning of words used in the legislation and would not extend to other factual circumstances surrounding the granting of the subsidy that provide the context for understanding the measure's design, structure, and modalities of operation. (Panel Report, *US – Tax Incentives*, para. 7.273 and fn 556 thereto)

<sup>801</sup> Appellate Body Report, *US – Tax Incentives*, para. 5.15.

<sup>802</sup> Panel Reports, para. 7.298.

<sup>803</sup> Panel Reports, para. 7.301.

Brazilian domestic goods."<sup>804</sup> The focus of this statement is on the domestic origin of the goods produced in accordance with production-step requirements under the PPBs. Article 3.1(b) of the SCM Agreement indeed prohibits subsidies contingent "upon the use of *domestic* over imported goods".<sup>805</sup> Brazil has not challenged the Panel's finding that components and subassemblies produced in accordance with PPBs will be Brazilian domestic goods.<sup>806</sup> However, the mere fact that goods produced in accordance with the production-step requirements under the PPBs will be domestic does not indicate the existence of a condition requiring the use of domestic over imported goods. We recall, in this respect, that under the Siting Provisions, which were part of the measure at issue in *US – Tax Incentives*, it was uncontested, but not determinative, that the wings and fuselages that had to be produced in Washington State, and the planes that had to be assembled in Washington State, were of US origin because of the location where these production and assembly steps took place. We further emphasize, as the Appellate Body explained in *US – Tax Incentives*, that the relevant question in determining the existence of a contingency under Article 3.1(b) is "whether a condition requiring the use of domestic over imported goods can be discerned" from the measure.<sup>807</sup>

5.280. As noted, the PPBs are defined as "a minimum set of operations, in a manufacturing establishment, which characterizes the effective industrialization of a given product".<sup>808</sup> It follows that, to characterize the actual industrialization of a given product and to qualify for the tax incentives, the steps outlined in the PPBs, such as manufacture of components and subassemblies, product testing, and final integration, must be performed in Brazil. For instance, the PPB for Optical Splice Closures provides that the following production steps be performed in Brazil: (i) manufacture of the moulds for the injection of the plastic parts; (ii) injection of the plastic parts; (iii) stamping of the metal parts; (iv) assembly of the air valve and closure kit subassemblies and base items; (v) final integration of the product; and (vi) product impermeability test.<sup>809</sup> Similarly, steps I-V of the PPB for Speed Alarms, Tracking and Control PPB require performance in Brazil of certain production steps, in particular: (i) stamping, cutting, folding and surface treatment of metal parts; (ii) injection of the housing's plastic parts; (iii) manufacture of the printed circuits from laminate; (iv) assembly and soldering, or equivalent process, of all components on the printed circuit boards; and (v) assembly of the electrical and mechanical parts, totally separated, at a basic component level. Production step VI of this PPB further provides for "integration of the printed circuit boards and the electrical and mechanical parts in the formation of the final product" in accordance with steps I-V of that PPB.<sup>810</sup>

5.281. The PPBs thus set out a number of sequential production steps, starting from manufacturing of components and subassemblies and ending with the final assembly and testing of the product. As the Panel put it, "[i]n terms of their content, all of the PPBs consist of a collection of production steps, most of which involve the conversion through a manufacturing process of basic raw materials in completely disaggregated form into a component or set of components or subassemblies, with the final step or steps involving the integration of all of these components or subassemblies into the final product along with, in some cases, testing and other final steps."<sup>811</sup> The structure of the PPBs suggests that the subsidy recipients will likely "use" in a subsequent production step the domestic components and subassemblies that were manufactured in a previous production step. For example, production step I under the PPB for Optical Splice Closures provides for the "manufacture of the moulds for the injection of the plastic parts", while production step II envisages the "injection of the plastic parts".<sup>812</sup> Thus, the moulds produced for the injection of the plastic parts in accordance with the first production step are likely to be used in the injection of the plastic parts under the second production step. Subsequently, the moulds and the components and subassemblies resulting from the ensuing production steps are likely to be incorporated into the incentivized product as part of final integration under production step V. However, while such use of domestic goods may be a likely consequence of the eligibility requirements for the tax incentives under the Informatics programme,

<sup>804</sup> Panel Reports, para. 7.301.

<sup>805</sup> Emphasis added.

<sup>806</sup> Brazil's response to questioning at the oral hearing.

<sup>807</sup> Appellate Body Report, *US – Tax Incentives*, para. 5.18. (emphasis original)

<sup>808</sup> Panel Reports, para. 7.280 (quoting Decree 5,906/2006 (Panel Exhibit JE-7), Article 16).

<sup>809</sup> Panel Reports, para. 7.287 (quoting Interministerial Implementing Order 93/2013 (Panel Exhibit JE-31)).

<sup>810</sup> Panel Reports, para. 7.289 (quoting PPB for Products for Speed Alarms, Tracking and Control).

<sup>811</sup> Panel Reports, para. 7.285.

<sup>812</sup> Panel Reports, para. 7.287 (quoting Interministerial Implementing Order 93/2013 (Panel Exhibit JE-31), Article 1).

this does not, in and of itself, indicate the existence of a condition requiring the use of domestic over imported products.

5.282. Article 3.1(b) does not prohibit *per se* conditioning eligibility for tax incentives on conducting certain production, processing, or assembly steps domestically.<sup>813</sup> Inherent effects of production subsidies are not sufficient for a finding of contingency upon import substitution.<sup>814</sup> Instead, as the Appellate Body explained in *US – Tax Incentives*, the key question for a measure to be found *de jure* inconsistent with Article 3.1(b) of the SCM Agreement is whether "*a condition requiring the use of domestic over imported goods*" can be discerned from its very words or by necessary implication therefrom.<sup>815</sup>

5.283. In this respect, we do not consider that the main PPBs that do not contain nested PPBs provide for more than "a collection of production steps", which must be carried out in Brazil, in order for a company to benefit from the tax incentives with respect to the product subject to the PPB under the relevant programme.<sup>816</sup> Although compliance with the production steps set out in the PPBs is likely to result in the use of domestic components and subassemblies, this is not sufficient for a *de jure* finding of inconsistency to be made under Article 3.1(b) of the SCM Agreement.<sup>817</sup> Such use of domestic products will be a consequence of the requirement to perform the production steps in Brazil, but this does not mean that a contingency requirement not to use imported products can be discerned from the wording of the PPBs or by necessary implication therefrom.

5.284. The Panel also found that the main PPBs that do not contain nested PPBs are inconsistent with Article III:4 of the GATT 1994 because it considered that they give rise to a requirement to use domestic over imported goods. We recall that, in an inquiry under Article III:4 of the GATT 1994, "what is relevant is whether ... regulatory differences distort the conditions of competition to the detriment of imported products".<sup>818</sup> Thus, an examination of whether a measure involves treatment less favourable "must be founded on a careful analysis of the contested measure and of its implications in the marketplace".<sup>819</sup> As noted, while the existence of an incentive to use domestic over imported goods will not be sufficient to establish an inconsistency with Article 3.1(b) of the SCM Agreement, it will suffice to find less favourable treatment under Article III:4 of the GATT 1994. We recall that compliance with the PPBs is mandatory in order for a company to receive tax benefits under the ICT programmes.<sup>820</sup> We also recall that the Panel found that "the products alleged by the complaining parties to be disadvantaged are *like* the products that are allegedly favoured."<sup>821</sup> As we

<sup>813</sup> As the Appellate Body noted, in agreeing with the panel in *US – Tax Incentives*, "while the terms of the First Siting Provision could result in the use by Boeing of some wings and fuselages produced in Washington, this did not necessarily mean that the provision, by its terms, requires Boeing to use domestic over imported wings and fuselages." (Appellate Body Report, *US – Tax Incentives*, para. 5.27 (fn omitted)) The panel in *US – Tax Incentives* also concluded that "[t]he contingency on siting certain production activities within the state of Washington [under the First Siting Provision] does not entail any explicit, or any necessarily implied, requirement to use domestic goods", and that "[n]o express or obvious contingency results from the terms used in the [Second Siting Provision], nor can one be derived inevitably from its terms." (Panel Report, *US – Tax Incentives*, paras. 7.296 and 7.310)

<sup>814</sup> In this vein, the Appellate Body concurred in *US – Tax Incentives* with "the panel's conclusions that the First and Second Siting Provisions are not *de jure* contingent under Article 3.1(b) were based on [the Panel's] findings that: (i) the contingencies set out in the terms of these provisions relate to the location of certain assembly operations within Washington; (ii) the provisions are silent as to the use of domestic or imported goods; and (iii) the terms of the provisions do not, by necessary implication, prevent the possibility of using imported goods." (Appellate Body Report, *US – Tax Incentives*, para. 5.30)

<sup>815</sup> Appellate Body Report, *US – Tax Incentives*, para. 5.18. (emphasis original) Indeed, in *US – Tax Incentives*, in the context of its *de jure* analysis of the First Siting Provision, the Appellate Body found that, even if Boeing was "likely [to] use some amount of domestically produced wings and fuselages, this observation [was] not in itself sufficient to establish the existence of a condition, reflected in the measure's terms or arising by necessary implication therefrom, requiring the use of domestic over imported goods". (Ibid., para. 5.40)

<sup>816</sup> Panel Reports, para. 7.285.

<sup>817</sup> As discussed above, we note that, in response to questioning at the oral hearing, the participants agreed that the Panel's findings under the ICT programmes were of a *de jure* nature. (Brazil's, the European Union's, and Japan's responses to questioning at the oral hearing)

<sup>818</sup> Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 128.

<sup>819</sup> Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215. The Appellate Body, however, cautioned that "the examination need not be based on the *actual effects* of the contested measure in the marketplace". (Ibid. (emphasis original))

<sup>820</sup> Panel Reports, para. 7.280.

<sup>821</sup> Panel Reports, para. 7.269. (emphasis original)

observed above, given the structure of the PPBs, which comprises a number of sequential production steps, it is likely that components and subassemblies produced in compliance with PPBs will be used as inputs in the subsequent production steps. Accordingly, given that compliance with the PPBs is mandatory in order for a company to qualify for the tax incentives and that, in complying with the PPBs, the producers of an incentivized product will be likely to use domestic components and subassemblies, we consider that the main PPBs without nested PPBs provide an incentive to use domestic over imported goods. By doing so, the main PPBs in the Informatics programme accord treatment less favourable to imported goods than that accorded to like domestic goods inconsistently with Article III:4 of the GATT 1994. We thus agree with the Panel, albeit for different reasons, that the main PPBs that do not contain nested PPBs under the Informatics programme are inconsistent with Article III:4 of the GATT 1994.

5.285. In light of the above, with respect to the main PPBs that do not incorporate nested PPBs, we consider that the Panel erred in finding that, "under the Informatics programme, regarding the outsourcing requirements in respect of the production step requirements for components and subassemblies used in the production of an incentivized product, the PPBs require the use of domestic goods."<sup>822</sup> Accordingly, we reverse the Panel's findings, in paragraphs 7.301-7.302, 7.313, 7.319, 8.5.e, and 8.16.f of the Panel Reports, that the main PPBs without nested PPBs under the Informatics programme are contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b) of the SCM Agreement. However, we uphold, albeit for different reasons, the Panel's findings, in paragraphs 7.301-7.302, 7.313, 7.319, 8.5.b, and 8.16.c of the Panel Reports, that the main PPBs that do not incorporate nested PPBs under the Informatics programme are inconsistent with Article III:4 of the GATT 1994.

#### 5.4.2.4.2 PADIS, PATVD, and Digital Inclusion programmes

5.286. Brazil further argues that the Panel made "a sweeping finding" that all ICT programmes are contingent upon the use of domestic over imported goods despite the fact that the PADIS and PATVD programmes allow accreditation regardless of whether companies comply with PPBs.<sup>823</sup> We recall that, in order to obtain accreditation and the relevant tax benefits under the PATVD programme, a company must either comply with the relevant PPBs or meet the criteria for the product to be "developed in Brazil".<sup>824</sup> We understand Brazil to take issue with the fact that the Panel made a finding of inconsistency with respect to the PPBs operating under the PATVD programme despite the fact that complying with PPBs is only one of the options for obtaining accreditation under the PATVD programme. We note, in this respect, that the Panel considered the possibility of accreditation under the PATVD programme by virtue of meeting the criteria for a product to be "developed in Brazil" as "a potentially WTO-consistent alternative option for compliance", which, in its view, did not alter its conclusion that the PPBs in the PATVD programme required the use of domestic goods under Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement.<sup>825</sup>

5.287. Indeed, the Panel found that "*the PPBs in the PATVD programme* require the use of domestic goods in the sense covered by Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement."<sup>826</sup> Accordingly, we understand the Panel to have made findings of inconsistency only with respect to the PPBs, in the scenario when a company obtains accreditation by virtue of complying with the relevant PPB, and not with respect to the criteria for a product to be "developed in Brazil". The Panel found that the PPBs in the PATVD programme require the use of domestic goods under Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement "[f]or the same reasons [as it gave] in respect of the Informatics programme".<sup>827</sup>

5.288. We understand that the PPBs under the PATVD programme follow the same structure and logic as those under the Informatics programme.<sup>828</sup> Above, we have agreed with the Panel's

<sup>822</sup> Panel Reports, para. 7.302.

<sup>823</sup> Brazil's opening statement at the oral hearing.

<sup>824</sup> Panel Reports, para. 7.307. (fn omitted)

<sup>825</sup> Panel Reports, para. 7.308.

<sup>826</sup> Panel Reports, para. 7.308. (emphasis added)

<sup>827</sup> Panel Reports, para. 7.308.

<sup>828</sup> As the Panel observed, "all of the PPBs consist of a collection of production steps, most of which involve the conversion through a manufacturing process of basic raw materials in completely disaggregated form into a component or set of components or subassemblies, with the final step or steps involving the integration of all of these components or subassemblies into the final product along with, in some cases, testing and other final steps." (Panel Reports, para. 7.285)

conclusion that the main PPBs that incorporate nested PPBs contain "explicit requirements to use domestic goods", i.e. the components and subassemblies covered by the nested PPBs, under Article 3.1(b) of the SCM Agreement and Article III:4 of the GATT 1994. For the same reasons, to the extent the PPBs under the PATVD programme incorporate nested PPBs, we consider them to require *de jure* the use of domestic over imported goods inconsistently with Article 3.1(b) of the SCM Agreement and Article III:4 of the GATT 1994. With respect to the main PPBs that do not incorporate nested PPBs, however, we have reversed the Panel finding that they reflect a condition requiring the use of domestic over imported goods under Article 3.1(b). This is so because, even if compliance with the production steps set out in the PPBs is likely to result in the use of more domestic components and subassemblies, this is not sufficient for a finding of inconsistency under Article 3.1(b) of the SCM Agreement.

5.289. We thus uphold the Panel's findings of inconsistency under Article 3.1(b) of the SCM Agreement concerning the PATVD programme, in paragraphs 7.308, 7.313, 7.317, 7.319, 8.5.e, and 8.16.f of the Panel Reports, to the extent they relate to the main PPBs that contain nested PPBs, and we reverse the Panel's findings, contained in the same paragraphs of the Panel Reports, to the extent they relate to the main PPBs that do not contain nested PPBs.

5.290. Under the PADIS programme accredited companies are exempted from paying certain taxes with respect to semiconductors and information displays, as well as to inputs, tools, equipment, machinery, and software for the production of semiconductors and displays.<sup>829</sup> In order to become accredited under the PADIS programme, a company must, in particular, engage in certain manufacturing activities in Brazil that depend on the products for which a company is seeking tax benefits.<sup>830</sup> Specifically, with respect to semiconductor electronic devices, a company must perform: (i) concept, development, and design; (ii) diffusion or physical-chemical processing; or (iii) cutting, encapsulation, and testing.<sup>831</sup> With respect to information displays, a company must perform: (i) concept, development, and design; (ii) manufacture of photosensitive, photo, or electroluminescent elements and light-emitting diodes; or (iii) final assembly of displays and electrical and optical testing.<sup>832</sup> Finally, with respect to inputs and equipment intended for the manufacture of electronic semiconductor devices and information displays, the company must manufacture those products in accordance with the relevant PPBs.<sup>833</sup>

5.291. We note that, in order to be accredited with respect to semiconductor electronic devices or information displays, it is sufficient for a company to comply with one of the listed production-step requirements.<sup>834</sup> For example, in order to receive tax benefits for manufacturing semiconductor electronic devices, a company must perform either concept, development, and design; diffusion or physical-chemical processing; or cutting, encapsulation, and testing in Brazil. While the company could, in principle, engage in all of these activities and be accredited under the PADIS programme,

<sup>829</sup> Panel Reports, para. 2.71.

<sup>830</sup> Panel Reports, para. 7.309.

<sup>831</sup> Panel Reports, para. 2.76. (referring to Law 11,484 of 31 May 2007 providing for the incentives to the Digital TV equipment and electronic semiconductor components industries and on the intellectual property protection of integrated circuit topographies, establishing the Semiconductor Technological Development Support Program (PADIS) and Support Program for the Technological Development of the Digital TV Equipment Industry (PATVD) (Law 11,484/2007) (Panel Exhibit JE-71), Article 2(I), as amended by Law 12,715 of 17 September 2012 (Law 12,715/2012) (Panel Exhibit JE-95), Article 57; Decree 6,233 of 11 October 2007 establishing the criteria for the purpose of accreditation to the Semiconductor Technological Development Support Program (PADIS), which grants income tax exemption and reduces PIS/PASEP, COFINS and IPI contributions to zero (Decree 6,233/2007) (Panel Exhibit JE-73), Article 6(I), as amended by Decree 8,247 of 23 May 2014, amending Decree 6,233/2007 (Decree 8,247/2014) (Panel Exhibit JE-75), Article 1; Regulatory Instruction RFB 852 of 13 June 2008 laying down procedures for qualification for the Programme for the Technological Development of the Semiconductor Industry (PADIS) by Secretary of the Federal Revenue Department of Brazil (Regulatory Instruction RFB 852/2008) (Panel Exhibit JE-76), Article 4(I); Decree 6,759/2009 (Panel Exhibit JE-8), Article 283(I); Decree 7,212 of 15 June 2010 regulating the charging, inspection, collection and administration of the Industrial Goods Tax (IPI) (Decree 7,212/2010) (Panel Exhibit JE-9), Article 150, section 1(I)).

<sup>832</sup> Panel Reports, para. 2.76. (referring to Law 11,484/2007 (Panel Exhibit JE-71), Article 2(II); Decree 6,233/2007 (Panel Exhibit JE-73), Article 6(II), as amended by Decree 8,247/2014 (Panel Exhibit JE-75), Article 1; Normative Instruction RFB 852/2008 (Panel Exhibit JE-76), Article 4(II); Decree 6,759/2009 (Panel Exhibit JE-8), Article 283(II); Decree 7,212/2010 (Panel Exhibit JE-9) Article 150, section 1(II)).

<sup>833</sup> Panel Reports, para. 2.76 (referring to Law 11,484/2007 (Panel Exhibit JE-71), Article 2, section 3, as amended by Law 12,715/2012 (Panel Exhibit JE-95), Article 57; Decree 6,233/2007 (Panel Exhibit JE-73), Article 6, section 3, as amended by Decree 8,247/2014 (Panel Exhibit JE-75), Article 1).

<sup>834</sup> Panel Reports, para. 7.310.

performing just one of them would suffice to get accreditation. Thus, in contrast to some PPBs that require incorporation of components and subassemblies produced in accordance with the PPBs in the ensuing stage of production, the PADIS programme does not reflect such a requirement. It is possible that, in the scenario when a company seeking accreditation complies with all or several requirements under the PADIS programme, it would use the inputs produced in accordance with the PADIS programme in the ensuing stage of production. In our view, however, this would be a *result* of the eligibility requirements under the PADIS programme rather than a *condition* requiring the use of domestic over imported goods. As the Appellate Body noted in *US – Tax Incentives*, production subsidies "can ordinarily be expected to increase the supply of the subsidized domestic goods in the relevant market, thereby increasing the use of these goods downstream and adversely affecting imports, without necessarily requiring the use of domestic over imported goods as a condition for granting the subsidy."<sup>835</sup> Such effects of eligibility criteria for tax incentives are not sufficient for a finding of contingency upon the use of domestic over imported goods.

5.292. Accordingly, we agree with the Panel that the eligibility requirements under the PADIS programme are inconsistent with Article III:4 of the GATT 1994 because these eligibility requirements provide an *incentive* to use domestic ICT products and accord treatment less favourable to like imported ICT products covered under the PADIS programme. We do not consider, however, that these eligibility requirements under the PADIS programme also constitute a contingency *requirement* to use domestic over imported goods under Article 3.1(b) of the SCM Agreement.

5.293. We further note Brazil's argument that no PPBs have been developed under the PADIS programme for inputs and equipment intended for the manufacture of electronic semiconductor devices and information displays.<sup>836</sup> We note that the Panel expressly recognized this fact in its analysis.<sup>837</sup> The Panel further stated that, although the PADIS programme contemplates the adoption of PPBs in the future, the Panel could not "make findings in respect of production-step requirements that do not (yet) exist".<sup>838</sup> The Panel also remarked that it sufficed for it to note that, "to the extent that any future PPBs adopted under the PADIS programme contain outsourcing provisions or nested PPBs in respect of manufactured components and subassemblies that operate in the same manner as those in the Informatics and PATVD programmes, such PPBs would require the use of domestic goods."<sup>839</sup> We consider the Panel's statement unfortunate and unnecessary given that it concerned a potential WTO-inconsistency of a measure that Brazil had not taken. While the Panel made this statement, the Panel was clear in that it was not making a finding of inconsistency with respect to the PPBs under the PADIS programme that have not been adopted. We thus reject Brazil's argument that the Panel erroneously made a finding of inconsistency with respect to the PPBs that do not exist.

5.294. In light of the above, we reverse the Panel's findings, in paragraphs 7.313, 7.319, 8.5.e, and 8.16.f of the Panel Reports, that the PADIS programme requires the use of domestic over imported goods inconsistently with Article 3.1(b) of the SCM Agreement.

5.295. Finally, we recall that, "[t]he Digital Inclusion programme provides for zero rates with respect to PIS/PASEP and COFINS contributions for companies that sell in Brazil at retail level certain digital consumer goods produced in accordance with the relevant PPBs."<sup>840</sup> As the Panel observed, "the role of PPBs under the Digital Inclusion programme departs from that under the other ICT programmes ... because under this programme the tax benefits are in respect of sales of certain products by retailers, rather than in respect of production of certain products by producers."<sup>841</sup> Having recalled its finding that all products produced in accordance with PPBs are Brazilian domestic products, the Panel found that only domestic goods are eligible for the tax benefits under the Digital Inclusion programme.<sup>842</sup> The Panel concluded that "this is a straightforward situation of incentives that are provided in respect of a preference (in this case by retailers) for domestic over imported goods."<sup>843</sup> In the Panel's view, for the same reasons as with respect to the Informatics programme,

<sup>835</sup> Appellate Body Report, *US – Tax Incentives*, para. 5.15.

<sup>836</sup> Brazil's response to questioning at the oral hearing.

<sup>837</sup> Panel Reports, para. 7.312. The Panel noted that, in reviewing the evidence before it, it found that "no PPBs have as yet been adopted in respect of these particular products." (Ibid.)

<sup>838</sup> Panel Reports, para. 7.312.

<sup>839</sup> Panel Reports, para. 7.312.

<sup>840</sup> Panel Reports, para. 2.95.

<sup>841</sup> Panel Reports, para. 7.316.

<sup>842</sup> Panel Reports, para. 7.316.

<sup>843</sup> Panel Reports, para. 7.317.



the Digital Inclusion programme is inconsistent with Article III:4 of the GATT 1994 and "involves a contingency on the use of domestic over imported goods in the sense covered by Article 3.1(b) of the SCM Agreement".<sup>844</sup>

5.296. As the Panel noted, the Digital Inclusion programme provides a tax incentive to the retailers "in respect of a preference ... for domestic over imported goods".<sup>845</sup> In our view, such a preference results in the less favourable treatment under Article III:4 of the GATT 1994 for like imported digital consumer products due to the differential tax burden that imported products are subjected to by virtue of the fact that foreign producers cannot be accredited under that programme. We thus agree with the Panel that the accreditation requirements under the Digital Inclusion programme are inconsistent with Article III:4 of the GATT 1994 since they provide an incentive to use domestic over imported goods.

5.297. We note, however, that no inconsistency with Article 3.1(b) of the SCM Agreement arises unless the granting of a subsidy is found to be contingent "upon the use of domestic over imported goods". We recall, in this respect, that the Panel found that the Digital Inclusion programme presents "a straightforward situation of incentives that are provided in respect of a preference (in this case by retailers) for domestic over imported goods".<sup>846</sup> On that basis, the Panel found that the Digital Inclusion programme is inconsistent both with Article III:4 of the GATT 1994 and with Article 3.1(b) of the SCM Agreement. While the existence of an incentive to buy and resell like domestic goods may be sufficient to meet the legal standard under Article III:4 of the GATT 1994, it is not sufficient to establish an inconsistency with Article 3.1(b). Instead, in order to find an inconsistency with Article 3.1(b) of the SCM Agreement, a measure must be found to contain "*a condition requiring the use of domestic over imported goods*".<sup>847</sup>

5.298. We observe, in addition, that the Panel stated that it was reaching its findings "for the same reasons as outlined in [section 7.3.2.2.4.1 of its Reports]".<sup>848</sup> That section of the Panel Reports, however, merely sets out the factual background of the operation of the PPBs and other production-step requirements. We thus fail to see how the discussion in that section could provide the reasons for the Panel's finding that the Digital Inclusion programme contains a contingency requirement that is inconsistent with Article 3.1(b) of the SCM Agreement.

5.299. In light of the above, we consider that the Panel did not have a proper basis to conclude that the Digital Inclusion programme contains a requirement to use domestic over imported goods under Article 3.1(b) of the SCM Agreement. We thus reverse the Panel's findings, in paragraphs 7.317, 7.319, 8.5.e, and 8.16.f of the Panel Reports, as they relate to the Digital Inclusion programme, that the Digital Inclusion programme involves a contingency upon the use of domestic over imported goods that is inconsistent with Article 3.1(b) of the SCM Agreement.

5.300. We, however, agree with the Panel that the PPBs and other production-step requirements under the PATVD, PADIS, and Digital Inclusion programmes provide an incentive to use domestic ICT products. We therefore uphold the Panel's findings, in paragraphs 7.308, 7.311, 7.313, 7.317, 7.319, 8.5.b, and 8.16.c of the Panel Reports, that the Informatics, PATVD, PADIS, and Digital Inclusion programmes accord less favourable treatment to imported ICT products than that accorded to like domestic products, inconsistently with Article III:4 of the GATT 1994.

#### 5.4.2.4.3 INOVAR-AUTO programme

5.301. Brazil further requests, "[t]o the extent that the Panel's findings are based on the erroneous assumption that production step requirements are sufficient to establish a contingency upon the use of domestic over imported goods within the meaning of Article 3.1(b) of the SCM Agreement"<sup>849</sup>, that we reverse the Panel's findings that certain aspects of the INOVAR-AUTO programme constitute a prohibited import substitution subsidy under Articles 3.1(b) and 3.2 of the SCM Agreement.<sup>850</sup>

<sup>844</sup> Panel Reports, para. 7.317.

<sup>845</sup> Panel Reports, para. 7.317.

<sup>846</sup> Panel Reports, para. 7.317.

<sup>847</sup> Appellate Body Report, *US – Tax Incentives*, para. 5.18. (emphasis original)

<sup>848</sup> Panel Reports, para. 7.317.

<sup>849</sup> Brazil's Notice of Appeal, para. 25.

<sup>850</sup> Brazil's Notice of Appeal, para. 25 (referring to Brazil's appellant's submission, para. 295; Panel Reports, paras. 7.751, 7.823, 7.847, 8.6.e, and 8.17.f).

Brazil, however, has not developed any argumentation in support of this claim. In response to questioning at the oral hearing, Brazil explained that it requests the Appellate Body to reverse those findings to the extent the Appellate Body would reverse the corresponding findings under the ICT programmes.

5.302. The Panel made a finding of inconsistency with Article 3.1(b) of the SCM Agreement with respect to: (i) the accreditation requirement to perform a minimum number of manufacturing steps in Brazil; (ii) the rules on accrual of presumed tax credits, with respect to purchases of strategic inputs and tools; and (iii) the accreditation requirements with respect to expenditure and investment in R&D in Brazil, pertaining to the purchase of Brazilian laboratory equipment.<sup>851</sup> We understand that Brazil's claim concerns the Panel's findings relating to the accreditation requirements to perform a minimum number of manufacturing steps in Brazil.

5.303. In its reasoning concerning the accreditation requirement to perform a minimum number of manufacturing steps in Brazil, the Panel relied on its previous analysis with respect to the PPBs and other production-step requirements under the ICT programmes.<sup>852</sup> The Panel observed that the "production step requirements under the INOVAR-AUTO programme operate in an analogous manner" to those under the ICT programmes.<sup>853</sup> As we see it, the requirement to perform a minimum number of manufacturing steps in Brazil operates in a way similar to the main PPBs that do not incorporate nested PPBs under the ICT programmes. The Panel's findings under the INOVAR-AUTO programme, similarly to those under the ICT programmes, also concern manufacturing steps that must be performed in Brazil in order to qualify for certain tax benefits.

5.304. Above, we have reversed the Panel's findings of inconsistency with Article 3.1(b) of the SCM Agreement with respect to the main PPBs that do not incorporate nested PPBs under the ICT programmes. As noted, the production-step requirements under the INOVAR-AUTO programme operate in a similar manner to the main PPBs that do not incorporate nested PPBs and, in reaching its findings of inconsistency with respect to the production-step requirements under the INOVAR-AUTO programme, the Panel relied on its analysis under the ICT programmes. Accordingly, having reversed the Panel's findings with respect to the main PPBs that do not incorporate nested PPBs under the ICT programmes, we also reverse the Panel's findings of inconsistency with Article 3.1(b) with respect to the requirement to perform a minimum number of manufacturing steps under the INOVAR-AUTO programme contained in paragraphs 7.751, 7.823, 7.847, 8.6.e, and 8.17.f of the Panel Reports.

### 5.4.3 The European Union's and Japan's appeal concerning the in-house scenario

#### 5.4.3.1 Introduction

5.305. We now turn to consider the European Union's and Japan's claims on appeal. The European Union and Japan submit that, by not making specific findings on the in-house scenario, the Panel exercised false judicial economy and failed to make an objective assessment of the matter before it under Article 11 of the DSU.<sup>854</sup> The European Union and Japan contend that they have challenged the production-step requirements of the ICT and INOVAR-AUTO programmes "as a whole", without distinguishing between the in-house and outsourcing scenarios<sup>855</sup>, such that the matter referred to the Panel "comprised both" scenarios.<sup>856</sup> The European Union and Japan request that we reverse the relevant Panel findings and complete the legal analysis to find that the production-step requirements in the ICT and INOVAR-AUTO programmes are inconsistent with

<sup>851</sup> Panel Reports, para. 7.773.

<sup>852</sup> Panel Reports, paras. 7.747-7.750 and 7.770 (referring to Panel Reports, paras. 7.290-7.304 and 7.307-7.313).

<sup>853</sup> Panel Reports, para. 7.747.

<sup>854</sup> European Union's other appellant's submission, para. 36; Japan's other appellant's submission, paras. 20, 31, and 50.

<sup>855</sup> European Union's other appellant's submission, para. 36; Japan's other appellant's submission, paras. 35-36 and 51.

<sup>856</sup> European Union's other appellant's submission, paras. 56 and 63. See also Japan's other appellant's submission, paras. 18-19.

Article III:4 of the GATT 1994, Article 2.1 of the TRIMs Agreement, and Article 3.1(b) of the SCM Agreement under both the in-house and outsourcing scenarios.<sup>857</sup>

5.306. In the alternative, if we were to consider that the Panel correctly exercised judicial economy by not making specific findings in the in-house scenario, the European Union requests that we "review, pursuant to Article 17.6 of DSU, the legal interpretations developed by the Panel and modify, pursuant to Article 17.13 of DSU, the findings ... so as to make it clearer that the Panel indeed did not need to rule twice on the production-step requirements (in the in-house and outsourcing scenarios) because [it] had already found that those steps are *per se* inconsistent with the covered agreements".<sup>858</sup> Similarly, if we were to find that the Panel actually made a finding with respect to the ICT and INOVAR-AUTO programmes "as a whole", Japan requests that we review, pursuant to Article 17.6 of the DSU, the legal interpretations developed by the Panel, and modify, pursuant to Article 17.13 of the DSU, the relevant findings, to the extent they may be understood as referring solely to the outsourcing scenario.<sup>859</sup> Should we decide that the Panel did not exercise judicial economy at all with respect to the in-house scenario, Japan also claims that the Panel acted inconsistently with Article 11 of the DSU because it failed to provide "coherent reasoning" under that provision.<sup>860</sup>

5.307. Finally, the European Union raises "a subordinate claim of error, subject to the Appellate Body rejecting" both of the above-mentioned claims.<sup>861</sup> The European Union requests that we "find that the Panel, by failing to consider the European Union's claims under Article III:4 of [the] GATT 1994, Article 2.1 of [the] TRIMs Agreement and Article 3.1(b) of [the] SCM Agreement in light of all the relevant facts of the case (which included both the in-house and outsourcing scenarios), erred in the application of those provisions."<sup>862</sup>

5.308. In response, Brazil claims that the other appellants' claims of error under Article 11 of the DSU should be rejected.<sup>863</sup> Brazil argues that the issue of judicial economy is "only relevant to the manner in which a panel deals with a party's claims"<sup>864</sup>, and that the in-house scenario was not a claim but an argument.<sup>865</sup> Brazil considers, however, that the Panel duly examined and made findings with respect to all of the legal claims raised by the European Union and Japan under the ICT and the INOVAR-AUTO programmes under Article III:4 of the GATT, Article 2.1 of the TRIMs Agreement, and Article 3.1(b) of the SCM Agreement.<sup>866</sup> Accordingly, Brazil considers that the Panel "did not act inconsistently with Article 11 of the DSU by not addressing the European Union and Japan's *argument* that in the in-house scenario the ICT programmes and INOVAR-AUTO gave rise to a requirement to use domestic over imported goods within the meaning of Article III:4 of the GATT 1994, Article 2.1 of the TRIMs Agreement, and Article 3.1(b) of the SCM Agreement".<sup>867</sup>

#### 5.4.3.2 Panel's findings

5.309. We note that the other appeals in this dispute relate to a specific aspect of the ICT and INOVAR-AUTO programmes, namely, the in-house scenario in the context of compliance with the production-step requirements contained in PPBs or other instruments under the relevant programmes. In section 5.4.2.2 above, we have summarized the Panel's findings concerning the inconsistency of the PPBs and other production-step requirements under the ICT programmes with

<sup>857</sup> The European Union requests we reverse the Panel findings in paragraphs 6.10-6.11, 6.13, 7.314, 7.749, and 8.5 of the Panel Reports. (European Union's other appellant's submission, para. 125) Japan requests that we reverse the Panel findings in paragraphs 7.302, 7.308, 7.314, and 7.317 of the Panel Reports. (Japan's other appellant's submission, paras. 52-53)

<sup>858</sup> European Union's other appellant's submission, para. 125. (emphasis original)

<sup>859</sup> Japan's other appellant's submission, paras. 30 and 49.

<sup>860</sup> Japan's other appellant's submission, para. 21.

<sup>861</sup> European Union's other appellant's submission, para. 125.

<sup>862</sup> European Union's other appellant's submission, para. 125. (fn omitted) The European Union thus requests that we reverse the Panel's findings, complete the legal analysis with regard to the in-house scenario and find that the production-step requirements contained in the ICT and INOVAR-AUTO programmes are inconsistent with Article III:4 of the GATT 1994, Article 2.1 of the TRIMs Agreement, and Article 3.1(b) of the SCM Agreement also under the in-house scenario. (Ibid.)

<sup>863</sup> Brazil's appellee's submission, para. 29.

<sup>864</sup> Brazil's appellee's submission, para. 6 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 511 (emphasis original)).

<sup>865</sup> Brazil's appellee's submission, para. 8.

<sup>866</sup> Brazil's appellee's submission, para. 7.

<sup>867</sup> Brazil's appellee's submission, para. 12.

Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement.<sup>868</sup> In the summary below, we recall the Panel's findings relevant for the in-house scenario under the ICT and the INOVAR-AUTO programmes.

5.310. Before the Panel, the complainants argued, *inter alia*, that the production-step requirements with which manufacturers must comply to receive the tax incentives under the four ICT programmes involve requirements to use domestic inputs in the production of the incentivized products<sup>869</sup>, and that "the requirement to perform certain manufacturing steps in Brazil [in all cases] is tantamount to requiring the incorporation of domestic content into the finished product", whenever the performance of those manufacturing steps results in the creation of a product.<sup>870</sup> The Panel observed that the complainants "ma[de] this argument without regard for whether a single company itself performs all of the production steps and thus itself creates the 'inputs' in question (so-called 'in-house' production), or instead outsources some production steps to third parties, by acquiring from them the outputs of those production steps, which it then incorporates as 'inputs' into its production of the incentivized product."<sup>871</sup>

5.311. The Panel observed that, depending on the PPB, "[c]ertain production-step requirements must be performed by the company accredited as the producer of the incentivized finished or intermediate product that is subject of the PPB, while other production-step requirements may be performed by 'third parties' based in Brazil."<sup>872</sup> The Panel further noted that, in the complainants' view, the production-step requirements "on their own" constituted requirements to use domestic goods in the production of incentivized products, without regard to whether those requirements are met "in-house" or through outsourcing some of those steps.<sup>873</sup> The Panel further observed that Brazil had argued that production-step requirements had "exclusively to do with production and in no case require the use of domestic goods".<sup>874</sup> Nevertheless, the Panel stated that there seemed to be "no theoretical disagreement among the parties that at least in the case in which a company is required, when it acquires a product from an outside source, to only acquire a domestic product, there would be a requirement to use domestic goods in the sense covered by Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement."<sup>875</sup> The Panel considered that "[g]iven these views of the parties", it would be "useful to separately analyse the two possible scenarios for compliance with the PPBs ... : the in-house scenario and the outsourcing scenario".<sup>876</sup>

5.312. With respect to the outsourcing scenario, the Panel found that, because nested PPBs imposed a mandatory minimum amount of such "domestic goods" to be used in producing the product subject to the main PPB, the only way to satisfy the requirement, when outsourcing, was to acquire and use domestic goods.<sup>877</sup> The Panel further considered that "[t]his analysis also holds true for the basic production step requirements of all PPBs under the Informatics programme."<sup>878</sup>

5.313. The Panel added that, even if certain PPBs contained alternative options to comply with certain production steps in those PPBs, the "mere existence of options for compliance that are potentially WTO-consistent could not preclude a finding of inconsistency in respect of the PPBs as a whole", so that the existence of alternative, potentially WTO-consistent options would not "alte[r] the inconsistency ... of an option that requires the use of domestic products over imported

<sup>868</sup> See section 5.4.2.2 above.

<sup>869</sup> Panel Reports, para. 7.256.

<sup>870</sup> Panel Reports, para. 7.272 (quoting Japan's first written submission to the Panel, para. 296; referring to European Union's first written submission to the Panel, para. 600).

<sup>871</sup> Panel Reports, para. 7.271.

<sup>872</sup> Panel Reports, para. 7.281. (emphasis omitted; fn omitted)

<sup>873</sup> Panel Reports, para. 7.297. See also *ibid.*, para. 7.271.

<sup>874</sup> Panel Reports, para. 7.297.

<sup>875</sup> Panel Reports, para. 7.297.

<sup>876</sup> Panel Reports, para. 7.298.

<sup>877</sup> Panel Reports, para. 7.300.

<sup>878</sup> Panel Reports, para. 7.301. The Panel applied this reasoning to each of the four ICT programmes and concluded for each of them that, "regarding the outsourcing requirements" with respect to the production-step requirements for components and subassemblies used in the production of an incentivized product, the PPBs or analogous production-step requirements in the ICT programmes require the use of domestic goods, in the sense covered by Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement. (Panel Reports, paras. 7.302, 7.308, 7.311, and 7.316)

products".<sup>879</sup> In light of this, and given the parties' "divergent views in respect of the in-house scenario for complying with the PPBs", the Panel found it "unnecessary" to address the in-house scenario.<sup>880</sup> In the Panel's view, even if it found that the in-house scenario did not involve a requirement to use domestic goods, this would not alter its finding with respect to the outsourcing scenario that such measures are inconsistent with Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement.<sup>881</sup>

5.314. With respect to the INOVAR-AUTO programme, the Panel noted that, to be eligible for the tax benefits under this programme, a company must comply with a minimum number of defined manufacturing and engineering infrastructure activities that "must be performed in Brazil either by the accredited company or through third parties".<sup>882</sup> Further, the performance of these steps must cover at least 80% of manufactured vehicles, and is subject to a schedule of the minimum number of activities to be performed, which varies by calendar year and type of vehicle manufactured.<sup>883</sup> The Panel then recalled its analysis regarding the outsourcing scenario in the context of the ICT programmes, and considered that the production-step requirements in the INOVAR-AUTO programme operated in an "analogous manner".<sup>884</sup> Thus, the Panel concluded that, in the outsourcing scenario, the production-step requirements under the INOVAR-AUTO programme require the use of domestic goods under Article III:4 and Article 3.1(b).<sup>885</sup>

5.315. Furthermore, the Panel considered that for the same reasons as under the ICT programmes, it did not need to examine "whether under the 'in-house' scenario the production step requirements also would constitute a requirement to use domestic goods".<sup>886</sup> The Panel added that it did not consider that the existence of an alternative, WTO-consistent option for compliance would alter the fact that the option that requires the use of domestic over imported goods is inconsistent with Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement.<sup>887</sup>

5.316. In its comments on the Interim Report, the European Union, raising concerns about paragraphs 7.314 and 7.747 of the Report, argued that "the Panel's completion of its legal analysis in respect of the 'in-house scenario' is 'essential to secure a positive solution' to the dispute", because otherwise, "the 'complainants would be compelled to start a new panel procedure and repeat their legal claims, even though those legal claims [were] properly before [the] Panel.'"<sup>888</sup> The European Union thus requested the Panel to complete its legal analysis with regard to the in-house scenario, or to include elements in the Panel Reports that would allow the Appellate Body to do so.<sup>889</sup>

5.317. In responding to the European Union's request, the Panel first recalled the Appellate Body's statement in *EC – Fasteners (China)*, that:

[A] panel has the discretion "to address only those arguments it deems necessary to resolve a particular claim" and "the fact that a particular argument relating to that claim is not specifically addressed in the 'Findings' section of a panel report will not, in and of itself, lead to the conclusion that that panel has failed to make the 'objective assessment of the matter before it' required by Article 11 of the DSU."<sup>890</sup>

5.318. For the Panel, its findings that the "relevant aspects of the programmes concerning production-step requirements, as challenged by the complaining parties in this dispute", are

<sup>879</sup> Panel Reports, para. 7.303. See also *ibid.*, paras. 7.304, 7.308, 7.311, and 7.314. In the Appendix to its Report, the Panel set out its analysis regarding individual production-step requirements that must be complied with to benefit from tax treatments under the four ICT programmes, in the outsourcing scenario. The Panel did not set out the potentially WTO-consistent alternative options referred to above. (*Ibid.*, para. 9.4)

<sup>880</sup> Panel Reports, para. 7.314.

<sup>881</sup> Panel Reports, para. 7.314.

<sup>882</sup> Panel Reports, para. 7.743.

<sup>883</sup> Panel Reports, para. 7.743.

<sup>884</sup> Panel Reports, para. 7.747.

<sup>885</sup> Panel Reports, para. 7.748.

<sup>886</sup> Panel Reports, para. 7.749.

<sup>887</sup> Panel Reports, para. 7.750.

<sup>888</sup> Panel Reports, para. 6.9 (quoting European Union's comments on the Interim Report, para. 26).

<sup>889</sup> Panel Reports, para. 6.9 (quoting European Union's comments on the Interim Report, para. 26).

<sup>890</sup> Panel Reports, para. 6.10 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 511, in turn referring to Appellate Body Report, *EC – Poultry*, para. 135).

inconsistent with certain provisions of the covered agreements makes it unnecessary to address the complainants' argument that the relevant production steps are inconsistent with the exact same provisions, for reasons other than those identified by the Panel.<sup>891</sup> The Panel further noted that "its factual findings are sufficient should the Appellate Body decide to rule on this issue", and that "should the Appellate Body want to review the Panel's analysis, it will be able to benefit from the descriptive part of the Report, the exhibits contained in the Panel record (and identified in the descriptive part), and the Appendix attached to the Report."<sup>892</sup> Finally, the Panel considered it "inappropriate at this stage to prejudge the manner in which Brazil may come into compliance with [its] obligations", and found that issues pertaining to the manner of Brazil's compliance can be addressed in Article 21.5 proceedings.<sup>893</sup> Thus, the Panel refused to make additional findings on the in-house scenario.

#### 5.4.3.3 Analysis

5.319. The European Union and Japan maintain that they have challenged the production-step requirements of the ICT and the INOVAR-AUTO programmes "as a whole", without distinguishing between the in-house and outsourcing scenarios<sup>894</sup>, such that the matter referred to the Panel "comprised both" scenarios.<sup>895</sup> They also raise before us a series of alternative claims concerning the Panel's findings regarding the in-house scenario under the ICT and INOVAR-AUTO programmes.

5.320. As noted, the European Union and Japan submit that the Panel, by deciding not to make specific findings on the in-house scenario, exercised false judicial economy and failed to make an objective assessment of the matter before it contrary to the requirements of Article 11 of the DSU.<sup>896</sup> In the European Union's and Japan's view, by distinguishing between the in-house scenario and outsourcing scenarios on its own volition and by making specific findings only with regard to the latter scenario, the Panel failed to secure "a positive solution" to the dispute, in the sense of Article 3.7 of the DSU.<sup>897</sup>

5.321. As an alternative to this claim, the European Union and Japan each raise a similar claim predicated on different conditions. If we were to consider that the Panel correctly exercised judicial economy by not making findings concerning the in-house scenario, the European Union requests that we "review, pursuant to Article 17.6 of [the] DSU, the legal interpretations developed by the Panel and modify, pursuant to Article 17.13 of [the] DSU, the findings ... so as to make it clearer that the Panel indeed did not need to rule twice on the production step requirements (in the in-house and in the outsourcing scenarios) because [it] had already found that those steps are *per se* inconsistent with the covered agreements".<sup>898</sup> Japan makes a similar request conditioned upon us concluding that the Panel actually made a finding with respect to the ICT and INOVAR-AUTO programmes "as a whole".<sup>899</sup> In the alternative, if we were to decide that the Panel did not exercise judicial economy at all with respect to the in-house scenario, Japan claims that the Panel acted inconsistently with Article 11 of the DSU because it failed to provide "coherent reasoning" under that provision.<sup>900</sup>

5.322. Finally, the European Union also raises "a subordinate claim of error", subject to us rejecting both of the above-mentioned claims.<sup>901</sup> The European Union thus requests that we reverse the

<sup>891</sup> Panel Reports, para. 6.11 (referring to sections 7.3.2.2.4, 7.3.4, 7.4.2.4.2, and 7.4.5 of the Panel Reports).

<sup>892</sup> Panel Reports, para. 6.12.

<sup>893</sup> Panel Reports, para. 6.13.

<sup>894</sup> European Union's other appellant's submission, para. 36; Japan's other appellant's submission, paras. 35-36 and 51.

<sup>895</sup> European Union's other appellant's submission, paras. 56 and 63. See also Japan's other appellant's submission, paras. 18-19.

<sup>896</sup> European Union's other appellant's submission, para. 36; Japan's other appellant's submission, paras. 20, 31, and 50.

<sup>897</sup> Japan's other appellant's submission, para. 20; European Union's other appellant's submission, para. 48.

<sup>898</sup> European Union's other appellant's submission, para. 125. (emphasis original)

<sup>899</sup> Japan's other appellant's submission, paras. 30 and 49.

<sup>900</sup> Japan's other appellant's submission, para. 21.

<sup>901</sup> European Union's other appellant's submission, para. 125. In particular, the European Union submits that "the Panel made an error in the application of Article III:4 of [the] GATT 1994, Article 2.1 of [the] TRIMs Agreement and Article 3.1(b) of [the] SCM Agreement by failing to consider those provisions in light of all the relevant facts of the case, i.e. the in-house scenario." (Ibid., para. 122. (emphasis omitted))

Panel's findings and complete the legal analysis with regard to the in-house scenario and find that the production-step requirements contained in the ICT and INOVAR-AUTO programmes are inconsistent with Article III:4 of the GATT 1994, Article 2.1 of the TRIMs Agreement, and Article 3.1(b) of the SCM Agreement under both the in-house and outsourcing scenarios.<sup>902</sup>

5.323. The European Union and Japan submit that the lack of clarity concerning the WTO-consistency of the in-house scenario could prevent effective implementation of the Panel's recommendations and rulings in this dispute.<sup>903</sup> The European Union considers that the Panel Reports could be understood as "not requiring Brazil to amend in any way the challenged measures, in so far as applicable to the in-house scenario", and leaving the participants and other WTO Members "in a situation of legal uncertainty" as regards the compatibility of the in-house scenario with the relevant WTO provisions.<sup>904</sup> Similarly, Japan argues that the lack of findings regarding the in-house scenario may lead to future disagreement as to whether Brazil is still permitted to maintain the measures at issue with respect to the in-house scenario. Furthermore, because a compliance panel's terms of reference are limited to measures taken to comply with the recommendations and rulings of the DSB, and it is unclear whether the Panel's findings, recommendations, and rulings (and thus Brazil's future compliance obligations) extend to the accreditation requirement as a whole, a positive solution to the dispute is not secured.<sup>905</sup>

5.324. For its part, Brazil does not contest that the European Union and Japan, in making their claims before the Panel, did not distinguish between in-house and outsourcing scenarios.<sup>906</sup> Brazil also agrees with the European Union and Japan that the scope of the Panel's findings at issue is unclear.<sup>907</sup> Brazil, however, claims that the issue of judicial economy is "only relevant to the manner in which a panel deals with a party's *claims*"<sup>908</sup>, and that the in-house scenario was not a claim, but an argument.<sup>909</sup> Hence, in Brazil's view, the European Union's and Japan's claims of error under Article 11 of the DSU should be rejected because judicial economy cannot be exercised improperly with respect to arguments.<sup>910</sup>

5.325. Brazil submits that the Panel was not required to "address every conceivable 'factual situation'" in which the European Union and Japan considered that the measures at issue are inconsistent with the covered agreements, and neither was the Panel's decision not to address the in-house scenario "internally contradictory with any interpretative finding made by the Panel, as Japan incorrectly posits".<sup>911</sup> Rather, the Panel simply "considered all of the arguments put forward ... but effectively decided to attribute to the in-house scenario the weight and significance it considered appropriate", within the bounds of its discretion under Article 11.<sup>912</sup>

5.326. As we see it, at the heart of the European Union's and Japan's appeal is the concern that, due to an alleged lack of clarity in the Panel's findings concerning the in-house scenario, the implementation of the Panel's recommendations and rulings in this dispute may be compromised and certain issues may be left unresolved.<sup>913</sup> We thus start our analysis by examining whether the Panel's findings cover the in-house scenario.

5.327. We recall that, prior to its analysis of the ICT programmes, the Panel noted that there seemed to be "no theoretical disagreement among the parties" that, in case a company is required, when it acquires a product from an outside source, to only acquire a domestic product, there would be a requirement to use domestic goods.<sup>914</sup> The Panel, however, also noted that, while the

<sup>902</sup> European Union's other appellant's submission, para. 125.

<sup>903</sup> European Union's and Japan's responses to questioning at the oral hearing.

<sup>904</sup> European Union's other appellant's submission, para. 85.

<sup>905</sup> Japan's other appellant's submission, paras. 38-39. See also European Union's other appellant's submission, para. 86.

<sup>906</sup> Brazil's responses to questioning at the oral hearing.

<sup>907</sup> Brazil's responses to questioning at the oral hearing.

<sup>908</sup> Brazil's appellee's submission, para. 6 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 511 (emphasis original)).

<sup>909</sup> Brazil's appellee's submission, para. 8.

<sup>910</sup> Brazil's appellee's submission, para. 29.

<sup>911</sup> Brazil's appellee's submission, para. 11 (referring to European Union's other appellant's submission, para. 77; Japan's other appellant's submission, para. 21, in turn referring to Appellate Body Report, *Colombia – Textiles*, para. 5.27).

<sup>912</sup> Brazil's appellee's submission, para. 12.

<sup>913</sup> European Union's and Japan's responses to questioning at the oral hearing.

<sup>914</sup> Panel Reports, para. 7.297.



complainants considered that "the production-step requirements on their own constitute requirements to use domestic goods", Brazil argued that production-step requirements have exclusively to do with production and do not require the use of domestic goods.<sup>915</sup> The Panel therefore considered that it would be "useful" to separately analyse the two possible scenarios, starting with the outsourcing one.<sup>916</sup> Accordingly, the Panel's subsequent analysis explored how the production-step requirements may result in a "requirement to use domestic goods" in the context of the "outsourcing scenario".<sup>917</sup> The Panel observed, in particular, that, whenever a producer of a product covered by a main PPB obtained components or subassemblies covered by its own nested PPB, it was obtaining "domestic goods". Furthermore, in the Panel's view, because nested PPBs imposed a mandatory minimum amount of such "domestic goods" to be used in producing the product subject to the main PPB, the only way to satisfy the requirement, when outsourcing, was to acquire and use domestic goods.<sup>918</sup>

5.328. In addition, with regard to three out of four of the ICT programmes (i.e. the Informatics, PATVD, and PADIS programmes), the Panel found that, "regarding the *outsourcing requirements* in respect of the production step requirements for components and subassemblies"<sup>919</sup> used in the production of an incentivized product, the PPBs required the use of domestic goods in the sense of Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement.<sup>920</sup> The explicit references to the outsourcing scenario in those findings may be viewed as suggesting that the Panel's findings of inconsistency, in paragraphs 7.302, 7.308, and 7.311-7.314 of its Report, concern the measures only as they apply in the outsourcing scenario, without prejudice to how they may apply in the in-house scenario.<sup>921</sup> Similarly, with regard to the INOVAR-AUTO programme, the Panel found that, in the outsourcing scenario, the production-step requirements under the INOVAR-AUTO programme require the use of domestic goods under Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement.<sup>922</sup>

5.329. Other elements of the Panel's analysis, however, can be understood as covering the in-house scenario. In particular, in its analysis under the ICT programmes, the Panel repeatedly observed that, even if certain PPBs contain "alternative options to compliance with certain production-steps in the PPBs", the "mere existence of options for compliance that are potentially WTO-consistent could not preclude a finding of inconsistency in respect of the PPBs as a whole", so that the existence of alternative, potentially WTO-consistent options, would not "alte[r] the inconsistency ... of an option that requires the use of domestic products over imported products".<sup>923</sup> The Panel subsequently referred to these observations in its analysis of the consistency of the INOVAR-AUTO programme with Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement.<sup>924</sup> These statements by the Panel may be seen as suggesting that the in-house scenario could be a "potentially WTO-consistent" option, had the Panel examined it.<sup>925</sup> We also note that the Panel is unclear in stating, on the one hand, that "potentially WTO-consistent [options] could not preclude a finding of inconsistency in respect of the PPBs as a whole", and, on the other hand, that potentially

<sup>915</sup> Panel Reports, para. 7.297.

<sup>916</sup> Panel Reports, para. 7.298.

<sup>917</sup> Panel Reports, paras. 7.298-7.314 and 7.746-7.751.

<sup>918</sup> Panel Reports, para. 7.300.

<sup>919</sup> Panel Reports, para. 7.302. (emphasis added)

<sup>920</sup> Panel Reports, paras. 7.302, 7.308, 7.311, and 7.316. In the case of the PADIS programme, the Panel found that a company seeking accreditation had to comply with different production-step requirements depending on the type of products, and that for certain products, no PPBs have been adopted yet. In this respect, the Panel noted that "to the extent that any future PPBs adopted under the PADIS programme contain *outsourcing* provisions or nested PPBs in respect of manufactured components and subassemblies that operate in the same manner as those in the Informatics and PATVD programmes, such PPBs would require the use of domestic goods." (Ibid., para. 7.312 (emphasis added))

<sup>921</sup> We note that, for the Digital Inclusion programme, however, the Panel did not make such explicit references to the outsourcing scenario, because it applies to sales of certain products by retailers. The Panel simply found that "this programme involves a contingency on the use of domestic over imported goods in the sense covered by Article 3.1(b) of the SCM Agreement." (Panel Reports, para. 7.317)

<sup>922</sup> Panel Reports, para. 7.748.

<sup>923</sup> Panel Reports, para. 7.303. See also *ibid.*, para. 7.304.

<sup>924</sup> Panel Reports, paras. 7.749-7.750 (referring to Panel Reports, paras. 7.303-7.304) and 7.770 (referring to Panel Reports, paras. 7.258, 7.303, and fn 648 to para. 7.258).

<sup>925</sup> Panel Reports, para. 7.314.



WTO-consistent options would not "alte[r] the inconsistency ... *of an option* that requires the use of domestic products over imported products".<sup>926</sup>

5.330. We also note that the Panel's overall conclusions regarding the ICT and INOVAR-AUTO programmes under Article III:4 of the GATT 1994 appear to suggest that the Panel's findings of inconsistency cover the measures as a whole. In particular, the Panel found, with respect to the ICT programmes, that:

[T]he production-step requirements and the requirement for products to obtain the status of "developed" in Brazil under the Informatics, PADIS, and PATVD programmes, and certain eligibility requirements under the Digital Inclusion programme ... accord to imported products treatment less favourable than that accorded to like domestic products, inconsistently with Article III:4 of the GATT 1994.<sup>927</sup>

5.331. Similarly, in the conclusions regarding the INOVAR-AUTO programme under Article III:4 of the GATT 1994, the Panel found that, "under the INOVAR-AUTO programme, the conditions for accreditation in order to receive presumed tax credits ... accord less favourable treatment to imported products than that accorded to like domestic products, inconsistently with Article III:4 of the GATT 1994."<sup>928</sup> Thus, in its overall conclusions on those two programmes, the Panel did not specify the factual scenarios in which the relevant production-step requirements and analogous requirements are WTO-inconsistent. Neither did the Panel refer to such distinction in the conclusions and recommendations of its Reports.<sup>929</sup>

5.332. In its overall conclusions and recommendations, the Panel may be seen as having made a finding of inconsistency with the relevant provisions for the measures as a whole, without distinguishing between the two factual scenarios used by the Panel in its analysis.

5.333. Our examination of the relevant Panel's analysis and findings thus reveals that some aspects of the Panel's reasoning and conclusions appear to refer to the outsourcing scenario, while excluding the in-house scenario. Other aspects of the Panel's analysis, including the overall conclusions and recommendations can be understood as covering measures as a whole and thus extending to the in-house scenario. In this respect, we share the concern of the European Union and Japan that the lack of clarity with respect to the scope of the Panel's findings may compromise the effective implementation of the recommendations and rulings in this dispute. This would not contribute to achieving a positive solution to this dispute, as required under Article 3.7 of the DSU.

5.334. We recall, that the Panel reached its findings of inconsistency under Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement with respect to the ICT programmes because it considered that the PPBs and other production-step requirements require the use of domestic goods.<sup>930</sup> Subsequently, the Panel referred to its analysis under the ICT programmes in reaching findings of inconsistency under Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement with respect to the accreditation requirement to perform certain manufacturing steps in Brazil under the INOVAR-AUTO programme.<sup>931</sup> The Panel also relied on these findings to reach its findings of inconsistency under Article 2.1 of the TRIMs Agreement with respect to the ICT and INOVAR-AUTO programmes.<sup>932</sup> Accordingly, the Panel used its findings of the existence of the requirement to use domestic goods under Article III:4 of the GATT and Article 3.1(b) of the SCM Agreement under the ICT programmes as a basis for its subsequent findings.

5.335. We also recall that the participants agree that the Panel's finding of inconsistency with respect to the PPBs and other production-step requirements under the ICT programmes was of a *de jure* nature.<sup>933</sup> In its analysis, under the ICT programmes, the Panel relied on the text of the relevant legal instruments and its own understanding of the operation of the PPBs and other production-step requirements and did not examine the factual circumstances surrounding the

<sup>926</sup> Panel Reports, para. 7.303. (emphasis added)

<sup>927</sup> Panel Reports, para. 7.318.

<sup>928</sup> Panel Reports, para. 7.772.

<sup>929</sup> Panel Reports, paras. 8.5.b, 8.5.d-e, 8.6b, 8.6.d-e, 8.16.c, 8.16.e-f, 8.17.c, and 8.17.e-f.

<sup>930</sup> Panel Reports, paras. 7.313 and 7.319.

<sup>931</sup> Panel Reports, paras. 7.747-7.751.

<sup>932</sup> Panel Reports, paras. 7.364 and 7.805.

<sup>933</sup> Participants' responses to questioning at the oral hearing.

granting of the subsidy.<sup>934</sup> Moreover, in examining the claims concerning the ICT programmes, the Panel indicated that it was analysing "the specific provisions of the PPBs"<sup>935</sup> and that the PPBs contain "an explicit requirement to use domestic goods".<sup>936</sup> Similarly, in the context of the INOVAR-AUTO programme, the Panel considered "that the accreditation requirements to invest in R&D in Brazil and make expenditure[s] in engineering, basic industrial technology and capacity-building of suppliers in Brazil, with respect to laboratory equipment used in performing R&D in Brazil, *by the necessary implication of the wording of the measure*, require the use of domestic over imported goods in order to be accredited and obtain the tax benefits."<sup>937</sup> Likewise, in our analysis above, we have focused on whether the PPBs and other production-step requirements under the ICT programmes contain in their very terms, or by necessary implication therefrom, a requirement to use domestic over imported goods under Article 3.1(b) and provide less favourable treatment under Article III:4 of the GATT 1994.<sup>938</sup>

5.336. We further recall that the legal standard under Article 3.1(b) of the SCM Agreement and Article III:4 of the GATT is not the same. While an inquiry under Article 3.1(b) of the SCM Agreement focuses on whether there is a condition requiring the use of domestic over imported goods, an incentive to use domestic goods is sufficient to find an inconsistency with Article III:4 of the GATT 1994.<sup>939</sup>

5.337. We recall that the legal standard under Article 3.1(b) of the SCM Agreement requires that *a condition requiring* the use of domestic over imported goods be discerned from the terms of the measure itself, or inferred from its design, structure, modalities of operation, and the relevant factual circumstances constituting and surrounding the granting of the subsidy that provide context for understanding the operation of these factors.<sup>940</sup> Accordingly, for purposes of establishing an inconsistency with Article 3.1(b) of the SCM Agreement, whether a company produces goods in-house or whether it outsources its production is not decisive. What matters, instead, is whether such a measure reflects a condition requiring the use of domestic over imported goods.<sup>941</sup>

5.338. By contrast, local content requirements that alter the conditions of competition to the detriment of the imported products by providing an incentive to use domestic goods will be found to be inconsistent with Article III:4 of the GATT 1994.<sup>942</sup> For purposes of analysis under Article III:4 of the GATT, as well as under Article 2.1 of the TRIMs Agreement, whether a company produces goods in-house or whether it outsources its production would not be determinative. Instead, the relevant inquiry is whether the measure accords to imported products treatment less favourable than that accorded to the domestic products.<sup>943</sup>

5.339. In light of the above, we consider that it did not matter, for purposes of the Panel's analysis, what factual scenarios were available for compliance with the requirements under the ICT and INOVAR-AUTO programmes. The Panel's bifurcation of its analysis into the two possible factual scenarios was thus unnecessary. Moreover, as noted, for purposes of establishing an inconsistency

<sup>934</sup> Panel Reports, para. 7.285.

<sup>935</sup> Panel Reports, para. 7.285.

<sup>936</sup> Panel Reports, para. 7.300.

<sup>937</sup> Panel Reports, para. 7.770. (emphasis added)

<sup>938</sup> See section 5.4.2.4.1 above.

<sup>939</sup> See paragraph 5.254 above.

<sup>940</sup> Appellate Body Report, *US – Tax Incentives*, para. 5.18.

<sup>941</sup> We recall, however, that, in *US – Tax Incentives*, the Appellate Body explained that "the existence of *de facto* contingency 'must be *inferred* from the total configuration of the facts constituting and surrounding the granting of the subsidy, none of which on its own is likely to be decisive in any given case'." (Appellate Body Report, *US – Tax Incentives*, para. 5.12 (quoting Appellate Body Report, *Canada – Aircraft*, para. 167. (emphasis original))) Such "factual circumstances potentially relevant to an assessment of whether a subsidy is *de facto* contingent may include the existence of a multi-stage production process, the level of specialization of the subsidized inputs, or the level of integration of the production chain in the relevant industry." (Ibid., fn 49 to para. 5.13)

<sup>942</sup> Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 220.

<sup>943</sup> We also recall that the Panel considered that the in-house scenario is one of "the two possible [factual] scenarios for compliance with the PPBs" under the ICT programmes. (Panel Reports, para. 7.298) We note, in this respect, that, for purposes of a *de jure* analysis, the factual circumstances surrounding the measure are of limited importance. Rather, a subsidy will be *de jure* contingent upon the use of domestic over imported goods under Article 3.1(b) of the SCM Agreement when the existence of that condition can be demonstrated on the basis of the very words of the measure, or can be derived from them by necessary implication. (Appellate Body Report, *Canada – Autos*, paras. 100 and 123)

with Article 3.1(b) of the SCM Agreement, Article III:4 of the GATT 1994, and Article 2.1 of the TRIMs Agreement, the possible factual scenarios existing under the measure are not decisive. What matters, instead, is whether the respective legal standard has been met.

5.340. In light of the above, we reverse the Panel's findings, in paragraphs 7.303-7.304 and 7.314 of the Panel Reports, made in the context of its analysis under ICT programmes, to the extent that they can be understood as suggesting that the in-house scenario was not covered by the Panel's findings. We also reverse the Panel's findings, in paragraphs 7.749-7.750 and 7.770 of the Panel Reports, made in the context of INOVAR-AUTO programme and referring to the mentioned Panel's findings under the ICT programmes, to the extent that they can also be understood as suggesting that the in-house scenario was not covered by the Panel's findings. We thus consider that the Panel's findings, in paragraphs 7.319, 7.772-7.773, 8.5.e, 8.6.b, 8.6.e, 8.16.c, 8.16.f, 8.17.c, and 8.17.f of the Panel Reports, apply also in the in-house scenario. For these reasons, we need not further address the European Union's and Japan's claims raised on appeal.

## 5.5 Article I:1 of the GATT 1994 and the Enabling Clause

5.341. We now turn to consider Brazil's claim on appeal that the Panel erred in finding that the claims raised by the European Union and Japan under Article I:1 of the GATT 1994 were within its terms of reference and that the differential and more favourable treatment in the form of internal tax reductions accorded to imports from Argentina, Mexico, and Uruguay under the INOVAR-AUTO programme was not justified under paragraphs 2(b) and 2(c) of the Enabling Clause.<sup>944</sup> We will begin by examining whether the Panel erred in its interpretation and application of paragraph 4(a) of the Enabling Clause. In so doing, we will first address the notification requirement in paragraph 4(a). We then review whether the differential tax treatment under the INOVAR-AUTO programme was notified pursuant to paragraph 4(a) as having been adopted under paragraphs 2(b) and 2(c) of the Enabling Clause, such that the complaining parties could be considered to have been on notice and, consequently, could have been expected to raise the Enabling Clause and identify the relevant provision(s) thereof in their panel requests. We then examine whether the Panel erred in its interpretation and application of paragraph 2(b) of the Enabling Clause, where we first examine the scope of that provision. Next, we review whether, as claimed by Brazil, the differential tax treatment under the INOVAR-AUTO programme falls within the scope of paragraph 2(b) and is therefore substantively justified under that provision. Finally, we examine Brazil's claim on appeal that the Panel erred in finding that Brazil has not identified any arrangement adopted under paragraph 2(c) that has a genuine link to the internal tax reductions under the INOVAR-AUTO programme such that the differential and more favourable treatment at issue can be substantively justified under that provision.

### 5.5.1 Whether the Panel erred in finding that the claims raised by the European Union and Japan under Article I:1 of the GATT 1994 were within its terms of reference

5.342. Before the Panel, the European Union and Japan raised claims under Article I:1 of the GATT 1994 with respect to certain aspects of the INOVAR-AUTO programme. The European Union and Japan argued that Brazil accords an advantage in the form of internal tax reductions implemented through Articles 21 and 22(I) of Decree 7,819/2012 to motor vehicles imported into Brazil from a member-country of MERCOSUR and Mexico that is not accorded to like motor vehicles imported into Brazil from other WTO Members, including the European Union and Japan.<sup>945</sup>

5.343. The Panel found that the tax reductions accorded to motor vehicles imported from MERCOSUR members and Mexico under the INOVAR-AUTO programme are advantages granted by Brazil to products originating in those countries that are not accorded immediately and unconditionally to like products originating in other WTO Members, inconsistently with Article I:1 of the GATT 1994.<sup>946</sup>

5.344. The Panel then turned to consider Brazil's defences under the Enabling Clause. Brazil argued that the differential tax treatment accorded to Argentina, Mexico, and Uruguay under the INOVAR-AUTO programme was justified under both paragraphs 2(b) and 2(c) of the Enabling Clause

<sup>944</sup> GATT Document L/4903, 28 November 1979, BISD 26S/203.

<sup>945</sup> Panel Reports, para. 7.1012 (referring to European Union's first written submission to the Panel, paras. 346-365; Japan's first written submission to the Panel, paras. 274-281).

<sup>946</sup> Panel Reports, para. 7.1048.

and was notified to the WTO, as required under paragraph 4(a) of the Enabling Clause.<sup>947</sup> Brazil further argued that the European Union and Japan had the burden of invoking the Enabling Clause in their panel requests and "since they did not do so, they cannot challenge the right of Brazil to invoke paragraph[s] 2(b) and 2(c) of the Enabling Clause to justify the inconsistency of the INOVAR-AUTO programme with Article I:1 of the GATT 1994."<sup>948</sup>

5.345. The Panel began by examining who had the burden of invoking the Enabling Clause. The Panel stated that the issue of whether the Enabling Clause has been properly invoked pertains to the jurisdiction of the Panel, and specifically "whether the complaining parties' claim under Article I:1 of the GATT 1994 is within the Panel's terms of reference".<sup>949</sup>

5.346. The Panel noted Brazil's argument that the Appellate Body has established that "a complaining party has the burden of indicating in its panel request that a particular challenged measure is not consistent with the relevant provisions of the Enabling Clause."<sup>950</sup> The Panel considered that the Appellate Body's statements in *EC – Tariff Preferences* were made in the specific context of that dispute.<sup>951</sup> According to the Panel, the Appellate Body's findings indicated that "the burden of invoking the Enabling Clause is placed on the complaining party in situations where the complaining party is on notice that the challenged measure was adopted (and in the view of the adopting member, justified) under the Enabling Clause."<sup>952</sup> The Panel, therefore, considered that in situations where a WTO Member has notified a particular arrangement imposing discriminatory treatment as adopted or modified under the Enabling Clause, other WTO Members are presumed to be aware that the specific discriminatory treatment was adopted pursuant to the Enabling Clause.<sup>953</sup> The Panel concluded that a complaining party does not have the burden to invoke the Enabling Clause in its panel request, unless that complaining party is informed that the responding party considers the challenged measure to have been adopted pursuant to the Enabling Clause.<sup>954</sup>

5.347. The Panel next considered "whether the challenged measures and their related justifications were notified to the WTO"<sup>955</sup> such that the complaining parties were on notice and therefore had the burden to invoke the relevant provisions of the Enabling Clause in their panel requests.

5.348. The Panel recalled that Brazil submitted that the differential tax treatment under the INOVAR-AUTO programme was notified to the WTO, as required under paragraph 4(a) of the Enabling Clause.<sup>956</sup> Brazil argued that the notification requirement was satisfied because "the 1980 Treaty of Montevideo establishing the Latin American Integration Association (LAIA) was notified to the WTO under [paragraph] 2(c) of the Enabling Clause"<sup>957</sup> and that the differential tax treatment granted to Argentina, Mexico, and Uruguay is based on economic complementation agreements (ECAs) negotiated under the auspices of the 1980 Treaty of Montevideo.<sup>958</sup> Brazil also argued that the "ECAs 'are implementation measures of the {1980} Treaty of Montevideo and [we]re notified to

<sup>947</sup> Panel Reports, para. 7.1054. The Panel noted that Brazil did not invoke the Enabling Clause with respect to the differential and more favourable treatment accorded to motor vehicles imported from Paraguay and Venezuela. (Ibid.) In response to questioning at the oral hearing in these appellate proceedings, Brazil confirmed that it does not challenge the Panel's findings contained in paragraphs 7.1048, 8.6.g-h, and 8.17.h-i of the Panel Reports that the internal tax reductions under the INOVAR-AUTO programme are inconsistent with Article I:1 of the GATT 1994 to the extent they concern Paraguay and Venezuela. (Brazil's response to questioning at the oral hearing)

<sup>948</sup> Panel Reports, para. 7.1054 (referring to Brazil's first written submissions to the Panel, paras. 694-742 (DS472) and paras. 627-674 (DS497); second written submission to the Panel, paras. 166-181; response to Panel questions Nos. 4 and 53-55; comments on other parties' responses to Panel questions Nos. 53-55).

<sup>949</sup> Panel Reports, para. 7.1062.

<sup>950</sup> Panel Reports, para. 7.1057 (referring to Brazil's response to Panel question No. 4, in turn referring to Appellate Body Report, *EC – Tariff Preferences*, para. 110).

<sup>951</sup> Panel Reports, para. 7.1063.

<sup>952</sup> Panel Reports, para. 7.1064.

<sup>953</sup> Panel Reports, para. 7.1066.

<sup>954</sup> Panel Reports, para. 7.1068. We note that, although one panelist appended a separate opinion, this panelist, however, does not disagree with this standard articulated by the Panel. (Panel Reports, para. 7.1130)

<sup>955</sup> Panel Reports, para. 7.1068.

<sup>956</sup> Panel Reports, para. 7.1069.

<sup>957</sup> Panel Reports, para. 7.1072.

<sup>958</sup> Panel Reports, para. 7.1072 (referring to Brazil's first written submissions to the Panel, paras. 706-707 (DS472) and paras. 638-639 (DS497)).

the WTO" and that the differential tax treatment under the INOVAR-AUTO programme is "the corollary of these ECAs and does not require further notification".<sup>959</sup>

5.349. The Panel noted that the 1980 Treaty of Montevideo was notified to the WTO by Uruguay on behalf of the LAIA on 1 July 1982, "as adopted pursuant to paragraph 2(c) of the Enabling Clause".<sup>960</sup> The Panel, however, stated that "no explicit notification in respect of paragraph 2(b) ha[d] been identified by any party, or submitted to the Panel as evidence."<sup>961</sup> Therefore, in order to determine whether the complaining parties were on notice that the challenged measure was adopted under paragraph 2(b) and, accordingly, whether or not they were required to invoke this provision of the Enabling Clause in their panel requests, the Panel turned to the question whether a notification of an arrangement adopted pursuant to paragraph 2(c) could also serve as a notification of an arrangement adopted pursuant to paragraph 2(b) of the Enabling Clause.<sup>962</sup> The Panel found that a notification of a regional trade agreement (RTA) adopted under paragraph 2(c) of the Enabling Clause, even if valid, is not sufficient to serve as a notification of a preferential trade arrangement (PTA) adopted under paragraph 2(b) of the Enabling Clause and that "there was no notification made under [paragraph] 4(a) to support a justification under paragraph 2(b)."<sup>963</sup> The Panel concluded that "Brazil has not demonstrated that any arrangement providing for the differential and more favourable treatment at issue was notified to the WTO as adopted pursuant to paragraph 2(b)."<sup>964</sup>

5.350. The Panel next considered whether the notification of the 1980 Treaty of Montevideo and the ECAs could substantively serve as a notification of the adoption under paragraph 2(c) of the Enabling Clause of the arrangement introducing the differential and more favourable treatment found to be inconsistent with Article I:1 of the GATT 1994, i.e. the differential tax treatment under the INOVAR-AUTO programme.<sup>965</sup> The Panel stated that "the differential and more favourable treatment sought to be justified under paragraph 2(c) must have a close and genuine link to the arrangement notified to the WTO *such as to put other WTO Members on notice* as to the adoption of the differential and more favourable treatment pursuant to the Enabling Clause."<sup>966</sup> The Panel found that "none of the provisions cited to in the [1980] Treaty of Montevideo bear the slightest relation[,] in and of themselves, to the internal tax reductions found to be inconsistent with Article I:1 of the GATT 1994."<sup>967</sup> The Panel also found that Brazil had failed to point to "a single provision of any ECA that would attest to the fundamental premise of Brazil's argument, namely that the INOVAR-AUTO programme is implementing the objectives of the ECAs".<sup>968</sup> Accordingly, the Panel found that "Brazil has not demonstrated how the relevant tax reductions found to be inconsistent under Article I:1 of the GATT 1994" are related to the 1980 Treaty of Montevideo or the ECAs that were notified as having been adopted pursuant to paragraph 2(c).<sup>969</sup>

<sup>959</sup> Panel Reports, para. 7.1072 (quoting Brazil's second written submission, para. 181; referring to Brazil's response to Panel question No. 53; Communication from LAIA to the Chair of the Trade and Development Committee of the WTO, 19 May 2016 (Panel Exhibits BRA-114 and BRA-115)). (curly brackets added) The Panel noted:

[T]he MERCOSUR agreement was allegedly notified on 5 March 1992 in document L/6985; ECA No. 55 [between MERCOSUR and Mexico] was allegedly notified on 21 November 2012 in document WT/COMTD/77; the 38th Additional Protocol to ECA No. 14 [between Argentina and Brazil] and the 68th Additional Protocol to ECA No. 2 [between Brazil and Uruguay] were allegedly notified on 8 November 2010, in document WT/COMTD/72; and the 69th Additional Protocol to ECA No. 2 [between Brazil and Uruguay] was allegedly notified on 25 October 2013 in document WT/COMTD/82.

(Panel Reports, fn 1443 to para. 7.1080 (referring to Communication from LAIA to the Chair of the Trade and Development Committee of the WTO, 19 May 2016 (Panel Exhibits BRA-114 and BRA-115)))

<sup>960</sup> Panel Reports, para. 7.1074. (fn omitted)

<sup>961</sup> Panel Reports, para. 7.1074.

<sup>962</sup> Panel Reports, para. 7.1075.

<sup>963</sup> Panel Reports, para. 7.1081. The Panel considered that paragraph 4(a) of the Enabling Clause "does not ... permit[] notification of a measure adopted under one provision of the Enabling Clause to serve equally as a notification of that measure being adopted under another provision of the Enabling Clause, unless indicated in the notification itself". (Panel Reports, para. 7.1079)

<sup>964</sup> Panel Reports, para. 7.1082. (fn omitted)

<sup>965</sup> Panel Reports, para. 7.1105.

<sup>966</sup> Panel Reports, para. 7.1108. (emphasis original)

<sup>967</sup> Panel Reports, para. 7.1112.

<sup>968</sup> Panel Reports, para. 7.1112.

<sup>969</sup> Panel Reports, para. 7.1115.

5.351. Thus, the Panel concluded that the challenged measure and its related justifications under the Enabling Clause (i.e. under paragraphs 2(b) and 2(c) thereof) were not notified to the WTO pursuant to paragraph 4(a) of the Enabling Clause, such that the complaining parties could be considered to have been on notice. Consequently, the Panel found that there was no burden on the complaining parties to invoke paragraphs 2(b) and 2(c) of the Enabling Clause in their panel requests, and therefore their claims under Article I:1 of the GATT 1994 were within the Panel's terms of reference.<sup>970</sup>

#### 5.5.1.1 Whether the Panel erred in its interpretation of paragraph 4(a) of the Enabling Clause

5.352. On appeal, Brazil takes issue with the Panel's finding that "the obligation to invoke the Enabling Clause would only apply if the complaining party had been 'appropriately informed that the responding party considers the challenged measure to have been adopted pursuant to (and justified under) the Enabling Clause.'"<sup>971</sup> According to Brazil, the Panel considered that "a disagreement regarding whether the notification was deemed appropriate suffices to waive the complainants' burden of invoking the Enabling Clause in their panel requests."<sup>972</sup> In Brazil's view, "[t]his logic, if it were to stand, would raise important systemic questions", because "a disagreement on the method of notification could justify *ex post* the lack of inclusion of the Enabling Clause" in a complainant's panel request.<sup>973</sup> Therefore, Brazil submits that, by conflating the substantive obligation to notify properly the measures and the threshold presumption of being informed that a Member considers a measure to be justified under the Enabling Clause, the Panel's understanding deprives of any meaningful effect the Appellate Body's finding that it is incumbent on the complaining party to raise the Enabling Clause in its panel request.<sup>974</sup>

5.353. In response, the European Union submits that the Appellate Body's findings in *EC – Tariff Preferences* have to be understood in the context of that particular case and of the specific provision of the Enabling Clause at issue.<sup>975</sup> The European Union explains that measures taken pursuant to paragraph 2(a) of the Enabling Clause "are different from measures taken pursuant to other paragraphs of the Enabling Clause, and in particular those pertaining to regional trade agreements".<sup>976</sup>

5.354. Japan contends that the present dispute can be distinguished from that in *EC – Tariff Preferences*, which involved tariff preferences for developing countries adopted pursuant to paragraph 2(a) of the Enabling Clause, as opposed to issues relating to RTAs.<sup>977</sup> According to Japan, "[i]n the case of a preference accorded pursuant to a Generalized System of Preferences ('GSP') it can be expected that the legal dispute would revolve around the (in)application of the Enabling Clause" and thus the complaining party "has to 'present the problem clearly' as required

<sup>970</sup> Panel Reports, paras. 7.1083 and 7.1120. One Panelist appended a separate opinion on Brazil's defence under paragraph 2(c) of the Enabling Clause. According to this Panelist, references in the relevant ECAs to "tariff preferences [were] sufficient to put Members on notice that, at a minimum, motor vehicles imported into Brazil from Mexico, Argentina and Uruguay will be treated differently to motor vehicles imported into Brazil from other Members." (Ibid., para. 7.1127) In the view of this Panelist, it was therefore "reasonable for Members to assume that such preferences would not be limited to fiscal measures applied at the border, but could potentially include internal fiscal measures" and Members could be considered to have been informed that "motor vehicles imported into Brazil from Mexico, Argentina and Uruguay may be subject to a differential tax burden". (Ibid.) Accordingly, this Panelist considered that "the ECAs are ... substantively sufficient to satisfy the notification obligation in paragraph 4(a) of the Enabling Clause." (Ibid., para. 7.1128) Moreover, this Panelist was of the view that "Brazil has at a minimum demonstrated that the European Union and Japan were informed that the Treaty of Montevideo, the MERCOSUR Agreement, and the relevant ECAs were adopted pursuant to paragraph 2(c) of the Enabling Clause." (Ibid., para. 7.1129) This Panelist therefore considered that "the European Union and Japan were sufficiently on notice that the Enabling Clause might be invoked by Brazil, a signatory to those ECAs, as a defence to a claim under Article I:1 of the GATT 1994, in respect of preferences granted to the signatories to those ECAs." (Ibid.) For these reasons, this Panelist concluded that the European Union and Japan were under an obligation to have included the relevant provisions of the Enabling Clause within their respective panel requests and the failure to do so "mean[t] that their claims under Article I:1 of the GATT 1994 [were] outside the Panel's terms of reference". (Ibid., para. 7.1131)

<sup>971</sup> Brazil's appellant's submission, para. 374 (quoting Panel Reports, para. 7.1068).

<sup>972</sup> Brazil's appellant's submission, para. 376.

<sup>973</sup> Brazil's appellant's submission, para. 377.

<sup>974</sup> Brazil's appellant's submission, para. 378.

<sup>975</sup> European Union's appellee's submission, para. 451.

<sup>976</sup> European Union's appellee's submission, para. 453.

<sup>977</sup> Japan's appellee's submission, paras. 153 and 155.

under Article 6.2 of the DSU by referring to the Enabling Clause explicitly in its panel request".<sup>978</sup> However, Japan submits that, in a dispute such as the present one, a complaining party cannot be expected to assume that the "measures were adopted pursuant to the Enabling Clause (particularly when the responding Member has never said so and never made any notification of the sort to the WTO)".<sup>979</sup>

5.355. We begin our analysis with the text of paragraph 4(a) of the Enabling Clause, which provides, in relevant part:

Any Member taking action to introduce an arrangement pursuant to paragraphs 1, 2 and 3 above or subsequently taking action to introduce modification or withdrawal of the differential and more favourable treatment so provided shall:[\*]

(a) notify the WTO and furnish [Members] with all the information they may deem appropriate relating to such action[.]

**[\*fn original]**<sup>4</sup> Nothing in these provisions shall affect the rights of Members under the General Agreement.

5.356. Paragraph 4(a) of the Enabling Clause thus deals with the requirement to notify any action by a Member seeking to introduce, modify, or withdraw differential and more favourable arrangements adopted pursuant to paragraphs 1 through 3 of the Enabling Clause. The Appellate Body has described paragraph 4 as setting forth "procedural conditions for the introduction, modification, or withdrawal of a preferential measure for developing countries".<sup>980</sup>

5.357. The use of the word "shall" indicates that paragraph 4(a) imposes an obligation on a Member according differential and more favourable treatment to notify the WTO of the arrangement it has adopted. In addition to the obligation to notify the introduction of an arrangement, paragraph 4(a) also imposes an obligation on Members to notify any modification or the withdrawal of the arrangement according differential and more favourable treatment. Paragraph 4(a) thus envisages that, at all times, Members are kept informed of any changes to, including the withdrawal of, an arrangement according differential and more favourable treatment.

5.358. Moreover, we observe that paragraph 4(a) provides that a Member adopting an arrangement according differential and more favourable treatment "furnish" Members "with all the information they may deem appropriate" relating to the introduction, modification, or withdrawal of the arrangements adopted. This requirement to furnish "all"<sup>981</sup> the information suggests that a notification pursuant to paragraph 4(a) should be sufficiently detailed so as to put the Members on notice regarding any "action" taken pursuant to paragraphs 1 through 3 of the Enabling Clause. The need for notifications under paragraph 4(a) to be sufficiently detailed is also borne out by the requirement to notify not only the introduction or withdrawal of an arrangement according differential and more favourable treatment but also of any modifications thereof.

5.359. Turning to the immediate context provided by paragraph 4(b) of the Enabling Clause, we observe that paragraph 4(b) stipulates that a Member introducing, modifying, or withdrawing an arrangement according differential and more favourable treatment shall "afford adequate opportunity for prompt consultations at the request of any interested Member with respect to any difficulty or matter that may arise" in connection with the adopted arrangement. Paragraph 4(b) thus builds upon the notification issued pursuant to paragraph 4(a) of the Enabling Clause by calling upon the WTO Member adopting an arrangement according differential and more favourable treatment to "afford adequate opportunity" for "prompt consultations" as may be requested by any other WTO Member in connection with the adopted arrangement.

5.360. A notification pursuant to paragraph 4(a) of the Enabling Clause thus speaks to and has a direct bearing on a complaining party's knowledge and, consequently, on the question whether it is

<sup>978</sup> Japan's appellee's submission, para. 155. (fn omitted)

<sup>979</sup> Japan's appellee's submission, para. 155.

<sup>980</sup> Appellate Body Report, *EC – Tariff Preferences*, para. 112.

<sup>981</sup> Emphasis added.

required to raise the Enabling Clause and identify the relevant provision(s) thereof in its panel request.

5.361. We recall that although the dispute in *EC – Tariff Preferences* did not involve the notification requirement in paragraph 4(a) specifically, the Appellate Body set out relevant considerations concerning the interpretation of the Enabling Clause. The Appellate Body considered that the Enabling Clause is not a "typical 'exception', or 'defence'".<sup>982</sup> The Appellate Body stated that, when a complaining party considers that a preference scheme of another Member does not meet one or more of the requirements set forth in the Enabling Clause, "the specific provisions of the Enabling Clause with which the scheme allegedly falls afoul[] form critical components of the 'legal basis of the complaint' and, therefore, of the 'matter' in dispute."<sup>983</sup> However, at the same time, the Appellate Body cautioned that "[t]he responsibility of the complaining party in such an instance ... should not be overstated."<sup>984</sup> Although the Appellate Body found that "it is insufficient in WTO dispute settlement for a complainant to allege inconsistency with Article I:1 of the GATT 1994 if the complainant seeks also to argue that the measure is not justified under the Enabling Clause"<sup>985</sup>, the Appellate Body also explained that "[t]his is especially so if the challenged measure ... is plainly taken pursuant to the Enabling Clause."<sup>986</sup>

5.362. However, the Appellate Body's statements in *EC – Tariff Preferences* concerning the burden on the complaining party to raise the Enabling Clause and identify the relevant provision(s) thereof in its panel request should be read in the context of the challenged measure at issue in that dispute, i.e. the tariff preference scheme, which as the Appellate Body itself indicated, was "*plainly taken pursuant to the Enabling Clause*".<sup>987</sup> The Appellate Body further noted that the challenged measure in that dispute was "*unmistakably a preferential tariff scheme, granted by a developed-country Member in favour of developing countries, and proclaiming to be in accordance with the GSP*".<sup>988</sup> Thus, the Appellate Body found it "*clear, on the face of the Regulation and from official, publicly-available explanatory documentation*", that the "Drug Arrangements" at issue in that dispute were "*part of a preferential tariff scheme implemented by the European Communities pursuant to the authorization in paragraph 2(a) of the Enabling Clause*".<sup>989</sup> Accordingly, in that dispute, the Appellate Body noted that India would have been "well aware" that the Drug Arrangements must comply with the requirements of the Enabling Clause, and that "the European Communities was likely to invoke the Enabling Clause in response to a challenge of inconsistency with Article I:1."<sup>990</sup>

5.363. Paragraph 4(a) of the Enabling Clause envisages a degree of specificity in the notification adopted thereunder. At a minimum, a notification pursuant to paragraph 4(a) should state under which provision of the Enabling Clause the differential and more favourable treatment has been adopted. Paragraph 4(a) indicates that arrangements or measures adopted under different subparagraphs of paragraph 2 would have to be notified to the WTO so as to put other Members on notice regarding the relevant differential and more favourable treatment sought to be accorded and justified under the Enabling Clause. In such circumstances, the mere procedural propriety of the notification itself, for example, in terms of "whether such notification was ... sent by the right actor or body, under the right procedure, at the right time, etc."<sup>991</sup>, is, however, not sufficient to dislodge the presumption that the complaining party is on notice that the responding party has adopted an arrangement or a measure that may be inconsistent with its obligations under Article I:1 of the GATT 1994, but that may nonetheless be justified under the Enabling Clause.

5.364. Moreover, paragraph 4(a) does not exclude the possibility that a single notification can state that the notifying Member considers an arrangement or a measure to have been adopted pursuant to one or more subparagraphs of paragraph 2 of the Enabling Clause. We do not detect anything in the text of paragraph 4(a) that indicates otherwise. To the contrary, paragraph 4 is broadly worded

<sup>982</sup> Appellate Body Report, *EC – Tariff Preferences*, para. 106.

<sup>983</sup> Appellate Body Report, *EC – Tariff Preferences*, para. 113 (quoting Article 6.2 of the DSU; Appellate Body Report, *US – Carbon Steel*, para. 125, in turn referring to Appellate Body Report, *Guatemala – Cement I*, paras. 69-76).

<sup>984</sup> Appellate Body Report, *EC – Tariff Preferences*, para. 115.

<sup>985</sup> Appellate Body Report, *EC – Tariff Preferences*, para. 110.

<sup>986</sup> Appellate Body Report, *EC – Tariff Preferences*, para. 110.

<sup>987</sup> Appellate Body Report, *EC – Tariff Preferences*, para. 110. (emphasis added)

<sup>988</sup> Appellate Body Report, *EC – Tariff Preferences*, para. 116. (emphasis added)

<sup>989</sup> Appellate Body Report, *EC – Tariff Preferences*, para. 117. (emphasis added)

<sup>990</sup> Appellate Body Report, *EC – Tariff Preferences*, para. 117.

<sup>991</sup> Panel Reports, para. 7.1105.



in providing that any "action to introduce an arrangement pursuant to *paragraphs 1, 2 and 3*" of the Enabling Clause be notified to the WTO.<sup>992</sup> However, in the absence of any such indication in the notification issued under paragraph 4(a), it cannot be taken for granted that a complaining party is on notice of those subparagraphs of paragraph 2 that the notifying Member considers applicable.

5.365. A complaining party is therefore required to raise the Enabling Clause and identify the relevant provisions thereof in its panel request when a measure according differential and more favourable treatment is: (i) plainly taken pursuant to the Enabling Clause, or when it is clear from the face of the measure itself that it has been adopted pursuant to the Enabling Clause; and/or (ii) notified pursuant to paragraph 4(a) of the Enabling Clause. However, the complaining party "is merely to *identify* those provisions of the Enabling Clause with which the [measure] is allegedly inconsistent, without bearing the burden of *establishing* the facts necessary to support such inconsistency".<sup>993</sup> Thus, while it is for the complaining party to identify the relevant provision(s) of the Enabling Clause in its panel request, the burden to "*prove*" that the measure "satisf[ies] the conditions set out in the Enabling Clause"<sup>994</sup> still "remains on the responding party" relying on "the Enabling Clause as a defence".<sup>995</sup>

5.366. In light of the foregoing considerations, we agree with the Panel that, in situations where a Member has notified a particular arrangement imposing discriminatory treatment as adopted or modified under the Enabling Clause, other Members would be considered to be aware that the specific discriminatory treatment was adopted pursuant to the Enabling Clause.<sup>996</sup> Therefore, to the extent that the Panel conditioned a complaining party's knowledge of an arrangement or a measure according differential and more favourable treatment as having been adopted under the Enabling Clause to the notification by the responding party of that arrangement or measure pursuant to paragraph 4(a), we see no reason to disagree with this standard articulated by the Panel. As explained, a notification pursuant to paragraph 4(a) of the Enabling Clause speaks to and has a direct bearing on a complaining party's knowledge and, consequently, on its burden to raise the Enabling Clause and identify the relevant provision(s) thereof in its panel request. We, therefore, uphold the Panel's finding that a complaining party has to raise the Enabling Clause and identify the relevant provision(s) thereof in its panel request "in situations where the complaining party is on notice that the challenged measure was adopted (and in the view of the adopting member, justified) under the Enabling Clause".<sup>997</sup>

#### **5.5.1.2 Whether the Panel erred in finding that the differential tax treatment under the INOVAR-AUTO programme was not notified pursuant to paragraph 4(a) as having been adopted under paragraph 2(b) of the Enabling Clause**

5.367. We now turn to review whether the measure at issue (the differential tax treatment under the INOVAR-AUTO programme in the form of internal tax reductions accorded to some but not other Members) was notified pursuant to paragraph 4(a) of the Enabling Clause as having been adopted under paragraph 2(b) thereof, such that the complaining parties could be considered to have been on notice and, consequently, had the burden to raise and identify paragraph 2(b) in their panel requests.

5.368. We recall that Decree No. 7,819/2012 is one of the instruments that administers the INOVAR-AUTO programme<sup>998</sup> and provides for the differential and more favourable treatment at issue in the form of internal tax reductions on imports of motor vehicles from certain countries.

5.369. Brazil's case before the Panel rested on its contention that, since the 1980 Treaty of Montevideo and the relevant ECAs were notified to the WTO as having been adopted under paragraph 2(c), the notification requirement in paragraph 4(a) with respect to the differential tax

<sup>992</sup> Emphasis added.

<sup>993</sup> Appellate Body Report, *EC – Tariff Preferences*, para. 115. (emphasis original)

<sup>994</sup> Appellate Body Report, *EC – Tariff Preferences*, para. 105. (emphasis original)

<sup>995</sup> Appellate Body Report, *EC – Tariff Preferences*, para. 115.

<sup>996</sup> Panel Reports, para. 7.1066.

<sup>997</sup> Panel Reports, para. 7.1064.

<sup>998</sup> Panel Reports, para. 2.100 (referring to Decree 7,819 of 3 October 2012 regulating Articles 40 to 44 of Law 12,715 of 17 September 2012, which contain provisions on the Incentive Scheme for Technological Innovation and Consolidation of the Automotive Supply Chain (INOVAR-AUTO) and Articles 5 and 6 of Law 12,546 of 14 December 2011, which contain provisions on a reduction of the Industrial Goods Tax, as the case dictates (Decree 7,819/2012) (Panel Exhibit JE-132), Articles 11-19).

treatment under the INOVAR-AUTO programme stood satisfied.<sup>999</sup> However, in its defence, Brazil contended that the differential tax treatment under the INOVAR-AUTO programme was justified not only under paragraph 2(c)<sup>1000</sup>, but also under paragraph 2(b).<sup>1001</sup> We therefore understand, as did the Panel, Brazil to have contended that the differential tax treatment under the INOVAR-AUTO programme was adopted pursuant to both paragraphs 2(b) and 2(c) of the Enabling Clause and did not require additional notification, since the 1980 Treaty of Montevideo and the relevant ECAs were notified as adopted pursuant to paragraph 2(c).

5.370. It is undisputed that the differential tax treatment under the INOVAR-AUTO programme, which is the measure at issue in this case, was not specifically notified to the WTO pursuant to paragraph 4(a) as having been adopted under paragraph 2(b). The Panel, as we recall, noted that "no explicit notification in respect of paragraph 2(b) ha[d] been identified by any party, or submitted to the Panel as evidence."<sup>1002</sup> The Panel therefore considered that its task was to determine whether a notification of an arrangement adopted pursuant to paragraph 2(c) could also serve as a notification of an arrangement adopted pursuant to paragraph 2(b).<sup>1003</sup> As a second step, the Panel considered that if the answer to the first question was in the positive, it would then determine whether the notification under paragraph 2(c) could substantively serve as a notification of the specific differential and more favourable treatment sought to be justified under paragraph 2(b).<sup>1004</sup>

5.371. Unlike what Brazil seems to contend<sup>1005</sup>, the Panel did not consider the question before it to concern the procedural propriety of the notification. Rather, the Panel's enquiry focused on whether or not the complaining parties could be considered to have been on notice that the differential tax treatment under the INOVAR-AUTO programme was notified as having been adopted pursuant to paragraph 2(b) by virtue of the notification under paragraph 2(c). The analysis of whether or not an arrangement or a measure alleged to be adopted under paragraph 2(b) was notified pursuant to paragraph 4(a) was necessary in determining the complaining parties' burden to raise the Enabling Clause and identify the relevant provisions(s) thereof in their panel requests and allege the inconsistency of the differential tax treatment under the INOVAR-AUTO programme with these relevant provisions of the Enabling Clause, including paragraph 2(b). However, in so doing, neither do we nor did the Panel prejudge the question whether the differential tax treatment under the INOVAR-AUTO programme was notified pursuant to paragraph 4(a) as having been adopted under paragraph 2(c).<sup>1006</sup> Indeed, that is the question we address in the next section of these Reports when we review Brazil's claim on appeal that the Panel erred in finding that the differential tax treatment under the INOVAR-AUTO programme was not notified pursuant to paragraph 4(a) as having been adopted under paragraph 2(c).

5.372. Brazil also challenges the Panel's finding that "a notification of an RTA adopted under paragraph 2(c) of the Enabling Clause, even if valid, is *not* sufficient to serve as a notification of a PTA adopted under paragraph 2(b) of the Enabling Clause."<sup>1007</sup> Brazil asserts that the Panel's reasoning was based on the provisions of the Transparency Mechanism for Preferential Trade Arrangements<sup>1008</sup> and the Transparency Mechanism for Regional Trade Agreements<sup>1009</sup>, which the Panel found to constitute subsequent agreements within the meaning of Article 31(3)(a) of the Vienna Convention on the Law of Treaties (Vienna Convention) regarding the interpretation of the

<sup>999</sup> Panel Reports, para. 7.1072. See also Brazil's appellant's submission, para. 395.

<sup>1000</sup> Panel Reports, para. 7.1099 (referring to Brazil's second written submission to the Panel, para. 181).

<sup>1001</sup> Panel Reports, para. 7.1069.

<sup>1002</sup> Panel Reports, para. 7.1074.

<sup>1003</sup> Panel Reports, para. 7.1075.

<sup>1004</sup> Panel Reports, para. 7.1075.

<sup>1005</sup> We note that Brazil argues that "the Panel concluded that because the challenged tax treatment was not notified in a specific format, Brazil had not met the notification requirements under the Enabling Clause, and the complainants could not have been presumed to be informed that the challenged measures were adopted under the Enabling Clause." (Brazil's appellant's submission, para. 375)

<sup>1006</sup> The Panel, as we recall, eventually concluded that "a notification of an RTA adopted under paragraph 2(c) of the Enabling Clause, even if valid, is *not* sufficient to serve as a notification of a PTA adopted under paragraph 2(b) of the Enabling Clause." (Panel Reports, para. 7.1081 (*italics original*; underlining added))

<sup>1007</sup> Brazil's appellant's submission, para. 398 (quoting Panel Reports, para. 7.1081). (*emphasis original*)

<sup>1008</sup> Transparency Mechanism for Preferential Trade Arrangements, General Council Decision of

14 December 2010, WT/L/806.

<sup>1009</sup> Transparency Mechanism for Regional Trade Agreements, General Council Decision of 14 December 2006, WT/L/671.

notification obligation under the Enabling Clause.<sup>1010</sup> In particular, Brazil asserts that the Panel found that the Transparency Mechanisms indicate that "Members notifying an RTA or PTA must specify under which precise provision of the Enabling Clause the RTA or PTA is being notified."<sup>1011</sup> According to Brazil, "the Transparency Mechanisms both explicitly state that they do not affect the 'substance and timing of the notifications required under ... the Enabling Clause' in the case of the Transparency Mechanism for RTAs"<sup>1012</sup> nor "the 'substance of the relevant provisions of the Enabling Clause' in the case of the Transparency Mechanism for PTAs".<sup>1013</sup>

5.373. The European Union contends that Brazil "misrepresents the Panel's findings and attempts to create the impression that the Panel based its decision on a flawed interpretation of the Transparency Mechanisms".<sup>1014</sup> The European Union submits that the Panel made it clear that it had already reached its conclusions by analysing the provisions of paragraph 4(a) and that "the Transparency Mechanisms were assessed only in order to confirm its conclusions."<sup>1015</sup> The European Union adds that even documents that were not found by previous panels to constitute "subsequent agreements regarding the interpretation of the treaty or the application of its provisions" under Article 31(3)(a) of the Vienna Convention were nevertheless considered as providing useful guidance.<sup>1016</sup> Accordingly, the European Union submits that, "even if Brazil would be right (*quod non*), the Transparency Mechanisms would still be able to play a useful interpretative role on the notification issue."<sup>1017</sup>

5.374. Similarly, Japan submits that "Brazil appears to make much of the fact" that the Panel referred to the Transparency Mechanisms as "subsequent agreements regarding the interpretation of the treaty or the application of its provisions" under Article 31(3)(a) of the Vienna Convention.<sup>1018</sup>

5.375. In interpreting paragraph 4(a), we have considered that this provision envisages a degree of specificity in the notification adopted thereunder and, at a minimum, a notification pursuant to paragraph 4(a) should state under which provision of the Enabling Clause the differential and more favourable treatment has been adopted. At the same time, we have also considered that paragraph 4(a) does not exclude the possibility that a single notification can state that the notifying Member considers an arrangement or a measure to have been adopted pursuant to one or more subparagraphs of paragraph 2. However, we have also explained that in the absence of any such indication, it cannot be taken for granted that a complaining party is on notice that the notifying Member considers the notified arrangement or measure to have been adopted pursuant to one or more subparagraphs of paragraph 2. Therefore, to the extent that the Panel observed that paragraph 4(a) "does not explicitly indicate what precisely is required to be notified"<sup>1019</sup>, we disagree.

5.376. That said, we note that the Panel ultimately found that paragraph 4(a) "does not ... permit[] notification of a measure adopted under one provision of the Enabling Clause to serve equally as a notification of that measure being adopted under another provision of the Enabling Clause, unless indicated in the notification itself".<sup>1020</sup> We agree with this conclusion of the Panel.

5.377. Contrary to what Brazil contends, in reaching this conclusion, the Panel did not base its reasoning exclusively on the provisions of the Transparency Mechanisms. Rather, the Panel found that "the Transparency Mechanisms serve to further confirm" that paragraph 4(a) does not permit a notification of a measure adopted under one provision of the Enabling Clause to function as a

<sup>1010</sup> Brazil's appellant's submission, para. 397 (referring to Panel Reports, fn 1443 to para. 7.1080).

<sup>1011</sup> Brazil's appellant's submission, para. 397.

<sup>1012</sup> Brazil's appellant's submission, para. 399 (quoting Transparency Mechanism for Regional Trade Agreements, General Council Decision of 14 December 2006, WT/L/671, para. 1).

<sup>1013</sup> Brazil's appellant's submission, para. 399 (quoting Transparency Mechanism for Preferential Trade Arrangements, General Council Decision of 14 December 2010, WT/L/806, Article A.2).

<sup>1014</sup> European Union's appellee's submission, para. 486 (referring to Brazil's appellant's submission, para. 397).

<sup>1015</sup> European Union's appellee's submission, para. 485 (referring to Panel Reports, fn 1443 to para. 7.1080). (emphasis original)

<sup>1016</sup> European Union's appellee's submission, para. 488 and fns 465-466 thereto (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 372; Panel Report, *India – Agricultural Products*, fn 1197 to para. 7.679).

<sup>1017</sup> European Union's appellee's submission, para. 490.

<sup>1018</sup> Japan's appellee's submission, para. 163.

<sup>1019</sup> Panel Reports, para. 7.1106.

<sup>1020</sup> Panel Reports, para. 7.1079.

notification of adoption of that same measure under another provision of the Enabling Clause.<sup>1021</sup> The Panel further recalled that it had "*concluded ... without reference* to the Transparency Mechanisms" that paragraph 4(a) does not permit notification of a measure adopted pursuant to one provision of the Enabling Clause to suffice as notification of that same measure being adopted pursuant to a different provision of the Enabling Clause.<sup>1022</sup> Thus, having already reached a conclusion on what is permitted under paragraph 4(a), the Panel found added support for its conclusion from the provisions of the Transparency Mechanisms.

5.378. Brazil further contends that "in the case of developing country Members, paragraphs 2(a) and 2(b) of the Enabling Clause are both contained in paragraph 2(c)."<sup>1023</sup> According to Brazil, under paragraph 2(c) "[d]eveloping country Members may adopt tariff preferences *vis-à-vis* other developing country Members without having to create a Generalized System of Preferences."<sup>1024</sup> Similarly, under that provision "a developing country Member may adopt preferential treatment with regard to non-tariff measures."<sup>1025</sup> Therefore, Brazil submits that the fact that a given agreement has been notified under paragraph 2(c), as was the case in the present dispute, suffices for the complaining parties to have been on notice that the measures at issue fell under the Enabling Clause.<sup>1026</sup>

5.379. Paragraph 2 of the Enabling Clause provides, in relevant part:

2. The provisions of paragraph 1 apply to the following:
  - (a) Preferential tariff treatment accorded by developed country Members to products originating in developing countries in accordance with the Generalized System of Preferences;
  - (b) Differential and more favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT;
  - (c) Regional or global arrangements entered into amongst developing country Members for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the WTO, for the mutual reduction or elimination of non-tariff measures, on products imported from one another[.]<sup>1027</sup>

5.380. Subparagraphs (a) to (c) of paragraph 2 of the Enabling Clause provide for differential and more favourable treatment with respect to which the authorization of paragraph 1 of the Enabling Clause applies. Paragraph 2(a) provides for differential and more favourable treatment in the form of preferential tariff treatment accorded by developed-country Members to products originating from developing countries. Paragraph 2(b) provides for differential and more favourable treatment concerning non-tariff measures. Unlike paragraph 2(a), which specifically speaks of "[p]referential tariff treatment accorded by developed country Members to ... developing countries", paragraph 2(b) does not define either the grantor or the beneficiary of the differential and more favourable treatment. Paragraph 2(c), unlike both paragraphs 2(a) and 2(b), provides for differential and more favourable treatment concerning tariff and non-tariff measures between developing country Members pursuant to "[r]egional or global arrangements".

5.381. As noted above, Brazil asserts that "in the case of developing country Members, paragraphs 2(a) and 2(b) ... are both contained in paragraph 2(c)."<sup>1028</sup> Even assuming it to be so, it does not necessarily follow that the notification of a measure as having been adopted under

<sup>1021</sup> Panel Reports, para. 7.1080. (emphasis added) The Panel noted this to be the case "at least in respect of those alleged notifications that took place *subsequent* to the adoption of one or both transparency mechanisms". (Ibid. (emphasis original))

<sup>1022</sup> Panel Reports, fn 1443 to para. 7.1080. (emphasis added) The Panel noted that "with respect to those alleged notifications that occurred *prior* to the adoption of the transparency mechanisms, it [was] sufficient for the Panel's purposes to note that its interpretation of paragraph 4(a) of the Enabling Clause is not contradicted by the Transparency Mechanisms." (Ibid. (emphasis original))

<sup>1023</sup> Brazil's appellant's submission, para. 400.

<sup>1024</sup> Brazil's appellant's submission, para. 400.

<sup>1025</sup> Brazil's appellant's submission, para. 400.

<sup>1026</sup> Brazil's appellant's submission, para. 400.

<sup>1027</sup> Fns omitted.

<sup>1028</sup> Brazil's appellant's submission, para. 400.

paragraph 2(c) would suffice for the purposes of paragraph 2(b) insofar as the complaining party's burden to raise and identify paragraph 2(b) of the Enabling Clause in its panel request is concerned. This would be the case in circumstances where, as we have explained and as the Panel also noted, it is "indicated in the notification itself".<sup>1029</sup> As we have explained, a notification pursuant to paragraph 4(a) speaks to and has a direct bearing on a complaining party's knowledge and, consequently, on its burden to raise the Enabling Clause and identify the relevant provision(s) thereof in its panel request.

5.382. In light of the foregoing considerations, we uphold the Panel's findings, in paragraphs 7.1082-7.1083 of the Panel Reports, that Brazil has not demonstrated that the differential tax treatment under the INOVAR-AUTO programme was notified to the WTO as adopted pursuant to paragraph 2(b), and therefore, in the circumstances of this case, the complaining parties were not required to raise and identify paragraph 2(b) of the Enabling Clause in their panel requests.

### **5.5.1.3 Whether the Panel erred in finding that the differential tax treatment under the INOVAR-AUTO programme was not notified pursuant to paragraph 4(a) as having been adopted under paragraph 2(c) of the Enabling Clause**

5.383. We now turn to review whether the differential tax treatment under the INOVAR-AUTO programme was notified pursuant to paragraph 4(a) of the Enabling Clause as having been adopted under paragraph 2(c) of the Enabling Clause, such that the complaining parties could be considered to have been on notice and, consequently, had the burden to raise and identify paragraph 2(c) in their panel requests.

5.384. Before the Panel, Brazil contended that "the complainants were sufficiently 'on notice' that the challenged measure was adopted (and justified) under the Enabling Clause because the 1980 Treaty of Montevideo ... was notified to the WTO under paragraph 2(c) of the Enabling Clause."<sup>1030</sup> Brazil further submitted that the differential and more favourable treatment granted to Argentina, Mexico, and Uruguay (in the form of internal tax reductions) is based on ECAs that were negotiated under the auspices of the 1980 Treaty of Montevideo and that in turn "were also notified to the WTO".<sup>1031</sup> Brazil contended that the differential tax treatment at issue under the INOVAR-AUTO programme is "a corollary of these ECAs, and thus did not require additional notification".<sup>1032</sup>

5.385. The Panel stated that it should first decide "whether the notification of the [1980] Treaty of Montevideo and the ECAs could substantively serve as a notification of the adoption under paragraph 2(c) ... of the arrangement introducing the differential and more favourable treatment (in the form of tax treatment) found to be inconsistent with Article I:1 of the GATT 1994".<sup>1033</sup> The Panel considered that "the differential and more favourable treatment sought to be justified under paragraph 2(c) must have a close and genuine link to the arrangement notified to the WTO such as to put other WTO Members on notice as to the adoption of the differential and more favourable treatment pursuant to the Enabling Clause."<sup>1034</sup>

5.386. The differential tax treatment under the INOVAR-AUTO programme was not specifically notified to the WTO pursuant to paragraph 4(a) of the Enabling Clause as having been adopted under paragraph 2(c). In order to determine that the complaining parties could be considered to have been on notice that the differential tax treatment under the INOVAR-AUTO programme was taken pursuant to arrangements adopted under paragraph 2(c), the Panel needed to determine whether the notification of the 1980 Treaty of Montevideo and the ECAs could substantively serve as a

<sup>1029</sup> Panel Reports, para. 7.1079.

<sup>1030</sup> Brazil's appellant's submission, para. 395. (fn omitted)

<sup>1031</sup> Brazil's appellant's submission, para. 395 (referring to Brazil's first written submission to the Panel, para. 742 (DS472)). The Panel, as we recall, noted that the ECAs were allegedly notified at various times between 1992 and 2013. (Panel Reports, fn 1443 to para. 7.1080)

<sup>1032</sup> Brazil's appellant's submission, para. 395 (referring to Brazil's second written submission to the Panel, para. 181; first written submission to the Panel, paras. 638-639 (DS 472)).

<sup>1033</sup> Panel Reports, para. 7.1105.

<sup>1034</sup> Panel Reports, para. 7.1108. (emphasis omitted) As explained below in section 5.5.3 of these Reports, it suffices that the differential and more favourable treatment sought to be justified under paragraph 2(c) has a "genuine" link or a rational connection with the arrangement notified to the WTO. Therefore, we disagree with the Panel to the extent it considered that in order for any differential and more favourable treatment to be justified under paragraph 2(c), there must exist *both* a "close" and "genuine" link to the arrangement notified to the WTO.

notification of the adoption under paragraph 2(c) of the differential tax treatment under the INOVAR-AUTO programme found to be inconsistent with Article I:1 of the GATT 1994.<sup>1035</sup> In so doing, the Panel rightly considered the question to be whether Brazil had demonstrated that "the RTA notified to the WTO put the rest of the Membership on notice as to the adoption of the particular differential and more favourable treatment sought to be justified under paragraph 2(c)."<sup>1036</sup>

5.387. We recall that Decree No. 7,819/2012 is the instrument that provides for the differential tax treatment under the INOVAR-AUTO programme, the measure at issue in this case.<sup>1037</sup> Articles 21 and 22(I) of Decree 7,819/2012, respectively, provide for a 30-percentage-point reduction of the IPI tax rates on certain categories of motor vehicles if:

a. Under Article 21, those motor vehicles are imported into Brazil by companies accredited as "domestic manufacturers" or "investors" under the INOVAR-AUTO programme, and the motor vehicles are imported from "countries that are signatories to the agreements established by Legislative Decree 350 of 21 November 1991, Decree 4,458 of 5 November 2002 and Decree 6[,]500 of 2 July 2008"; or

b. Under Article 22(I), those motor vehicles are imported into Brazil by any company (whether accredited or unaccredited) under the INOVAR-AUTO programme, and the motor vehicles are imported "under the agreement established by Decree 6,518 of 30 July 2008 and Decree 7,658 of 23 December 2011".<sup>1038</sup>

5.388. Decree 350 of 21 November 1991, referred to in Article 21 of Decree 7,819/2012, provides for the implementation of the MERCOSUR Treaty for the formation of a common market between Argentina, Brazil, Paraguay, and Uruguay.<sup>1039</sup> Decree 4,458 of 5 November 2002, referred to in Article 21 of Decree 7,819/2012, provides for the implementation of the Economic Complementation Agreement No. 55 between MERCOSUR and Mexico (ECA No. 55).<sup>1040</sup> Decree 6,500 of 2 July 2008, referred to in Article 21 of Decree 7,819/2012, provides for the implementation of the 38th Additional Protocol to Economic Complementation Agreement No. 14 between Argentina and Brazil (ECA No. 14).<sup>1041</sup> Decree 6,518 of 30 July 2008, referred to in Article 22(I) of Decree 7,819/2012, provides for the implementation of the 68th Additional Protocol to Economic Complementation Agreement No. 2 between Brazil and Uruguay (ECA No. 2).<sup>1042</sup> Decree 7,658 of 23 December 2011, referred to in Article 22(I) of Decree 7,819/2012, lays down provisions concerning the implementation of the 69th Additional Protocol to Economic Complementation Agreement No. 2 between Brazil and Uruguay.<sup>1043</sup>

5.389. Brazil submits that the 1980 Treaty of Montevideo and the ECAs "have an ample scope comprising internal tax reduction measures".<sup>1044</sup> Brazil refers to Articles 3(c), 3(e), and, in particular, Article 9(g) of the 1980 Treaty of Montevideo.<sup>1045</sup> Brazil asserts that Article 21 of

<sup>1035</sup> Panel Reports, para. 7.1105.

<sup>1036</sup> Panel Reports, para. 7.1108.

<sup>1037</sup> Panel Reports, para. 2.100 (referring to Decree 7,819/2012 (Panel Exhibit JE-132)).

<sup>1038</sup> Panel Reports, para. 7.1014. (emphasis omitted; fns omitted)

<sup>1039</sup> Panel Reports, fn 246 to para. 2.102 (referring to Decree 350 of 21 November 1991 on the Treaty for the Formation of a Common Market between the Republic of Argentina, the Federative Republic of Brazil, the Republic of Paraguay and the Oriental Republic of Uruguay (MERCOSUR) (Decree 350/1991) (Panel Exhibit JE-163 (rev))).

<sup>1040</sup> Panel Reports, fn 246 to para. 2.102 (referring to Decree 4,458 of 5 November 2002 on the Economic Complementation Agreement No. 55 between MERCOSUR and the United Mexican States (Decree 4,458/2002) (Panel Exhibit JE-164 (rev))).

<sup>1041</sup> Panel Reports, fn 246 to para. 2.102 (referring to Decree 6,500 of 2 July 2008 on the Economic Complementation Agreement No. 14 between the Republic of Argentina and the Federative Republic of Brazil (Decree 6,500/2008) (Panel Exhibit JE-165 (rev))).

<sup>1042</sup> Panel Reports, fn 255 to para. 2.102 (referring to Decree 6,518 of 30 July 2008 providing for the implementation of the 68th Additional Protocol to Economic Complementation Agreement No. 2, signed between the Governments of the Federative Republic of Brazil and the Oriental Republic of Uruguay (Decree 6,518/2008) (Panel Exhibit JE-203 (rev))).

<sup>1043</sup> Panel Reports, fn 255 to para. 2.102 (referring to Decree 7,658 of 23 December 2011 laying down provisions concerning the implementation of the 69th Additional Protocol to Economic Complementation Agreement No. 2 signed by the Governments of the Federal Republic of Brazil and the Oriental Republic of Uruguay (Decree 7,658/2011) (Panel Exhibit JE-204 (rev))).

<sup>1044</sup> Brazil's appellant's submission, para. 422.

<sup>1045</sup> Brazil's appellant's submission, para. 422.

Decree 7,819/2012 "makes an explicit reference to these legal instruments"<sup>1046</sup>, and therefore "the tax treatment at issue under [the] INOVAR-AUTO [programme] was a corollary of these ECAs, and thus did not require additional notification."<sup>1047</sup>

5.390. In response, Japan submits that the 1980 Treaty of Montevideo "does not contemplate the specific preferential tax treatment conferred by Articles 21 and 22 of Decree 7,819".<sup>1048</sup> The European Union adds that the references to the three decrees in Article 21 of Decree 7,819/2012 "nowhere mention the provisions in those decrees referring to preferential tax treatment".<sup>1049</sup> Both the European Union and Japan further contend that Brazil makes reference to those decrees in Article 21 of Decree 7,819/2012 simply because it wants to avoid referring to the beneficiary countries directly by name.<sup>1050</sup>

5.391. We recall that the Panel examined the provisions of the 1980 Treaty of Montevideo to determine if the internal tax reductions under the INOVAR-AUTO programme, i.e. the differential tax treatment at issue, had a genuine link to the 1980 Treaty of Montevideo that had been notified as adopted under paragraph 2(c) of the Enabling Clause. The Panel, in particular, reviewed Articles 3(c) and 3(e)<sup>1051</sup>, Article 9<sup>1052</sup>, and Article 11<sup>1053</sup> of the 1980 Treaty of Montevideo and, based on its

<sup>1046</sup> Brazil's appellant's submission, para. 382.

<sup>1047</sup> Brazil's appellant's submission, para. 395. (fn omitted) See also Panel Reports, para. 7.1072 (referring to Brazil's second written submission to the Panel, para. 181). We observe that the Panel noted that "Brazil maintains that the tax reductions under Article 21 of Decree 7,819/2012 'are not accorded because of the MERCOSUR Treaty'". (Panel Reports, para. 7.1031 (quoting Brazil's comments to other parties' responses to Panel question No. 52)) On appeal, Brazil does not take issue with this statement by the Panel.

<sup>1048</sup> Japan's appellee's submission, para. 160.

<sup>1049</sup> European Union's appellee's submission, para. 515.

<sup>1050</sup> European Union's appellee's submission, para. 515; Japan's appellee's submission, para. 175.

<sup>1051</sup> Article 3 of the 1980 Treaty of Montevideo provides, in relevant part:

In the implementation of this Treaty and in the advance towards its final objective, the member countries shall bear in mind the following principles:

...

(c) Flexibility, characterized by the capacity to allow the conclusion of partial agreements, regulated in a manner compatible with the gradual achievement of their convergence and with the strengthening of ties of integration;

...

(e) Multiplicity, to make possible various types of agreement between member countries in harmony with the objectives and functions of the integration process, using all instruments capable of activating and expanding regional markets.

(Panel Reports, para. 7.1110 and fn 1472 thereto (quoting the 1980 Treaty of Montevideo (Panel Exhibit BRA-93), Article 3; referring to Brazil's response to Panel question No. 52))

<sup>1052</sup> Article 9 of the 1980 Treaty of Montevideo provides:

Partial agreements shall be subject to the following general rules:

(a) They shall be open for accession, after prior negotiations, to the other member countries;

(b) They shall contain clauses advocating convergence so that their benefits extend to all member countries;

(c) They may contain clauses advocating convergence with other Latin American countries, in conformity with the mechanisms established in this Treaty;

(d) They shall recommend different treatment for the three categories of countries recognized by this Treaty; each agreement shall specify the kind of treatment to be applied and negotiation procedures for its periodic revision at the request of any member country which considers itself at a disadvantage;

(e) Tariff reductions may be applied to the same products or tariff sub-items and on the basis of a percentage reduction in the tariffs on imports originating from non-participating countries;

(f) They shall be applied for a minimum period of one year; and

(g) They may include, among others, specific rules regarding origin, safeguard clauses, non-tariff restrictions, withdrawal of concessions, renegotiation of concessions, denunciation, co-ordination and harmonization of policies. In the event that such specific rules have not been adopted, account will be taken of the provisions adopted by member countries on the matters in question.

(Panel Reports, para. 7.1110 and fn 1473 thereto (quoting the 1980 Treaty of Montevideo (Panel Exhibit BRA-93), Article 9; referring to Brazil's second written submission to the Panel, para. 179))

<sup>1053</sup> Article 11 of the 1980 Treaty of Montevideo provides:

The economic complementarity agreements shall be designed *inter alia* to promote the maximum utilization of the factors of production, to stimulate economic complementarity, to ensure equitable conditions of competition, to facilitate the competitiveness of products on the international market and to encourage the balanced and harmonious development of member countries.

These agreements shall be subject to the specific rules to be established for this purpose.

review, found that "none of the provisions cited to in the [1980] Treaty of Montevideo" had any relation "in and of themselves" to the differential tax treatment under the INOVAR-AUTO programme (in the form of internal tax reductions accorded to some but not other Members) found to be inconsistent with Article I:1 of the GATT 1994.<sup>1054</sup>

5.392. Articles 21 and 22(I) of Decree 7,819/2012, which provide for the differential tax treatment under the INOVAR-AUTO programme at issue, do not refer to the 1980 Treaty of Montevideo. We observe that Article 4 of the 1980 Treaty of Montevideo provides for the conclusion of partial agreements, which in turn, pursuant to Article 9(g), "may include ... specific rules regarding ... non-tariff restrictions". Article 3 of the 1980 Treaty of Montevideo enumerates the "principles" that signatories shall bear in mind and includes in subparagraph (e) the principle of "[m]ultiplicity", pursuant to which signatories are "to make possible various types of agreement between member countries in harmony with the objectives and functions of the integration process, using all instruments capable of activating and expanding regional markets". The 1980 Treaty of Montevideo thus does not itself specify any rules regarding internal tax reductions. We therefore see no reason to disagree with the Panel's finding that "none of the provisions cited to in the [1980] Treaty of Montevideo" have any relation, "in and of themselves", to the differential tax treatment under the INOVAR-AUTO programme (in the form of internal tax reductions accorded to some but not other Members) found to be inconsistent with Article I:1 of the GATT 1994.<sup>1055</sup>

5.393. That said, we note that Articles 21 and 22(I) of Decree 7,819/2012 fall under Chapter VII thereof, entitled "Tax Rates and Suspension of IPI". As noted, Articles 21 and 22(I) of Decree 7,819/2012 provide for a reduction of the IPI tax rates on certain categories of motor vehicles when they are imported into Brazil from the countries that are signatories to the above-mentioned ECAs. The reference to the ECAs in Articles 21 and 22(I) of Decree 7,819/2012, in our view, is limited to identifying the countries, imports from which benefit from the IPI tax reduction. These ECAs, in turn, do not, however, in and of themselves, refer to internal taxation. In this regard, we recall that the Panel reviewed the provisions of the relevant ECAs to determine if the internal tax reductions (in the form of IPI tax reductions) under the INOVAR-AUTO programme had a genuine link to these ECAs that had been notified as adopted under paragraph 2(c) of the Enabling Clause.

5.394. The Panel noted that "Brazil has not pointed to a single provision of any ECA" that would attest to "the fundamental premise of Brazil's argument, namely that the INOVAR-AUTO programme is implementing the objectives of the ECAs".<sup>1056</sup> Based on its review, the Panel found that it "could not discern any such relationship".<sup>1057</sup>

5.395. We observe that, in reaching this conclusion, the Panel noted that, while "ECA No. 55, between MERCOSUR and Mexico, indicates that its objective is to 'lay the foundations for the establishment of free trade in the motor vehicle sector and to promote the productive integration and complementation of their respective motor vehicle sectors'", the definition of "free trade" is limited to "tariff reductions", and the term "tariff" is defined as concerning "taxes or charges 'in connection with importation of goods'".<sup>1058</sup> With respect to the 38th Additional Protocol to ECA No. 14 between Argentina and Brazil, the Panel noted that this Additional Protocol indicates that "automotive goods shall be placed on the market between the parties with a 100% preferential tariff (0% of ad valorem tariff within the area) provided that the origin requirements and the conditions laid down in the Agreements have been met."<sup>1059</sup> Similarly, we observe that with respect to the 68th Additional Protocol to ECA No. 2 between Brazil and Uruguay, the Panel noted that this Additional Protocol indicates that "motor vehicle products shall be sold between the Parties with 100% (one hundred) preference (0% (zero) 'ad valorem' intra-zone tariff), whenever they meet the

(Panel Reports, para. 7.1110 and fn 1474 thereto (quoting the 1980 Treaty of Montevideo (Panel Exhibit BRA-93), Article 11; referring to Brazil's first written submissions to the Panel, para. 706 (DS472) and para. 638 (DS497)))

<sup>1054</sup> Panel Reports, para. 7.1112.

<sup>1055</sup> Panel Reports, para. 7.1112.

<sup>1056</sup> Panel Reports, para. 7.1112.

<sup>1057</sup> Panel Reports, para. 7.1112.

<sup>1058</sup> Panel Reports, para. 7.1113 (quoting Decree 4,458/2002 (Panel Exhibit JE-164 (rev)), Articles 1 and 2).

<sup>1059</sup> Panel Reports, para. 7.1113 (quoting Decree 6,500/2008 (Panel Exhibit JE-165 (rev)), Article 9).



requirements of origin and the conditions set out in this Agreement."<sup>1060</sup> The Panel thus found that "these provisions are indicative of tariff preferences ... [and] do not refer to internal taxation."<sup>1061</sup>

5.396. On appeal, Brazil has not identified any provisions of the ECAs that would support its contention that "the [differential] tax treatment ... under [the] INOVAR-AUTO [programme is] a corollary of these ECAs."<sup>1062</sup> Neither do we find Brazil to have demonstrated that there is a rational connection between the IPI tax reduction provided under the INOVAR-AUTO programme and the above-mentioned ECAs, save to the extent of identifying the countries that are signatories to these ECAs. To the contrary, the above-mentioned ECAs, in our view (and as also noted by the Panel), provide for the adoption of tariff preferences in the automotive sector and do not refer to internal taxation and therefore have no genuine link to the differential tax treatment in the form of IPI tax reductions under the INOVAR-AUTO programme. In the absence of a genuine link with the ECAs, we do not see how the INOVAR-AUTO programme according the differential and more favourable treatment in the form of IPI tax reductions could be considered to have been notified as having been adopted under paragraph 2(c), pursuant to paragraph 4(a), of the Enabling Clause. Accordingly, we agree with the Panel that "Brazil has not demonstrated how the ... tax reductions found to be inconsistent under Article I:1 of the GATT 1994 are related to the RTA that Brazil has notified to the WTO (the [1980] Treaty of Montevideo) or the ECAs allegedly implementing that RTA."<sup>1063</sup>

5.397. In light of the foregoing considerations, we uphold the Panel's finding, in paragraph 7.1119 of the Panel Reports, that the differential and favourable treatment (i.e. the differential tax treatment in the form of internal tax reductions) under the INOVAR-AUTO programme was not notified as adopted under paragraph 2(c) of the Enabling Clause, as required pursuant to paragraph 4(a). Consequently, we also uphold the Panel's finding, in paragraph 7.1120 of the Panel Reports, that, in the circumstances of this case, there was no burden on the complaining parties to raise and identify paragraph 2(c) of the Enabling Clause in their panel requests.

### **5.5.2 Whether the Panel erred in its interpretation of paragraph 2(b) of the Enabling Clause and in finding that the differential tax treatment under the INOVAR-AUTO programme was not justified under that provision**

5.398. Having upheld the Panel's finding that the complaining parties' claims were within its terms of reference, we now turn to address Brazil's claim on appeal that the Panel erred in its interpretation and application of the Enabling Clause in the present dispute, starting with paragraph 2(b) of the Enabling Clause.<sup>1064</sup> In so doing, we first examine the scope of paragraph 2(b), particularly the phrase "non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT", following which we review the Panel's finding of whether the differential tax treatment under the INOVAR-AUTO programme falls within the scope of that provision.

5.399. Before the Panel, Brazil argued that "the tax reductions challenged by the complaining parties fall within the scope of paragraph 2(b)."<sup>1065</sup> Brazil submitted that the internal tax reductions at issue "are non-tariff measures (NTMs) because they constitute internal taxes subject to Article III of the GATT 1994 and, consequently, are subject to the [most-favoured nation] MFN obligation under Article I:1 of the GATT 1994".<sup>1066</sup> Brazil further submitted that "internal taxes are NTMs 'governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT' because the GATT 1947 (and subsequently the GATT 1994) are relevant multilaterally-negotiated instruments covering internal taxation, and there is no specific agreement covering internal taxes."<sup>1067</sup>

<sup>1060</sup> Panel Reports, para. 7.1113 (quoting Decree 6,518/2008 (Panel Exhibit JE-203 (rev)), Article 3).

<sup>1061</sup> Panel Reports, para. 7.1114.

<sup>1062</sup> Brazil's appellant's submission, para. 395.

<sup>1063</sup> Panel Reports, para. 7.1115.

<sup>1064</sup> Brazil's appellant's submission, paras. 387-388.

<sup>1065</sup> Panel Reports, para. 7.1086.

<sup>1066</sup> Panel Reports, para. 7.1086 (referring to Brazil's first written submissions to the Panel, paras. 708-709 and 729 (DS472) and paras. 640-641 and 661 (DS497); second written submission to the Panel, paras. 167-171).

<sup>1067</sup> Panel Reports, para. 7.1086 (quoting Brazil's second written submission to the Panel, paras. 167-175).

5.400. The Panel noted that the issue before it included "whether internal taxes are 'non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT'".<sup>1068</sup> The Panel, however, did not consider it necessary to define the term "non-tariff measures" in isolation from the rest of paragraph 2(b)<sup>1069</sup>, and considered instead the question of "[w]hether the alleged non-tariff measures at issue ... have been demonstrated to be within the scope of [paragraph] 2(b)".<sup>1070</sup> Accordingly, the Panel proceeded to assess whether paragraph 2(b) applies to non-tariff measures governed exclusively by those provisions of the GATT 1994 that were incorporated from the GATT 1947.<sup>1071</sup>

5.401. The Panel considered that paragraph 2(b), in referring to "[d]ifferential and more favourable treatment with respect to the provisions of the General Agreement concerning *non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT*{}" at the time the Enabling Clause was adopted, "meant non-tariff measures *other than* those non-tariff measures governed exclusively by the provisions of the GATT 1947".<sup>1072</sup> Recalling that the Enabling Clause was adopted by the GATT Contracting Parties during the Tokyo Round when a number of plurilateral agreements covering certain non-tariff measures were concluded<sup>1073</sup>, the Panel considered that "the intended application of paragraph 2(b) must have been limited to the discrimination explicitly provided for in specific [special and differential (S&D)] provisions of the Tokyo Round Codes."<sup>1074</sup> The Panel noted that the provisions of the GATT 1994 that Brazil relied on, namely Articles III:2 and III:4, "do not introduce any special and differential treatment for taxes in the form of non-tariff measures" and "are substantively identical to provisions in the GATT 1947".<sup>1075</sup> Accordingly, the Panel concluded that "a non-tariff measure within the scope of paragraph 2(b) must be governed by specific provisions on special and differential treatment[] that are distinct from the provisions of the GATT 1994 incorporating the GATT 1947."<sup>1076</sup>

5.402. For these reasons, the Panel found that "the tax reductions accorded to imported products from Argentina, Mexico and Uruguay and found to be inconsistent under Article I:1 of the GATT 1994 are not justified under paragraph 2(b) of the Enabling Clause."<sup>1077</sup>

5.403. On appeal, Brazil disagrees that "instruments multilaterally negotiated under the auspices of the GATT" must be "distinct from the provisions of the GATT 1994 incorporating the GATT 1947" because the GATT 1994 itself is an instrument which was multilaterally negotiated under the auspices of the GATT (institution)".<sup>1078</sup> Brazil argues that "[t]he GATT 1994 is the covered agreement that governs internal taxation, in Article III" and the Enabling Clause itself "as it was incorporated to the WTO as part of the GATT 1994, is, therefore, an 'instrument multilaterally negotiated under the auspices of the GATT'".<sup>1079</sup> Brazil contends that the Panel interpreted paragraph 2(b) to apply "only to specific Special and Differential (S&D) provisions present in the covered agreements other than the GATT itself".<sup>1080</sup> Brazil submits that, according to the Panel's reasoning, if the Enabling Clause is incorporated in the GATT 1994 but only applies to provisions outside of the GATT, "it also follows that the S&D provisions prevail over the GATT and therefore the Enabling Clause

<sup>1068</sup> Panel Reports, para. 7.1088.

<sup>1069</sup> Panel Reports, para. 7.1088. The Panel further considered that paragraph 2(b) when read as a whole does not refer to "non-tariff measures" generally, but rather refers to a limited category of non-tariff measures, namely "non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT". Therefore, the Panel considered that "[i]t would be unnecessary and inappropriate ... to interpret only one part of paragraph 2(b) without reference to the rest of the provision." (Ibid., fn 1449 thereto) We note that, to the extent that the Panel chose not to define the term "non-tariff measures" and determine whether internal taxes are "non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT", on appeal, none of the participants take issue with the Panel's approach.

<sup>1070</sup> Panel Reports, fn 1449 to para. 7.1088.

<sup>1071</sup> Panel Reports, para. 7.1088.

<sup>1072</sup> Panel Reports, para. 7.1089. (emphasis original; curly brackets added)

<sup>1073</sup> Panel Reports, para. 7.1092.

<sup>1074</sup> Panel Reports, para. 7.1093.

<sup>1075</sup> Panel Reports, para. 7.1096. The Panel further noted that Brazil conceded that other than the GATT 1994 there is no specific covered agreement dealing with internal taxation. (Ibid.)

<sup>1076</sup> Panel Reports, para. 7.1096. (fn omitted)

<sup>1077</sup> Panel Reports, para. 7.1097.

<sup>1078</sup> Brazil's appellant's submission, para. 410 (quoting Panel Reports, para. 7.1096).

<sup>1079</sup> Brazil's appellant's submission, para. 410.

<sup>1080</sup> Brazil's appellant's submission, para. 408 (referring to Panel Reports, para. 7.1096).

itself, according to [the general interpretative note to] Annex 1A of the Marrakesh Agreement."<sup>1081</sup> Brazil therefore asserts that "[t]he Panel's interpretation renders the text of paragraph 2(b) of the Enabling Clause *inutile*."<sup>1082</sup> Brazil therefore seeks reversal of the Panel's conclusion that a non-tariff measure within the scope of paragraph 2(b) must be governed by specific provisions on S&D treatment that are distinct from the provisions of the GATT 1994 incorporating the GATT 1947.<sup>1083</sup> Brazil also seeks reversal of the Panel's "consequential finding" that the internal tax reductions accorded to imported products from Argentina, Mexico, and Uruguay and found to be inconsistent under Article I:1 of the GATT 1994 are not justified under paragraph 2(b) of the Enabling Clause<sup>1084</sup> and requests the Appellate Body to complete the analysis and find that "the differential tax treatment is justified under paragraph 2(b) and complies with the requirements of paragraph 3 of the Enabling Clause."<sup>1085</sup>

5.404. In response, the European Union asserts that "Brazil's over-creative reading", according to which paragraph 2(b) refers to "all the provisions of the GATT relating to non-tariff measures as being negotiated under the auspices of the GATT (or of the WTO), does not find any support in the text, context or the object and purpose of the Enabling Clause".<sup>1086</sup> The European Union points to the Panel's explanation that the Enabling Clause was adopted by the GATT CONTRACTING PARTIES during the Tokyo Round in the context of which a number of plurilateral agreements governing certain non-tariff measures were concluded.<sup>1087</sup> The European Union submits that it is in this context that the reference in paragraph 2(b) to "instruments multilaterally negotiated under the auspices of the GATT" should be understood.<sup>1088</sup>

5.405. Japan submits that paragraph 2(b) "does not endorse exceptions to the MFN principle with respect to 'non-tariff measures' themselves" but instead "pertains to differential and more favourable treatment with respect to '*the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT*'".<sup>1089</sup> According to Japan, the Panel carefully interpreted those terms and confirmed that they mean "since 'Article III:2 and III:4 of the GATT 1994 [] do not introduce any special and differential treatment for taxes in the form of non-tariff measures'" and "there is no specific WTO Agreement dealing with internal taxation, Brazil's measures cannot be substantially covered by paragraph 2(b)."<sup>1090</sup>

5.406. We begin by analysing the scope of the phrase "non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT" as it appears in paragraph 2(b) of the Enabling Clause. This paragraph provides, in relevant part:

2. The provisions of paragraph 1 apply to the following:

...

(b) Differential and more favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT[.]<sup>1091</sup>

5.407. Paragraph 2(b) thus identifies a certain form of differential and more favourable treatment to which the authorization of paragraph 1 of the Enabling Clause applies. In other words, a measure that a Member claims to be excepted from a finding of inconsistency with Article I of the

<sup>1081</sup> Brazil's appellant's submission, para. 412. (fn omitted)

<sup>1082</sup> Brazil's appellant's submission, para. 412. (emphasis original)

<sup>1083</sup> Brazil's appellant's submission, para. 431 (referring to Panel Reports, para. 7.1096).

<sup>1084</sup> Brazil's appellant's submission, para. 431 (referring to Panel Reports, paras. 7.1097, 8.6.i, and 8.17.j).

<sup>1085</sup> Brazil's appellant's submission, para. 432.

<sup>1086</sup> European Union's appellee's submission, para. 496.

<sup>1087</sup> European Union's appellee's submission, para. 494.

<sup>1088</sup> European Union's appellee's submission, para. 494.

<sup>1089</sup> Japan's appellee's submission, para. 168 (quoting paragraph 2(b) of the Enabling Clause). (emphasis added by Japan)

<sup>1090</sup> Japan's appellee's submission, para. 168 (quoting Panel Reports, para. 7.1096; referring to para. 7.1097).

<sup>1091</sup> Fn omitted.

"General Agreement" "must fit within"<sup>1092</sup> the meaning of paragraph 2(b). To this effect, paragraph 2(b) provides for the adoption of a limited category of differential and more favourable treatment, namely treatment that concerns "non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT [as an institution]". The text of paragraph 2(b) does not, however, support a reading of that provision as extending to the adoption of differential and more favourable treatment concerning non-tariff measures governed by "provisions of the General Agreement" itself. Indeed, had it been so, the latter part of paragraph 2(b) in referring to "provisions of instruments multilaterally negotiated under the auspices of the GATT" would be deprived of any meaning.

5.408. We find support for this reading from the contextual history surrounding the adoption of the Enabling Clause. We recall that the Enabling Clause was adopted in 1979 during the Tokyo Round of multilateral trade negotiations, which also witnessed the conclusion of a number of plurilateral agreements governing various non-tariff measures, i.e. the Tokyo Round Codes.<sup>1093</sup> The Tokyo Round Codes were "negotiated under the auspices of the GATT [as an institution]". We observe that a number of these plurilateral agreements sought to further the objectives of and/or build upon existing provisions of the GATT 1947, and contained provisions on S&D treatment for developing countries. The reference in paragraph 2(b) to differential and more favourable treatment "with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT" was in relation to these plurilateral agreements that were negotiated under the auspices of the GATT, as an institution and furthered the objectives of and/or built upon existing provisions of the GATT 1947. Moreover, in using the phrase "*provisions* of instruments multilaterally negotiated under the auspices of the GATT"<sup>1094</sup>, as opposed to "instruments multilaterally negotiated under the auspices of the GATT", paragraph 2(b) referred to specific provisions of these plurilateral agreements, in particular, the S&D treatment provisions, and not the entire agreements themselves.

5.409. We find additional support from contemporaneous decisions adopted during the Tokyo Round of multilateral trade negotiations. In particular, we recall the decision entitled "Action by the CONTRACTING PARTIES on the Multilateral Trade Negotiations"<sup>1095</sup>, which recognized in paragraph 2 thereof that "as a result of the Multilateral Trade Negotiations, a number of Agreements covering certain non-tariff measures ... have been drawn up."<sup>1096</sup> We observe that paragraph 1 of that decision provided that the CONTRACTING PARTIES "reaffirm their intention to ensure the unity and consistency of the GATT system, and to this end they shall oversee the operation of the system as a whole and take action as appropriate."<sup>1097</sup> Paragraph 3, in particular, stated that "[t]he CONTRACTING PARTIES also note that existing rights and benefits under the GATT of contracting parties not being parties to these Agreements, including those derived from Article I, are not affected by these Agreements."<sup>1098</sup>

5.410. In other words, the GATT CONTRACTING PARTIES addressed the issue of MFN treatment arising out of Article I of the GATT 1947 by reaffirming "their intention to ensure the unity and consistency of the GATT system" and expressly confirming that the benefits of the Tokyo Round plurilateral agreements were to accrue to all the contracting parties to the GATT, even those that were not parties to the plurilateral agreements, insofar as the subject matter of those agreements were covered by Article I of the GATT 1947. Therefore, at the time of the conclusion of the Tokyo

<sup>1092</sup> Appellate Body Report, *EC – Tariff Preferences*, para. 112.

<sup>1093</sup> The Tokyo Round witnessed the conclusion of (i) the Agreement on Technical Barriers to Trade (TBT Agreement); (ii) the Agreement on Government Procurement; (iii) the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade (Subsidies and Countervailing Duties); (iv) the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (Customs Valuation Agreement); (v) the Agreement on Import Licensing Procedures; (vi) the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Anti-Dumping Agreement); (vii) the Agreement on Trade in Civil Aircraft; (viii) the International Dairy Agreement; and (ix) the International Bovine Meat Agreement.

<sup>1094</sup> Emphasis added.

<sup>1095</sup> Action by the Contracting Parties on the Multilateral Trade Negotiations, Decision by the Contracting Parties of 28 November 1979, GATT Document L/4905, BISD 26S/201.

<sup>1096</sup> Action by the Contracting Parties on the Multilateral Trade Negotiations, Decision by the Contracting Parties of 28 November 1979, GATT Document L/4905, BISD 26S/201, para. 2.

<sup>1097</sup> Action by the Contracting Parties on the Multilateral Trade Negotiations, Decision by the Contracting Parties of 28 November 1979, GATT Document L/4905, BISD 26S/201, para. 1.

<sup>1098</sup> Action by the Contracting Parties on the Multilateral Trade Negotiations, Decision by the Contracting Parties of 28 November 1979, GATT Document L/4905, BISD 26S/201, para. 3.

Round Codes, absent the Enabling Clause, a Contracting Party who was not a party to a Tokyo Round plurilateral agreement could have challenged a measure taken by a party to that plurilateral agreement pursuant to a S&D treatment provision thereof in favour of a developing country as being inconsistent with Article I of the GATT 1947.

5.411. The adoption of the Enabling Clause, particularly paragraph 2(b), addressed this situation. Paragraph 2(b) provided an umbrella by excepting differential and more favourable treatment concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT, i.e. differential and more favourable treatment accorded pursuant to the S&D treatment provisions of the Tokyo Round Codes, from the purview of a challenge under Article I of the GATT 1947.

5.412. The foregoing considerations therefore suggest that the phrase "non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT" in paragraph 2(b), at the time of the adoption of the Enabling Clause, concerned non-tariff measures taken pursuant to the S&D treatment provisions of the Tokyo Round Codes and not the provisions of the GATT 1947.

5.413. We note that with the entry into effect of the WTO Agreement, the Tokyo Round Codes are no longer in force. The Enabling Clause, however, stands incorporated as an "integral part" of the GATT 1994.<sup>1099</sup> The Appellate Body considered in *EC – Tariff Preferences* that "Members reaffirmed the significance of the Enabling Clause ... with [its] incorporation ... into the GATT 1994."<sup>1100</sup> The Uruguay Round of multilateral trade negotiations culminated in the establishment of the WTO, following which GATT as an institution was replaced by the WTO. Article II:1 of the WTO Agreement expressly recognizes that "[t]he WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to [the WTO] Agreement".<sup>1101</sup> The Enabling Clause as an "integral part" of the GATT 1994 falls within the scope of Article II:1 of the WTO Agreement. Therefore, while at the time of its adoption, paragraph 2(b) of the Enabling Clause speaks of "instruments multilaterally negotiated under the auspices of the GATT" as an institution, following the entry into force of the WTO Agreement, paragraph 2(b) refers to "instruments multilaterally negotiated under the auspices of the [WTO]" as an institution.<sup>1102</sup> Paragraph 2(b) of the Enabling Clause, following the entry into force of the WTO Agreement, thus provides for the adoption of a limited category of differential and more favourable treatment, namely treatment that concerns non-tariff measures governed by provisions of instruments multilaterally negotiated under the auspices of the WTO. The GATT 1994, while an integral part of the WTO Agreement, was not negotiated under the auspices of the WTO as an institution.

5.414. These considerations, read in light of the text, context, and circumstances surrounding the adoption of the Enabling Clause and thereafter the establishment of the WTO, indicate that paragraph 2(b) does not concern non-tariff measures governed by the provisions of the GATT 1994. Instead, paragraph 2(b) speaks to non-tariff measures taken pursuant to S&D treatment provisions of "instruments multilaterally negotiated under the auspices of the [WTO]".<sup>1103</sup> Brazil's contention that paragraph 2(b) applies to non-tariff measures taken pursuant to the provisions of the GATT 1994 incorporating the GATT 1947<sup>1104</sup>, in our view, calls for paragraph 2(b) to be given a meaning that was not ascribed to it either at the time of its adoption or thereafter with the establishment of the WTO. We therefore uphold the Panel's finding, in paragraph 7.1096 of the

<sup>1099</sup> Appellate Body Report, *EC – Tariff Preferences*, para. 90.

<sup>1100</sup> Appellate Body Report, *EC – Tariff Preferences*, para. 108 (referring to paragraph 1(b)(iv) of the language of Annex 1A to the WTO Agreement incorporating the GATT 1994 into the WTO Agreement).

<sup>1101</sup> Article II:1 of the WTO Agreement. We also note that Article III:2 of the WTO Agreement states in relevant part that "[t]he WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to [the WTO] Agreement." (Article III:2 of the WTO Agreement)

<sup>1102</sup> We note Brazil's contention that the terms "under the auspices of the GATT" in paragraph 2(b) of the Enabling Clause, "at present, should be read 'under the auspices of the WTO'". (Brazil's appellant's submission, para. 410 (quoting Brazil's second written submission to the Panel, para. 174))

<sup>1103</sup> This reading of paragraph 2(b) of the Enabling Clause does not, however, affect the S&D treatment provisions contained in the other multilateral agreements on trade in goods in Annex 1A to the WTO Agreement. The S&D treatment provisions of these multilateral agreements on trade in goods apply in their own right in the context of their respective agreements as among all WTO Members.

<sup>1104</sup> Brazil's appellant's submission, para. 410.

Panel Reports, that "a non-tariff measure within the scope of paragraph 2(b) must be governed by specific provisions on special and differential treatment, that are distinct from the provisions of the GATT 1994 incorporating the GATT 1947."<sup>1105</sup>

5.415. Turning to the Panel's application of paragraph 2(b) of the Enabling Clause, we recall that the Panel found that the provisions of the GATT 1994 relied on by Brazil, namely Articles III:2 and III:4, "do not introduce any special and differential treatment for taxes in the form of non-tariff measures".<sup>1106</sup> We have considered above that paragraph 2(b) of the Enabling Clause did not apply, at the time of its adoption, with respect to Articles III:2 and III:4 of the GATT 1947, and following the entry into force of the WTO Agreement, does not apply with respect to Articles III:2 and III:4 of the GATT 1994. Thus, subjecting like products of different WTO Members to different internal taxes inconsistently with Article I:1 of the GATT 1994 cannot be justified under paragraph 2(b) of the Enabling Clause. We therefore uphold the Panel's finding, in paragraph 7.1097 of the Panel Reports, that the internal tax reductions under the INOVAR-AUTO programme accorded to imported products from Argentina, Mexico, and Uruguay and found to be inconsistent under Article I:1 of the GATT 1994 are not justified under paragraph 2(b) of the Enabling Clause.<sup>1107</sup>

### **5.5.3 Whether the Panel erred in its interpretation of paragraph 2(c) of the Enabling Clause and in finding that the differential tax treatment under the INOVAR-AUTO programme was not justified under that provision**

5.416. We now turn to paragraph 2(c) of the Enabling Clause. We recall that we have agreed with the Panel to the extent the Panel found that there is no genuine link or a rational connection between differential tax treatment under the INOVAR-AUTO programme and the notified arrangements adopted under paragraph 2(c). Consequently, we have upheld the Panel's finding that the differential and favourable treatment (i.e. the differential tax treatment in the form of internal tax reductions accorded to some but not other Members) under the INOVAR-AUTO programme was not notified as adopted under paragraph 2(c), as required pursuant to paragraph 4(a) of the Enabling Clause. In this section, we review whether the Panel erred in finding that the differential tax treatment under the INOVAR-AUTO programme was not substantively justified under paragraph 2(c).

5.417. The Panel recalled that, to satisfy the notification requirement in paragraph 4(a), any differential and more favourable treatment adopted under paragraph 2(c) must have "a close and genuine link to an RTA sufficient to alert other WTO Members to the adoption of such differential and more favourable treatment pursuant to the Enabling Clause".<sup>1108</sup> The Panel considered that a "similar standard" applies with respect to the substantive justification under paragraph 2(c) itself.<sup>1109</sup> Thus, the Panel found that, "[i]n order for any differential and more favourable treatment to be justified under paragraph 2(c) of the Enabling Clause, there must exist a close and genuine link to a 'regional arrangement entered into amongst less-developed contracting parties'".<sup>1110</sup> In this case, the Panel found that Brazil had not identified an RTA with a close and genuine link to the internal tax reductions at issue.<sup>1111</sup> The Panel stated that, while "Brazil has made assertions regarding the [1980] Treaty of Montevideo and the ECAs", Brazil has not pointed to a provision providing for tax preferences in those RTAs nor "demonstrated how the tax reductions at issue are related to those RTAs", and therefore how the relevant differential and more favourable treatment could be justified under paragraph 2(c).<sup>1112</sup> The Panel therefore found that "Brazil has not met its burden of proof in respect of the substantive requirements of paragraph 2(c)".<sup>1113</sup>

<sup>1105</sup> Panel Reports, para. 7.1096. (fn omitted)

<sup>1106</sup> Panel Reports, para. 7.1096. In particular, the Panel noted that "Brazil concedes that other than the GATT 1994 there is no specific WTO covered agreement dealing with internal taxation." (Ibid. (referring to Brazil's second written submission to the Panel, para. 174))

<sup>1107</sup> Panel Reports, para. 7.1097.

<sup>1108</sup> Panel Reports, para. 7.1117 (referring to *ibid.*, para. 7.1108).

<sup>1109</sup> Panel Reports, para. 7.1117.

<sup>1110</sup> Panel Reports, para. 7.1117.

<sup>1111</sup> Panel Reports, para. 7.1118.

<sup>1112</sup> Panel Reports, para. 7.1118. (fn omitted)

<sup>1113</sup> Panel Reports, para. 7.1118.

5.418. For these reasons, the Panel concluded that "the tax reductions accorded to imported products from Argentina, Mexico and Uruguay and found to be inconsistent under Article I:1 of the GATT 1994 are not justified under paragraph 2(c) of the Enabling Clause."<sup>1114</sup>

5.419. On appeal, Brazil contends that the Panel's substantive evaluation of paragraph 2(c) "is essentially indistinguishable from its evaluation of whether the notification was sufficient under paragraph 4(a)".<sup>1115</sup> Brazil submits that the Panel rested its finding on its "flawed conclusion that because the [1980] Treaty of Montevideo and the provisions of the relevant ECAs do not expressly make reference to internal taxation, they did not have a genuine link with paragraph 2(c)" and therefore "WTO Members could not have been expected to be informed that Brazil intended to accord internal tax reductions to motor vehicles from Argentina, Mexico and Uruguay".<sup>1116</sup> Brazil further submits that the Panel's finding that "Brazil has not demonstrated 'how the tax reductions at issue are related to [the] RTAs'"<sup>1117</sup> is "directly contradicted by the facts on the record".<sup>1118</sup> Brazil asserts that the 1980 Treaty of Montevideo, the relevant ECAs, and LAIA have "an ample scope comprising internal tax reduction measures".<sup>1119</sup> Accordingly, Brazil requests the Appellate Body to reverse the Panel's conclusion that Brazil did not meet its burden of proof with respect to the substantive requirements of paragraph 2(c)<sup>1120</sup> and to complete the analysis and find that "the differential tax treatment is justified under paragraph 2(c) and complies with the requirements of paragraph 3 of the Enabling Clause."<sup>1121</sup>

5.420. In response, the European Union asserts that what Brazil "in essence" claims in its appeal is that "the Panel failed to make an objective assessment of the matter before it, while Brazil has not raised a claim under Article 11 of DSU."<sup>1122</sup> Thus, the European Union submits that "the Appellate Body can and should ... dismiss this part of Brazil's appeal."<sup>1123</sup> That said, the European Union disagrees with Brazil's contention that Article 21 of Decree 7,819/2012 contains the necessary references and argues instead that the article does not mention the provisions in the relevant decrees referring to preferential tax treatment.<sup>1124</sup>

5.421. Japan submits that "Brazil's claim appears to be that the Panel did not properly analyse and weigh the facts."<sup>1125</sup> Japan contends that "[s]uch a claim ... cannot be raised by Brazil at this stage (at least not under any other basis than potentially a DSU Article 11 claim, which Brazil did not raise)."<sup>1126</sup> That said, Japan submits that the Panel reached the correct conclusion concerning paragraph 2(c) of the Enabling Clause.<sup>1127</sup> Japan submits that Article 21 of Decree 7,819/2012 refers to "vehicles [...] originating from countries that are signatories to the agreements" established by the relevant decrees.<sup>1128</sup> According to Japan, "[t]he references to the relevant decrees do not identify the provisions in those decrees referring to preferential tax treatment."<sup>1129</sup> Japan contends that "Brazil makes reference to those decrees ... because it wants to avoid referring to the beneficiary countries directly by name."<sup>1130</sup>

<sup>1114</sup> Panel Reports, para. 7.1121.

<sup>1115</sup> Brazil's appellant's submission, para. 414.

<sup>1116</sup> Brazil's appellant's submission, para. 419 (referring to Panel Reports, para. 7.1115).

<sup>1117</sup> Brazil's appellant's submission, para. 421 (quoting Panel Reports, para. 7.1118).

<sup>1118</sup> Brazil's appellant's submission, para. 422.

<sup>1119</sup> Brazil's appellant's submission, para. 422.

<sup>1120</sup> Brazil's appellant's submission, para. 433 (referring to Panel Reports, para. 7.1118).

<sup>1121</sup> Brazil's appellant's submission, para. 434.

<sup>1122</sup> European Union's appellee's submission, para. 508. (fn omitted)

<sup>1123</sup> European Union's appellee's submission, para. 508.

<sup>1124</sup> European Union's appellee's submission, para. 515.

<sup>1125</sup> Japan's appellee's submission, para. 171.

<sup>1126</sup> Japan's appellee's submission, para. 171.

<sup>1127</sup> Japan's appellee's submission, paras. 172-174.

<sup>1128</sup> Japan's appellee's submission, para. 175 (quoting Decree 7,819/2012 (Panel Exhibit JE-132), Article 21).

<sup>1129</sup> Japan's appellee's submission, para. 175.

<sup>1130</sup> Japan's appellee's submission, para. 175.

5.422. Paragraph 2 of the Enabling Clause provides, in relevant part:

The provisions of paragraph 1 apply to the following:

...

(c) Regional or global arrangements entered into amongst developing country Members for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the [WTO Members], for the mutual reduction or elimination of non-tariff measures, on products imported from one another[.]<sup>1131</sup>

5.423. Paragraph 2(c) excepts differential and more favourable treatment accorded pursuant to "[r]egional or global arrangements entered into amongst" developing country Members from a finding of inconsistency with Article I of the GATT 1994. Paragraph 2(c) limits the kind of differential and more favourable treatment to the: (i) mutual reduction or elimination of tariffs; and (ii) mutual reduction or elimination of non-tariff measures. In case of the latter, paragraph 2(c) adds that the "mutual reduction or elimination of non-tariff measures" have to be "in accordance with criteria or conditions which may be prescribed" by the WTO Members. Paragraph 2(c) does not exclude the possibility that developing country Members that are parties to regional or global arrangements may adopt such instruments that they may deem appropriate for the mutual reduction or elimination of tariffs and non-tariff measures. However, it suffices that the instrument adopted that way, to be justified under paragraph 2(c) for the differential and more favourable treatment it accords, has a "genuine" link or a rational connection with the regional or global arrangement adopted and notified to the WTO. Therefore, we disagree with the Panel to the extent it considered that, in order for any differential and more favourable treatment to be justified under paragraph 2(c), there must exist *both* a "close" and "genuine" link to a "regional arrangement entered into amongst" developing country Members.<sup>1132</sup>

5.424. As noted, Brazil submits that the Panel rested its finding on its "flawed conclusion that because the [1980] Treaty of Montevideo and the provisions of the relevant ECAs do not expressly make reference to internal taxation, they did not have a genuine link with paragraph 2(c)".<sup>1133</sup> We consider that Brazil mischaracterizes the Panel's finding. The Panel did not find, as Brazil contends, that the 1980 Treaty of Montevideo and the relevant ECAs do not bear a genuine link with the requirements of paragraph 2(c).<sup>1134</sup> Instead, the Panel found that "Brazil has not demonstrated how the relevant tax reductions [under the INOVAR-AUTO programme] found to be inconsistent under Article I:1 of the GATT 1994 are *related* to the RTA that Brazil has notified to the WTO (the Treaty of Montevideo) or the ECAs allegedly implementing that RTA."<sup>1135</sup> Consequently, the Panel was not satisfied "how the relevant differential and more favourable treatment could be justified under paragraph 2(c)".<sup>1136</sup> In reaching this conclusion, the Panel examined the provisions of the 1980 Treaty of Montevideo and found that "none of the provisions cited to in the [1980] Treaty of Montevideo" had any relation "in and of themselves" to the differential tax treatment under the INOVAR-AUTO programme (in the form of internal tax reductions accorded to some but not other Members) found to be inconsistent with Article I:1 of the GATT 1994.<sup>1137</sup> Turning to the relevant ECAs referred to in Articles 21 and 22(I) of Decree 7,819/2012, the Panel noted that it "could not discern any ... relationship" that would attest to "the fundamental premise of Brazil's argument, namely that the INOVAR-AUTO programme is implementing the objectives of the ECAs".<sup>1138</sup>

5.425. The Panel was required to undertake this analytical exercise given that, as Brazil explains on appeal, it contended before the Panel that "the tax treatment accorded within the framework of [the] INOVAR-AUTO [programme] ... is inscribed in the context of the implementation process of the ... [ECAs] negotiated ... under the umbrella of the 1980 Treaty of Montevideo."<sup>1139</sup> Consequently,

<sup>1131</sup> Fn omitted.

<sup>1132</sup> Panel Reports, para. 7.1117.

<sup>1133</sup> Brazil's appellant's submission, para. 419 (referring to Panel Reports, para. 7.1115).

<sup>1134</sup> Brazil's appellant's submission, para. 418.

<sup>1135</sup> Panel Reports, para. 7.1115. (emphasis added)

<sup>1136</sup> Panel Reports, para. 7.1118. (fn omitted)

<sup>1137</sup> Panel Reports, para. 7.1112.

<sup>1138</sup> Panel Reports, para. 7.1112.

<sup>1139</sup> Brazil's appellant's submission, para. 367.



as Brazil further explains, the differential tax treatment was not only justified under paragraph 2(c)<sup>1140</sup> but also "did not require additional notification".<sup>1141</sup>

5.426. We have considered above the question whether or not the differential tax treatment under the INOVAR-AUTO programme was notified pursuant to paragraph 4(a) of the Enabling Clause as having been adopted under paragraph 2(c) by virtue of the notification of the 1980 Treaty of Montevideo and the relevant ECAs under paragraph 2(c). In so doing, we have noted that Articles 21 and 22(I) of Decree 7,819/2012 do not refer to the 1980 Treaty of Montevideo and that the 1980 Treaty of Montevideo does not itself specify any rules regarding internal tax reductions. We have also considered that, while Articles 21 and 22(I) of Decree 7,819/2012 refer to the relevant ECAs, those ECAs provide for the adoption of tariff preferences in the automotive sector and do not refer to internal taxation. Accordingly, in the absence of a genuine link between the differential tax treatment under the INOVAR-AUTO programme, on the one hand, and the 1980 Treaty of Montevideo and the relevant ECAs, on the other hand, we have agreed with the Panel's finding that "Brazil has not demonstrated how the ... tax reductions found to be inconsistent under Article I:1 of the GATT 1994 are related to the RTA that Brazil has notified to the WTO (the [1980] Treaty of Montevideo) or the ECAs allegedly implementing that RTA."<sup>1142</sup> Therefore, to the extent that the Panel relied on its earlier analysis concerning whether or not the INOVAR-AUTO programme, which accords the differential and more favourable treatment (i.e. the differential tax treatment in the form of internal tax reductions accorded to some but not other Members), had a genuine link to "the arrangement notified to the WTO"<sup>1143</sup> in determining if the differential and more favourable tax treatment was substantively justified under paragraph 2(c), we find no error in the Panel's approach. The considerations outlined by the Panel in that part of its analysis were bound to have a substantial bearing on whether or not the differential and more favourable treatment under the INOVAR-AUTO programme was substantively justified under paragraph 2(c), given the manner in which Brazil framed its arguments before the Panel. Indeed, if there is no genuine link between the measure at issue according the differential and more favourable treatment and the arrangements notified to the WTO, it is difficult to see how the measure at issue could be substantively justified under paragraph 2(c).

5.427. In light of the foregoing considerations, we uphold the Panel's finding, in paragraph 7.1118 of the Panel Reports, to the extent that the Panel found that Brazil has not identified any arrangement with a genuine link to the differential tax treatment envisaged under the INOVAR-AUTO programme. Consequently, we also uphold the Panel's finding, in paragraph 7.1121 of the Panel Reports, that the internal tax reductions accorded under the INOVAR-AUTO programme to imported products from Argentina, Mexico, and Uruguay and found to be inconsistent under Article I:1 of the GATT 1994 are not justified under paragraph 2(c) of the Enabling Clause.

#### 5.5.4 Conclusion with respect to the Enabling Clause

5.428. Paragraph 4(a) of the Enabling Clause envisages a degree of specificity in the notification adopted thereunder. At a minimum, a notification pursuant to paragraph 4(a) should state under which particular provision of the Enabling Clause the differential and more favourable treatment has been adopted so as to put other Members on notice. Paragraph 4(a) does not exclude the possibility that a single notification can state that the notifying Member considers an arrangement or a measure to have been adopted pursuant to one or more subparagraphs of paragraph 2 of the Enabling Clause. However, in the absence of any such indication, it cannot be taken for granted that a complaining party is on notice of those subparagraphs of paragraph 2 that the notifying Member considers to be applicable. A notification pursuant to paragraph 4(a) therefore speaks to and has a direct bearing on a complaining party's knowledge. Consequently, it speaks to whether the complaining party is required to raise the Enabling Clause and identify the relevant provision(s) thereof in its panel request and assert that an arrangement or a measure adopted by the responding party is inconsistent not only with Article I:1 of the GATT 1994, but also with the relevant provisions of the Enabling Clause. While it is for the complaining party to raise the Enabling Clause and identify the relevant provision(s) thereof in its panel request, the burden to prove that the measure satisfies the

<sup>1140</sup> Brazil's appellant's submission, para. 367.

<sup>1141</sup> Brazil's appellant's submission, para. 395. (fn omitted)

<sup>1142</sup> Panel Reports, para. 7.1115.

<sup>1143</sup> Panel Reports, para. 7.1108.

conditions set out in the Enabling Clause remains on the responding party relying on the Enabling Clause as a defence.

5.429. With regard to whether the measure at issue (i.e. differential tax treatment under the INOVAR-AUTO programme in the form of internal tax reductions accorded to some but not other Members) was notified pursuant to paragraph 4(a) as having been adopted under paragraph 2(b) of the Enabling Clause, our review of the Panel's findings indicates that Brazil has not demonstrated that the differential tax treatment under the INOVAR-AUTO programme was notified to the WTO as adopted under paragraph 2(b), as required pursuant to paragraph 4(a) of the Enabling Clause. We therefore uphold the Panel's finding, in paragraphs 7.1082-7.1083 of the Panel Reports, that Brazil has not demonstrated that the differential tax treatment under the INOVAR-AUTO programme was notified to the WTO as adopted pursuant to paragraph 2(b), and therefore, in the circumstances of this case, there was no burden on the complaining parties to raise and identify paragraph 2(b) of the Enabling Clause in their panel requests.

5.430. With regard to whether the measure at issue (i.e. the differential tax treatment under the INOVAR-AUTO programme in the form of internal tax reductions accorded to some but not other Members) was notified pursuant to paragraph 4(a) as having been adopted under paragraph 2(c) of the Enabling Clause, our review of the Panel's findings indicates that Brazil has not demonstrated that the 1980 Treaty of Montevideo and the ECAs notified to the WTO have a genuine link to the INOVAR-AUTO programme providing for the differential and more favourable treatment at issue, and, consequently, the differential and more favourable treatment at issue was not notified to the WTO as adopted under paragraph 2(c), as required pursuant to paragraph 4(a) of the Enabling Clause. We therefore uphold the Panel's finding, in paragraph 7.1119 of the Panel Reports, that the differential tax treatment under the INOVAR-AUTO programme was not notified as adopted under paragraph 2(c), as required pursuant to paragraph 4(a). Consequently, we also uphold the Panel's finding, in paragraph 7.1120 of the Panel Reports, that, in the circumstances of this case, there was no burden on the complaining parties to raise and identify paragraph 2(c) of the Enabling Clause in their panel requests.

5.431. In light of the foregoing considerations, we uphold the Panel's findings, in paragraphs 8.6.h and 8.17.i of the Panel Reports, that there was no burden on the complaining parties to raise and identify the relevant provisions of the Enabling Clause in their panel requests, and their claims under Article I:1 of the GATT 1994 were therefore within the Panel's terms of reference.

5.432. With respect to paragraph 2(b) of the Enabling Clause, we note that paragraph 2(b) provides for the granting of "[d]ifferential and more favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT". Paragraph 2(b) provides for the adoption of a limited category of differential and more favourable treatment, namely treatment that concerns "non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT" as an institution. The phrase "non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT", at the time of the adoption of the Enabling Clause, concerned non-tariff measures taken pursuant to the S&D treatment provisions of the Tokyo Round Codes, and not the provisions of the GATT 1947. Following the entry into force of the WTO Agreement, paragraph 2(b) of the Enabling Clause provides for the adoption of a limited category of differential and more favourable treatment, namely treatment that concerns non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the WTO. The GATT 1994, while an integral part of the WTO Agreement, was not negotiated under the auspices of the WTO. These considerations read in light of the text, context, and circumstances surrounding the adoption of the Enabling Clause and thereafter the establishment of the WTO indicates that paragraph 2(b) does not concern non-tariff measures governed by the provisions of the GATT 1994. Instead, paragraph 2(b) speaks to non-tariff measures taken pursuant to S&D treatment provisions of "instruments multilaterally negotiated under the auspices of the [WTO]".

5.433. We therefore uphold the Panel's finding, in paragraph 7.1096 of the Panel Reports, that "a non-tariff measure within the scope of paragraph 2(b) must be governed by specific provisions on special and differential treatment, that are distinct from the provisions of the GATT 1994 incorporating the GATT 1947."<sup>1144</sup> We also uphold the Panel's findings, in paragraphs 7.1097, 8.6.i,

<sup>1144</sup> Panel Reports, para. 7.1096. (fn omitted)

and 8.17.j of the Panel Reports, that the tax reductions accorded under the INOVAR-AUTO programme to imported products from Argentina, Mexico, and Uruguay and found to be inconsistent under Article I:1 of the GATT 1994 are not justified under paragraph 2(b) of the Enabling Clause.

5.434. With respect to paragraph 2(c) of the Enabling Clause, we note that paragraph 2(c) excepts differential and more favourable treatment accorded pursuant to "[r]egional or global arrangements entered into amongst" developing country Members from a finding of inconsistency with Article I of the GATT 1994. Paragraph 2(c) does not exclude the possibility that developing country Members that are parties to regional or global arrangements may adopt such instruments that they may deem appropriate for the mutual reduction or elimination of tariffs and non-tariff measures. However, it suffices that the instrument adopted that way, to be justified under paragraph 2(c) for the differential and more favourable treatment it accords, has a "genuine" link or a rational connection with the regional or global arrangement adopted and notified to the WTO.

5.435. Our review of the Panel's findings indicates that the Panel did not find, as Brazil contends, that the 1980 Treaty of Montevideo and the relevant ECAs do not bear a genuine link with the requirements of paragraph 2(c). Instead, the Panel found that Brazil has not demonstrated how the internal tax reductions under the INOVAR-AUTO programme found to be inconsistent under Article I:1 of the GATT 1994 are related to the RTA (the 1980 Treaty of Montevideo) that Brazil has notified to the WTO or the ECAs allegedly implementing that RTA. Consequently, the Panel was not satisfied how the relevant differential and more favourable treatment under the INOVAR-AUTO programme could be justified under paragraph 2(c). Therefore, to the extent that the Panel relied on its earlier analysis concerning whether or not the INOVAR-AUTO programme, according the differential and more favourable treatment (i.e. the differential tax treatment in the form of internal tax reductions accorded to some but not other Members), had a genuine link to "the arrangement notified to the WTO" in determining if the differential and more favourable treatment was substantively justified under paragraph 2(c), we find no error in the Panel's approach. Indeed, if there is no genuine link between the measure at issue according the differential and more favourable treatment and the arrangements notified to the WTO, we find it difficult to see how the measure at issue could be substantively justified under paragraph 2(c).

5.436. We therefore uphold the Panel's finding, in paragraph 7.1118 of the Panel Reports, to the extent that the Panel found that Brazil has not identified any arrangement with a genuine link to the differential tax treatment envisaged under the INOVAR-AUTO programme. Consequently, we also uphold the Panel's findings, in paragraphs 7.1121, 8.6.i, and 8.17.j of the Panel Reports, that the tax reductions accorded under the INOVAR-AUTO programme to imported products from Argentina, Mexico, and Uruguay and found to be inconsistent under Article I:1 of the GATT 1994 are not justified under paragraph 2(c) of the Enabling Clause.

## **5.6 Articles 11 and 12.7 of the DSU and Article 4.7 of the SCM Agreement**

### **5.6.1 Introduction**

5.437. In this section, we address Brazil's claim that the Panel acted inconsistently with Articles 11 and 12.7 of the DSU in recommending, pursuant to Article 4.7 of the SCM Agreement, that Brazil withdraw the prohibited subsidies identified by the Panel within 90 days.<sup>1145</sup> To recall briefly, during the interim review stage of the Panel proceedings, the European Union and Japan requested that the Panel specify in its recommendations the time period within which the measures must be withdrawn, pursuant to Article 4.7 of the SCM Agreement.<sup>1146</sup> On 6 December 2016, the Panel thus submitted an additional question to the parties regarding the appropriate time period that the Panel should specify in its recommendations. The Panel received the parties' responses to this question

<sup>1145</sup> Brazil's appellant's submission, para. 436. Brazil's claim is conditional upon us upholding the Panel's findings that the measures at issue are prohibited subsidies under Articles 3.1(a) and 3.1(b) of the SCM Agreement. (Ibid., para. 436) Having partially upheld the Panel's findings under Article 3.1(b) of the SCM Agreement in section 5.4 above, we are therefore called upon to address Brazil's claim under Articles 11 and 12.7 of the DSU and Article 4.7 of the SCM Agreement.

<sup>1146</sup> Panel Reports, para. 6.15. Article 4.7 of the SCM Agreement specifies that "the panel *shall* recommend that the subsidizing Member withdraw the subsidy without delay". (emphasis added)

and the parties' comments on each other's responses on 9 December 2016 and 12 December 2016, respectively.<sup>1147</sup>

5.438. In its Reports, the Panel noted that previous panels addressing the specific time period contemplated under Article 4.7 of the SCM Agreement have "tended" to specify 90 days as the time period in which the subsidy must be withdrawn.<sup>1148</sup> The Panel considered it "difficult" to "reconcile" the "'reasonable period of time' (ostensibly up to 15 months, subject to the arbitrator's discretion)" contemplated in Article 21.3(c) of the DSU and the requirement to withdraw prohibited subsidies "'without delay' (i.e. typically 90 days)" under Article 4.7 of the SCM Agreement.<sup>1149</sup> Recalling the Appellate Body's statements in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* that "the expedited remedy provided under Article 4.7 ... is an 'important consideration'", the Panel decided to "respect the specific remedy contemplated in Article 4".<sup>1150</sup> The Panel thus added paragraphs 8.11 and 8.22 to its Report, wherein, "[t]aking into account the procedures that may be required to implement [its] recommendation on the one hand, and the requirement that Brazil withdraw its subsidies 'without delay' on the other", the Panel recommended that the prohibited subsidies identified by it be withdrawn within 90 days.<sup>1151</sup>

5.439. On appeal, Brazil claims that the Panel acted inconsistently with Articles 11 and 12.7 of the DSU because it failed to engage with the arguments put forward by the parties and to provide a "reasoned and adequate explanation" or a "basic rationale" for its conclusion that the prohibited subsidies at issue be withdrawn within 90 days.<sup>1152</sup> Noting that the Panel's reasoning was limited to a single paragraph of its Reports, Brazil asserts, in particular, that the Panel was required – but failed – to "explain why 90 days was appropriate in light of the 'nature of the measures' and the 'procedures that may be required to implement [the panel's] recommendation'".<sup>1153</sup>

5.440. We begin our analysis by discussing, briefly, the relevant legal standards under Articles 11 and 12.7 of the DSU as well as Article 4.7 of the SCM Agreement. Subsequently, we consider whether the Panel acted inconsistently with Articles 11 and 12.7, as alleged by Brazil.

## **5.6.2 Relevant legal standards under Articles 11 and 12.7 of the DSU and Article 4.7 of the SCM Agreement**

5.441. Article 11 of the DSU provides, in relevant part, that:

[A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.

The provision requires a panel to make an objective assessment of the matter before it, which includes a requirement that the panel provide a "'reasoned and adequate' explanation" and coherent reasoning for its findings as the initial trier of facts.<sup>1154</sup> A panel is required to "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual

<sup>1147</sup> Panel Reports, para. 6.16.

<sup>1148</sup> Panel Reports, para. 6.17 (referring to Panel Reports, *Australia – Automotive Leather II*, para. 10.7; *Brazil – Aircraft*, para. 8.5; *Canada – Aircraft Credits and Guarantees*, para. 8.4; *Canada – Autos*, para. 11.7; *Korea – Commercial Vessels*, para. 8.5; *US – Tax Incentives*, para. 8.6).

<sup>1149</sup> Panel Reports, para. 6.17.

<sup>1150</sup> Panel Reports, para. 6.17 (referring to Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.7, in turn referring to Appellate Body Report, *EC – Export Subsidies on Sugar*, paras. 332-335).

<sup>1151</sup> Panel Reports, paras. 8.11 and 8.22.

<sup>1152</sup> Brazil's appellant's submission, paras. 437, 443, and 445.

<sup>1153</sup> Brazil's appellant's submission, para. 453 (referring to Panel Reports, *Australia – Automotive Leather II*, para. 10.7; *Brazil – Aircraft*, para. 8.5; *Canada – Aircraft*, para. 10.4; *Canada – Autos*, para. 11.6; *EC and certain member States – Large Civil Aircraft*, para. 8.6; *Korea – Commercial Vessels*, para. 8.5; *US – Tax Incentives*, para. 8.6).

<sup>1154</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 881 (quoting and referring to Appellate Body Reports, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97; *US – Upland Cotton (Article 21.5 – Brazil)*, para. 293 and fn 618 thereto and para. 294).

findings have a proper basis in that evidence".<sup>1155</sup> Thus, when called on to review a panel's analysis, the Appellate Body "cannot base a finding of inconsistency under Article 11 simply on the conclusion that [it] might have reached a different factual finding from the one the panel reached".<sup>1156</sup> Neither does a panel err simply because it declines to accord to the evidence the weight that one of the parties believes should be accorded to it.<sup>1157</sup>

5.442. Article 12.7 of the DSU provides that "the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes." What constitutes a "basic rationale" is not defined in the covered agreements. In *Mexico – Corn Syrup (Article 21.5 – US)*, the Appellate Body noted that Article 12.7 "establishes a minimum standard for the reasoning that panels must provide in support of their findings and recommendations".<sup>1158</sup> However, the Appellate Body cautioned that it was neither possible nor desirable "to determine, in the abstract, the minimum standard of reasoning that will constitute a 'basic rationale' for the findings and recommendations made by a panel."<sup>1159</sup> Instead, whether a basic rationale has been set out should be decided on a case-by-case basis, taking into account the "facts of the case, the specific legal provisions at issue, and the particular findings and recommendations made by a panel".<sup>1160</sup> In all circumstances, panels must set forth explanations and reasons sufficient to disclose the "essential, or fundamental, justification" for their findings and recommendations.<sup>1161</sup> In particular, panels must identify the relevant facts and the applicable legal norms. In applying those legal norms to the relevant facts, the reasoning of the panel must reveal how and why the law applies to the facts. In this way, panels will, in their reports, disclose the essential or fundamental justification for their findings and recommendations.<sup>1162</sup> This does not, however, necessarily imply that Article 12.7 requires panels to expound at length on the reasons for their findings and recommendations. There may, for example, be instances where a panel's "basic rationale" could be found in reasoning that is set out in other documents, such as in previous panel or Appellate Body reports – provided that such reasoning is quoted or, at a minimum, incorporated by reference.<sup>1163</sup>

5.443. We now consider the legal standard under Article 4.7 of the SCM Agreement, which is the specific legal provision applied by the Panel in the present dispute. Article 4.7 provides:

If the measure in question is found to be a prohibited subsidy, the panel shall recommend that the subsidizing Member withdraw the subsidy without delay. In this regard, the panel shall specify in its recommendation the time-period within which the measure must be withdrawn.

5.444. Through the use of the word "shall", Article 4.7 *requires* a panel to recommend that prohibited subsidies found to exist be withdrawn "without delay".<sup>1164</sup> Further, Article 4.7 mandates that a panel must specify the time period within which such withdrawal must occur.<sup>1165</sup>

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<sup>1155</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.178 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 185, in turn referring to Appellate Body Report, *EC – Hormones*, paras. 132-133). See also Appellate Body Reports, *Australia – Salmon*, para. 266; *EC – Asbestos*, para. 161; *EC – Bed Linen (Article 21.5 – India)*, paras. 170, 177, and 181; *EC – Sardines*, para. 299; *EC – Tube or Pipe Fittings*, para. 125; *Japan – Apples*, para. 221; *Japan – Agricultural Products II*, paras. 141-142; *Korea – Alcoholic Beverages*, paras. 161-162; *Korea – Dairy*, para. 138; *US – Carbon Steel*, para. 142; *US – Gambling*, para. 363; *US – Oil Country Tubular Goods Sunset Reviews*, para. 313; *EC – Selected Customs Matters*, para. 258.

<sup>1156</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1317 (quoting Appellate Body Report, *US – Wheat Gluten*, para. 151).

<sup>1157</sup> Appellate Body Reports, *Australia – Salmon*, para. 267; *Japan – Apples*, para. 221; *Korea – Alcoholic Beverages*, para. 164.

<sup>1158</sup> Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 106.

<sup>1159</sup> Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 108 (referring to Appellate Body Report, *Korea – Alcoholic Beverages*, para. 168).

<sup>1160</sup> Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 108. See also Appellate Body Report, *US – Carbon Steel (India)*, para. 4.194.

<sup>1161</sup> Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 106.

<sup>1162</sup> Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 108 (referring to Appellate Body Report, *Chile – Alcoholic Beverages*, para. 78).

<sup>1163</sup> Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 108-109.

<sup>1164</sup> Appellate Body Report, *Brazil – Aircraft*, para. 192.

<sup>1165</sup> Appellate Body Report, *Brazil – Aircraft*, paras. 191-192.

5.445. The remedy under Article 4.7 of the SCM Agreement to withdraw prohibited subsidies "without delay" is distinct from the remedy contemplated under Article 21 of the DSU. Paragraph 1 of Article 21 of the DSU requires "prompt compliance with recommendations or rulings of the DSB", and paragraph 3 thereof allows the implementing Member "a reasonable period of time" to implement the recommendations or rulings of the DSB, where it is impracticable to comply "immediately".<sup>1166</sup> We note in this regard that Article 4.7 of the SCM Agreement is listed in Appendix 2 to the DSU as a "special or additional rule or procedure" on dispute settlement, and the provisions of Article 21.3 of the DSU therefore "are not relevant in determining the period of time for implementation of a finding of inconsistency with the prohibited subsidies provisions of Part II of the SCM Agreement".<sup>1167</sup>

5.446. As regards the meaning of "without delay" in Article 4.7, the dictionary meanings of "delay" include, as a noun, "procrastination ... ; waiting, lingering"<sup>1168</sup>, and as a verb, "[t]o put off to a later time; to defer, postpone".<sup>1169</sup> As to the context, we note that, in requiring that prohibited subsidies be withdrawn "without delay", Article 4.7 states that panels have to specify the time period within which the measures must be withdrawn. Furthermore, Article 4.10 requires the DSB to grant authorization to the complaining Member to take appropriate countermeasures in the event the recommendations of the DSB are not followed within the time period specified by a panel pursuant to Article 4.7. The text and the context of Article 4.7 therefore suggest to us that the term "without delay" in Article 4.7 is not used in the sense of requiring *immediate* compliance. Nor does the term "without delay", combined with the requirement that the panel specify a time period, impose a single standard or time period applicable in all cases. Instead, Article 4.7 requires a panel to specify a time period that constitutes "without delay" within the realm of possibilities in a given case and considering the domestic legal system of the implementing Member. In determining the time period under Article 4.7 that constitutes "without delay", a panel should typically take into account the nature of the measure(s) to be revoked or modified and the domestic procedures available for such revocation or modification. These domestic procedures include any extraordinary procedures that may be available within the legal system of a WTO Member.<sup>1170</sup>

5.447. Finally, we consider it useful to contrast the text of Article 4.7 of the SCM Agreement with that of Article 21.3(c) of the DSU. Article 21.3 of the DSU specifies that, "[i]f it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so." Article 21.3(c) of the DSU in turn provides that an arbitrator may be appointed where a reasonable time period cannot be agreed on, and that "a guideline for the arbitrator should be that the reasonable period of time ... should not exceed 15 months from the date of adoption", although that time period "may be shorter or longer, depending upon the particular circumstances".<sup>1171</sup> By contrast, Article 4.7 of the SCM Agreement contains no reference to flexibilities depending on "circumstances". Article 4.7 simply mandates that "the panel shall recommend that the subsidizing Member withdraw the subsidy without delay" and that "the panel shall specify in its recommendation the time period within which the measure must be withdrawn." Therefore, in contrast to Article 21.3(c) of the DSU, the use of the term "without delay" in Article 4.7 constrains the latitude available to a panel in specifying the time period under that provision.

<sup>1166</sup> Appellate Body Report, *Brazil – Aircraft*, para. 191.

<sup>1167</sup> Appellate Body Report, *Brazil – Aircraft*, para. 192.

<sup>1168</sup> Oxford English Dictionary online, definition of "delay" (noun), <http://www.oed.com/view/Entry/49277?rskey=23TzIE&result=1&isAdvanced=false#eid>.

<sup>1169</sup> Oxford English Dictionary online, definition of "delay" (verb), <http://www.oed.com/view/Entry/49278?rskey=23TzIE&result=2&isAdvanced=false#eid>.

<sup>1170</sup> By contrast, we note that the existence of, and recourse to, extraordinary procedures within the domestic legal system of a WTO Member State is a factor that is generally not taken into account in determining the "reasonable period of time" under Article 21.3(c) of the DSU. See Award of the Arbitrator, *EC – Chicken Cuts (Article 21.3(c))*, para. 49 (referring to Award of the Arbitrator, *Korea – Alcoholic Beverages (Article 21.3(c))*, para. 42; Award of the Arbitrator, *Chile – Price Band System (Article 21.3(c))*, para. 51; Award of the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 74).

<sup>1171</sup> The three governing principles applicable to an arbitrator's determination of the reasonable period of time under Article 21.3(c) of the DSU are as follows: (i) the reasonable period of time should be the shortest period of time possible within the legal system of the implementing Member; (ii) the implementing Member must utilize all the flexibility and discretion available within its legal and administrative system in order to implement within the shortest period of time possible; and (iii) the "particular circumstances" of the case must be taken into account in determining the reasonable period of time. (Award of the Arbitrator, *EC – Export Subsidies on Sugar (Article 21.3(c))*, para. 61)



### 5.6.3 Whether the Panel acted inconsistently with Articles 11 and 12.7 of the DSU in recommending that Brazil withdraw the prohibited subsidies within 90 days

5.448. On appeal, Brazil claims that the Panel acted inconsistently with Articles 11 and 12.7 of the DSU in recommending that Brazil withdraw the prohibited subsidies found to exist in the present dispute within 90 days.<sup>1172</sup> In Brazil's view, the Panel failed to engage with the arguments put forward by the parties and to provide a "reasoned and adequate explanation" or a "basic rationale" for its conclusion that the recommended timeframe of 90 days was adequate, as required under those provisions.<sup>1173</sup> Brazil alleges that the Panel did not explain why "respect[ing] the specific remedy contemplated in Article 4 of the SCM Agreement" necessitated the granting of only 90 days, when other panels have afforded considerably more than 90 days when making specific recommendations under Article 4.7.<sup>1174</sup> In Brazil's view, in order to provide a "reasoned and adequate explanation" or "basic rationale" for its conclusion, the Panel was required to explain why 90 days was appropriate in light of the "nature of the measures"<sup>1175</sup> and the "procedures that may be required to implement [the panel's] recommendation".<sup>1176</sup> By failing to provide such an explanation, Brazil alleges that the Panel acted inconsistently with its obligations under Articles 11 and 12.7 of the DSU.<sup>1177</sup> Consequently, Brazil requests us to reverse the Panel's findings, in paragraphs 8.11 and 8.22 of its Reports, and to complete the legal analysis and recommend that Brazil withdraw the prohibited subsidies at issue within 18 months from the adoption of the recommendations and rulings of the DSB.<sup>1178</sup>

5.449. Requesting the Appellate Body to reject Brazil's claim<sup>1179</sup>, the European Union and Japan observe that panels do not need to address in their reports every argument or all evidence raised by the parties<sup>1180</sup>, and the fact that panels are required to set forth explanations and reasons "sufficient to disclose the essential, or fundamental, justification" for their findings and recommendations does not necessarily imply that Article 12.7 requires panels "to expound at length on the reasons for their findings and recommendations".<sup>1181</sup> In the appellees' view, the Panel came to its conclusion after considering the parties' views and had "taken into account the procedures that may be required to implement the recommendation", on the one hand, and the requirement under Article 4.7 of the SCM Agreement that prohibited subsidies be withdrawn "without delay", on the other hand.<sup>1182</sup> The European Union further notes that the Panel supported its conclusion by observing a trend to specify 90 days in previous cases.<sup>1183</sup> Moreover, the European Union considers that Brazil "appears to disagree with the Panel's conclusion" and that this does not mean that the Panel has failed to provide a basic rationale for its recommendation.<sup>1184</sup> Japan makes a similar argument that Brazil's claim on appeal "appears to be simply an effort to relitigate the question that the Panel already raised and on which it carefully considered all of the parties' views, as reflected in Panel question 83 to the Parties".<sup>1185</sup> The European Union observes that panels in previous cases "have motivated the 90-days period on the same basis [as the Panel], i.e. without the need to go

<sup>1172</sup> Brazil's appellant's submission, para. 436.

<sup>1173</sup> Brazil's appellant's submission, paras. 437, 443, and 445.

<sup>1174</sup> Brazil's appellant's submission, para. 447 (referring to Panel Reports, *US – Upland Cotton*, para. 8.3(b); *US – FSC*, para. 8.8).

<sup>1175</sup> Brazil's appellant's submission, para. 453 (quoting Panel Reports, *Australia – Automotive Leather II*, para. 10.7; *Brazil – Aircraft*, para. 8.5; *EC and certain member States – Large Civil Aircraft*, para. 8.6; *US – Tax Incentives*, para. 8.6).

<sup>1176</sup> Brazil's appellant's submission, para. 453 (quoting Panel Reports, *Brazil – Aircraft*, para. 8.5; *Canada – Aircraft*, para. 10.4; *Canada – Autos*, para. 11.6; *Korea – Commercial Vessels*, para. 8.5).

<sup>1177</sup> Brazil's appellant's submission, para. 453.

<sup>1178</sup> Brazil's appellant's submission, paras. 454 and 461.

<sup>1179</sup> European Union's appellee's submission, para. 532; Japan's appellee's submission, para. 184.

<sup>1180</sup> European Union's appellee's submission, para. 528; Japan's appellee's submission, para. 181.

<sup>1181</sup> European Union's appellee's submission, para. 528 (referring to Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 108-109); Japan's appellee's submission, para. 181 (referring to Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 108-109).

<sup>1182</sup> European Union's appellee's submission, para. 529; Japan's appellee's submission, para. 182.

<sup>1183</sup> European Union's appellee's submission, para. 529.

<sup>1184</sup> European Union's appellee's submission, para. 530.

<sup>1185</sup> Japan's appellee's submission, para. 184. Panel question No. 83 to the parties stated: "in light of the reference in Article 4.7 of the SCM Agreement to withdrawal of a subsidy 'without delay', could the parties please indicate what they consider is the time period within which the relevant subsidies in this dispute should be withdrawn, as well as their reasons for indicating such a time period?".

into a detailed reasoning to support their conclusions"<sup>1186</sup>, and considers that, in any event, the Panel did not err in recommending a timeframe of 90 days, because Brazil "can withdraw the prohibited subsidies immediately through provisional measures (*Medida Provisória*) which are adopted by the executive branch".<sup>1187</sup>

5.450. The main issue before us in the present case is whether the Panel provided a "reasoned and adequate explanation" or "basic rationale", in accordance with Articles 11 and 12.7 of the DSU, for its recommendation, in paragraphs 8.11 and 8.22 of its Reports, that Brazil withdraw the prohibited subsidies found to exist within 90 days. We do not share the appellees' view that Brazil simply appears to take issue with the Panel's conclusion and is thus merely recasting its arguments before the Panel in the guise of a claim under Article 11 of the DSU.<sup>1188</sup> Although Brazil also disagrees with the Panel's final conclusion regarding the time period of 90 days, we note that its appeal is directed at the Panel's analysis in its Reports and whether that analysis constituted a "reasoned and adequate explanation" or "basic rationale" for its conclusion that 90 days is the appropriate time. We thus do not consider that Brazil is simply recasting factual arguments made before the Panel in the guise of an Article 11 claim.<sup>1189</sup> Rather, the issue that Brazil raises on appeal concerns the Panel's treatment of information on the record and, in particular, whether its failure to engage with the parties' arguments and to "explain why 90 days was appropriate in light of the 'nature of the measures' and the 'procedures that may be required to implement [the panel's] recommendation'" constitute errors under Article 11 and Article 12.7 of the DSU.<sup>1190</sup>

5.451. Turning to the Panel's analysis, we note that the Panel referred to the practice of previous panels and noted that they have "tended" to specify 90 days as the time period under Article 4.7 of the SCM Agreement.<sup>1191</sup> The Panel further considered the differences between the timeframe contemplated under Article 21.3 of the DSU and Article 4.7 of the SCM Agreement and observed that:

[A] local content requirement in a subsidy would need to be remedied "without delay" (i.e. typically 90 days) when challenged as a prohibited subsidy under the SCM Agreement, whereas the same local content requirement in the same instruments when challenged under the GATT 1994 would need to be remedied within a "reasonable period of time" (ostensibly up to 15 months, subject to the arbitrator's discretion). It is difficult for the Panel to reconcile these provisions.<sup>1192</sup>

Noting the Appellate Body's statements in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* "that the expedited remedy provided under Article 4.7 ... is an 'important consideration'"<sup>1193</sup>, the Panel decided to "respect the specific remedy contemplated in Article 4"<sup>1194</sup> and added paragraphs 8.10, 8.11, 8.21, and 8.22 to its conclusions. In those paragraphs, the Panel recommended that Brazil withdraw the subsidies identified by the Panel "without delay".<sup>1195</sup> Furthermore, "[t]aking into account the procedures that may be required to implement [the Panel's] recommendation on the one hand, and the requirement that Brazil withdraw its subsidies 'without

<sup>1186</sup> European Union's appellee's submission, para. 530 (referring to Panel Reports, *Australia – Automotive Leather II*, para. 10.7; *Brazil – Aircraft*, para. 8.5; *Canada – Aircraft Credits and Guarantees*, para. 8.4; *Canada – Autos*, para. 11.7; *Korea – Commercial Vessels*, para. 8.5; *US – Tax Incentives*, para. 8.6).

<sup>1187</sup> European Union's appellee's submission, para. 531. The European Union incorporated by reference its arguments in response to Panel question No. 83 and its comments on Brazil's response to Panel question No. 83. (Ibid., fn 510 thereto)

<sup>1188</sup> European Union's appellee's submission, para. 530; Japan's appellee's submission, para. 184.

<sup>1189</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 442.

<sup>1190</sup> Brazil's appellant's submission, para. 453 (referring to Panel Reports, *Australia – Automotive Leather II*, para. 10.7; *Brazil – Aircraft*, para. 8.5; *Canada – Aircraft*, para. 10.4; *Canada – Autos*, para. 11.6; *EC and certain member States – Large Civil Aircraft*, para. 8.6; *Korea – Commercial Vessels*, para. 8.5; *US – Tax Incentives*, para. 8.6).

<sup>1191</sup> Panel Reports, para. 6.17 (referring to Panel Reports, *Australia – Automotive Leather II*, para. 10.7; *Brazil – Aircraft*, para. 8.5; *Canada – Aircraft Credits and Guarantees*, para. 8.4; *Canada – Autos*, para. 11.7; *Korea – Commercial Vessels*, para. 8.5; *US – Tax Incentives*, para. 8.6).

<sup>1192</sup> Panel Reports, para. 6.17.

<sup>1193</sup> Panel Reports, para. 6.17 (quoting Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.7, in turn referring to Appellate Body Report, *EC – Export Subsidies on Sugar*, paras. 332-335).

<sup>1194</sup> Panel Reports, para. 6.17.

<sup>1195</sup> Panel Reports, paras. 8.10 and 8.21.



delay' on the other", the Panel specified a time period of 90 days for the withdrawal of the subsidies at issue.<sup>1196</sup>

5.452. The Panel's analysis under Article 4.7 proceeded in three steps. First, referring to the practice of previous panels, the Panel considered that the time period for a recommendation under Article 4.7 of the SCM Agreement was "typically" 90 days. As the second step, referring to the Appellate Body's statements in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, the Panel considered that, because the specific remedy under Article 4.7 of the SCM Agreement is an "important consideration"<sup>1197</sup>, the stricter time period of "typically 90 days" under Article 4.7 of the SCM Agreement should prevail over the possibly longer time frame of up to 15 months contemplated under Article 21.3(c) of the DSU. Finally, "[t]aking into account the procedures that may be required to implement [the Panel's] recommendation on the one hand, and the requirement that Brazil withdraw its subsidies 'without delay' on the other", the Panel specified a time period of 90 days for the withdrawal of the subsidies at issue.<sup>1198</sup>

5.453. The Appellate Body has found that a panel provides a "basic rationale" where it incorporates, as part of its findings, a reference to past jurisprudence supporting its reasoning.<sup>1199</sup> In the present case, the Panel referred to prior panel reports specifying 90 days as the time period under Article 4.7 as well as the Appellate Body Reports in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*. Beginning with the latter, we do not consider that the Panel's reference to the Appellate Body's observations in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* is germane to the issue at hand in the present dispute. In those earlier disputes, the Appellate Body's statement that the "specific remedy provided under Article 4.7 of the SCM Agreement is an important consideration" related to the issue of whether the panel had erred in the sequence of its analysis by choosing not to start with the claims under the SCM Agreement.<sup>1200</sup> We fail to see how the Appellate Body's statement in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, although not incorrect, serves as reasoning underpinning the Panel's indication of 90 days as the time period under Article 4.7 in light of the specific facts and circumstances of this case.

5.454. Next, we turn to the Panel's observation that "previous panels addressing the specific time period under Article 4.7 of the SCM Agreement have tended to specify 90 days as the time period in which the subsidy must be withdrawn."<sup>1201</sup> In considering whether the Panel's reference to the practice of prior panels specifying 90 days as the time period under Article 4.7 constitutes sufficient reasoning for its conclusions in the present case, we note that the Panel itself acknowledged that the time period specified by prior panels was "typically 90 days".<sup>1202</sup> Indeed, while many panels have tended to specify 90 days as the time period for withdrawal of prohibited subsidies "without delay", other panels have specified longer periods under Article 4.7.<sup>1203</sup> This is in line with our discussion above that the use of the term "without delay" in Article 4.7 does not establish a bright-line standard of 90 days to be specified in all cases under that provision. Instead, a panel's duty under Article 4.7 is to specify the time period taking into account the facts and circumstances of each case, such that it applies the "without delay" standard in Article 4.7 on a case-by-case basis. Although there may well be a trend of 90 days as the time period for the withdrawal of prohibited subsidies, this does not *ipso facto* support the Panel's conclusion that 90 days was the appropriate time period in the present dispute. Moreover, while we agree that the time period under Article 21.3(c) of the DSU is not relevant to the determination of the appropriate time period under Article 4.7 of the SCM Agreement<sup>1204</sup>, we also do not consider that the language "without delay" in Article 4.7 should

<sup>1196</sup> Panel Reports, paras. 8.11 and 8.22.

<sup>1197</sup> Panel Reports, para. 6.17 (quoting Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.7, in turn referring to Appellate Body Report, *EC – Export Subsidies on Sugar*, paras. 332-335).

<sup>1198</sup> Panel Reports, paras. 8.11 and 8.22.

<sup>1199</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.195.

<sup>1200</sup> Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.7.

<sup>1201</sup> Panel Reports, para. 6.17 (referring to Panel Reports, *Korea – Commercial Vessels*, para. 8.5; *Canada – Aircraft Credits and Guarantees*, para. 8.4; *Canada – Autos*, para. 11.7; *Australia – Automotive Leather II*, para. 10.7; *Brazil – Aircraft*, para. 8.5; *US – Tax Incentives*, para. 8.6).

<sup>1202</sup> Panel Reports, para. 6.17. (emphasis added)

<sup>1203</sup> Panel Reports, *US – FSC*, para. 8.8; *US – Upland Cotton*, para. 8.3.

<sup>1204</sup> The Appellate Body has noted in past jurisprudence that Article 4.7 of the SCM Agreement is listed in Appendix 2 to the DSU as a "special or additional rule[]" and procedure[]" on dispute settlement, and that the provisions of Article 21.3 of the DSU "are not relevant in determining the period of time for implementation of a finding of inconsistency with the prohibited subsidies provisions of Part II of the SCM Agreement". (Appellate Body Report, *Brazil – Aircraft*, para. 192)

automatically lead to a recommendation of 90 days for the withdrawal of prohibited subsidies in all circumstances.

5.455. As the third step in its analysis, in specifying a period of 90 days as part of its conclusions under Article 4.7 in this case, the Panel stated that it took into account "procedures that may be required to implement [its] recommendation on the one hand, and the requirement that Brazil withdraw its subsidies 'without delay' on the other".<sup>1205</sup> We recall that a panel is not required under Article 11 of the DSU to "consider each and every argument put forward by the parties in support of their respective cases".<sup>1206</sup> Furthermore, it is generally "within the competence of a panel 'freely to use arguments submitted by any of the parties – or to develop its own legal reasoning – to support its own findings and conclusions on the matter under its consideration'".<sup>1207</sup> Thus, the fact that the Panel did not engage with each of the parties' arguments would not in and of itself constitute a failure to make an objective assessment of the matter in the sense of Article 11 of the DSU. A panel is, however, required to "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence".<sup>1208</sup>

5.456. As Brazil rightly points out, during the interim review stage of the panel proceedings, the parties presented extensive arguments as part of their responses and comments on each other's responses to the Panel's additional question on this issue. The European Union and Japan sought a time period of 90 days<sup>1209</sup>, whereas Brazil advocated for a period of 18 months.<sup>1210</sup> In particular, Japan argued, recalling previous disputes where panels established a time period of 90 days, that, in determining the time period for a withdrawal "without delay", a panel may take into account "the nature of the measures and the procedures which may be required to implement [the] recommendation"<sup>1211</sup>, but need not consider the time required to "design replacement measures".<sup>1212</sup> The European Union emphasized that it was possible for Brazil to withdraw the measures found to be prohibited subsidies within 90 days, through the use of provisional measures in the Brazilian system (*Medida Provisória*), and alleged that such provisional measures had been used many times to amend the programmes at issue in this dispute.<sup>1213</sup> The European Union had also noted that many of the legal instruments ensuring the operation of the challenged programmes, and notably those containing the discriminatory local content requirements, were administrative acts, such as the *Portarias* containing PPBs, which the executive branch can amend by simple administrative action.<sup>1214</sup> The European Union further argued that it would be "incongruous" to interpret "without delay", under Article 4.7, as being equal or longer than the maximum period by which an actionable subsidy shall be withdrawn or its adverse effects removed, namely, six months.<sup>1215</sup>

5.457. Brazil, for its part, pointed out that, "in circumstances where the withdrawal of the subsidies would entail significant economic consequences, or where legislative action was required, panels

<sup>1205</sup> Panel Reports, paras. 8.11 and 8.22.

<sup>1206</sup> Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 125.

<sup>1207</sup> Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.116 (quoting Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.215, in turn quoting Appellate Body Reports, *EC – Hormones*, para. 156; referring to Appellate Body Report, *US – Certain EC Products*, para. 123).

<sup>1208</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.178 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 185, in turn referring to Appellate Body Report, *EC – Hormones*, paras. 132-133; referring to Appellate Body Reports, *Australia – Salmon*, para. 266; *EC – Asbestos*, para. 161; *EC – Bed Linen (Article 21.5 – India)*, paras. 170, 177, and 181; *EC – Sardines*, para. 299; *EC – Tube or Pipe Fittings*, para. 125; *Japan – Apples*, para. 221; *Japan – Agricultural Products II*, paras. 141-142; *Korea – Alcoholic Beverages*, paras. 161-162; *Korea – Dairy*, para. 138; *US – Carbon Steel*, para. 142; *US – Gambling*, para. 363; *US – Oil Country Tubular Goods Sunset Reviews*, para. 313; *EC – Selected Customs Matters*, para. 258).

<sup>1209</sup> European Union's response to Panel question No. 83; Japan's response to Panel question No. 83.

<sup>1210</sup> Brazil's response to Panel question No. 83.

<sup>1211</sup> Panel Reports, *Australia – Automotive Leather II*, para. 10.4; *Brazil – Aircraft*, para. 8.5.

<sup>1212</sup> Japan's response to Panel question No. 83, paras. 4 and 6.

<sup>1213</sup> See European Union's response to Panel question No. 83, para. 4. According to the European Union, provisional measures "allow the executive branch to swiftly enact infra-constitutional norms [that] ... are as a rule immediately effective but ... must be submitted to the Parliament for conversion into law (possibly with amendments) within a certain period (60 to 120 days), failing which they expire." (*Ibid.*, para. 3 (fn omitted))

<sup>1214</sup> European Union's response to Panel question No. 83, para. 6.

<sup>1215</sup> European Union's response to Panel question No. 83, para. 8.

ha[d] afforded up to one year for implementation under Article 4.7."<sup>1216</sup> Brazil also elaborated extensively on: (i) the nature of the measures; and (ii) the procedures that would be required to implement the Panel's recommendation. According to Brazil, the nature of those measures meant that they "constitute a series of inter-connected tax exemptions, tax reductions, and tax suspensions established under distinct federal laws and regulations that apply to a wide range of production processes in key economic sectors of the Brazilian economy".<sup>1217</sup> Further, Brazil considered that the procedures for withdrawal would involve legislative action, entailing "a complex and lengthy process that usually takes more than 2 years, involving both the executive and the legislative branch".<sup>1218</sup> Brazil estimated that, following the normal legislative process, "even under the most expeditious scenario the withdrawal of the measures at issue could not be accomplished in less than 18 months from adoption of the DSB recommendations and rulings in this dispute."<sup>1219</sup>

5.458. The parties further submitted extensive comments rebutting each other's arguments, with the European Union arguing, *inter alia*, that the difficulties described by Brazil were "contradicted by the frequency with which those programmes have been amended ... during their life".<sup>1220</sup> Likewise, Japan commented that, while Brazil was free to consider each step of the entire production chain in the affected sectors or the risk of judicial challenges, this should have no bearing on the Panel's interpretation and application of the phrase "without delay", and that these were factors to be considered within Brazil in the design of compliance measures, not factors for the Panel to consider when determining the time period for withdrawal.<sup>1221</sup> By contrast, Brazil denied that provisional measures could be used to implement the Panel's recommendation, as the European Union argued, because they "lose effect retroactively if not converted into law within [120 days], through a legislative process similar to the one described by Brazil in its response to the Panel, and cannot be re-enacted".<sup>1222</sup> Accordingly, in Brazil's view, the enactment of a provisional measure would "at most affect a *temporary* withdrawal of the measures at issue, and [would] not obviate the need to go through Brazil's ordinary legislative process".<sup>1223</sup>

5.459. Other than the Panel's indication, in paragraphs 8.11 and 8.22 of its Reports, that it had taken into account "the procedures that may be required to implement [its] recommendation on the one hand, and the requirement that Brazil withdraw its subsidies 'without delay' on the other", there is no way to determine the extent to which the Panel took into account the practical aspects of the procedures necessary for withdrawal in the present case. In particular, we consider that the parties' arguments regarding the two potential avenues for implementation – namely, through the normal legislative process or through provisional measures – are relevant to the Panel's assessment of whether or not 90 days was appropriate in view of the facts of the case. While we disagree with Brazil's suggestion that the Panel was required to engage in an inquiry similar to that under Article 21.3(c) of the DSU, we nonetheless consider that the Panel's failure to engage with these arguments is particularly glaring in light of Brazil's argument that certain panels have afforded more than 90 days "in circumstances ... where legislative action was required"<sup>1224</sup> and the European Union's rebuttal thereof.<sup>1225</sup> The single statement by the Panel in its conclusions on Article 4.7 does not allow us to ascertain whether the panel's findings and recommendations were based on a sufficient evidentiary basis on the record and an adequate engagement with the arguments presented by the parties, and whether its recommendation was based on a reasoned and

<sup>1216</sup> Brazil's response to Panel question No. 83 (referring to Panel Reports, *US – Upland Cotton*, para. 8.3(b); *US – FSC*, para. 8.8).

<sup>1217</sup> Brazil's response to Panel question No. 83.

<sup>1218</sup> Brazil's response to Panel question No. 83.

<sup>1219</sup> Brazil's response to Panel question No. 83.

<sup>1220</sup> European Union's comments on Brazil's response to Panel question No. 83, para. 14. See also Japan's comments on Brazil's response to Panel question No. 83, para. 5.

<sup>1221</sup> Japan's comments on Brazil's response to Panel question No. 83, para. 3.

<sup>1222</sup> Brazil's comments on the European Union's and Japan's responses to Panel question No. 83, para. 3.

<sup>1223</sup> Brazil's comments on the European Union's and Japan's responses to Panel question No. 83, para. 3. (emphasis original)

<sup>1224</sup> Brazil's response to Panel question No. 83 (referring to Panel Reports, *US – Upland Cotton*, para. 8.3(b); *US – FSC*, para. 8.8). See Brazil's appellant's submission, para. 448.

<sup>1225</sup> The European Union argued, *inter alia*, that the panel in *US – FSC* did not set the time period for the United States to withdraw the export contingent subsidies only because legislative action was necessary. Instead, the panel looked into "what was absolutely necessary for the United States to withdraw 'without delay' the subsidies, which required legislative action, as acknowledged by the European Communities. (European Union's comments on Brazil's response to Panel question No. 83, paras. 8-9)

adequate explanation, in accordance with Article 11 of the DSU.<sup>1226</sup> Moreover, in our view, as a result of the Panel's failure to engage with the participants' arguments on the relevant procedures necessary to implement its recommendation, the Panel's analysis does not "reveal how and why the law applies" to the facts *at hand*, in accordance with Article 12.7 of the DSU.<sup>1227</sup>

5.460. In light of the above, we do not consider that the Panel established a sufficient link between the time period of 90 days specified by it for the withdrawal of the subsidies at issue and the domestic procedure within Brazil for such withdrawal. Instead, the Panel appears to have treated the practice of specifying 90 days by some prior panels as the *de facto* standard to be applied in all cases. As discussed, Article 4.7 requires a case-by-case analysis of the time period to be prescribed for the withdrawal of prohibited subsidies "without delay". We therefore find that by failing to provide a "reasoned and adequate explanation" or a "basic rationale" in recommending a time period of 90 days under Article 4.7 of the SCM Agreement in the present case, the Panel acted inconsistently with Articles 11 and 12.7 of the DSU. Consequently, we reverse the Panel's conclusions, in paragraphs 8.11 and 8.22 of its Reports, that Brazil withdraw the prohibited subsidies identified at paragraphs 8.5.e, 8.6.e, 8.7, 8.16.f, 8.17.f, and 8.18 of the Panel Reports within 90 days.

5.461. Having reversed the Panel's findings, we turn to Brazil's request to complete the legal analysis.<sup>1228</sup> Brazil alleges that it is "undisputed that legislation is required in order to withdraw the relevant measures" and that the "unresolved disagreement between the parties concerns whether the measures must be withdrawn using Brazil's 'ordinary legislative process', or whether the withdrawal of the relevant measures could be made effective through provisional measures".<sup>1229</sup> Further, Brazil asserts that, because "the enactment of a provisional measure will at most effect a temporary withdrawal of the measures", the "question left unresolved by the Panel is whether the temporary withdrawal of the subsidies is consistent with the requirement under Article 4.7".<sup>1230</sup> Accordingly, in Brazil's view, the Appellate Body "should conclude that the only avenue for Brazil to withdraw the subsidies in a manner consistent with Article 4.7 [was] pursuant to the ordinary legislative process in Brazil", namely, within 18 months.<sup>1231</sup>

5.462. In previous disputes, the Appellate Body has emphasized that it can complete the analysis "only if the factual findings of the panel, or the undisputed facts in the panel record" provide a sufficient basis for it to do so.<sup>1232</sup> We have already noted that the Panel made no factual findings relating to the domestic procedure for the withdrawal of the subsidies at issue under Brazil's legal system. We further note that, before the Panel, besides agreeing that the measures at issue are contained in multiple legal instruments having the nature of laws, regulations, and administrative acts<sup>1233</sup>, the parties disagreed over all factual aspects related to the procedures that may be employed to implement the Panel's recommendation.<sup>1234</sup>

5.463. We do not, for example, agree with Brazil's assertion that it is *undisputed* that "legislation is required in order to withdraw the relevant measures" and that the "unresolved disagreement between the parties concerns whether the measures must be withdrawn using Brazil's 'ordinary legislative process', or whether the withdrawal of the relevant measures could be made effective through provisional measures".<sup>1235</sup> In this regard, we recall that the European Union, in refuting

<sup>1226</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.178 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 185, in turn referring to Appellate Body Report, *EC – Hormones*, paras. 132-133; referring to Appellate Body Reports, *Australia – Salmon*, para. 266; *EC – Asbestos*, para. 161; *EC – Bed Linen (Article 21.5 – India)*, paras. 170, 177, and 181; *EC – Sardines*, para. 299; *EC – Tube or Pipe Fittings*, para. 125; *Japan – Apples*, para. 221; *Japan – Agricultural Products II*, paras. 141-142; *Korea – Alcoholic Beverages*, paras. 161-162; *Korea – Dairy*, para. 138; *US – Carbon Steel*, para. 142; *US – Gambling*, para. 363; *US – Oil Country Tubular Goods Sunset Reviews*, para. 313; *EC – Selected Customs Matters*, para. 258).

<sup>1227</sup> Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 108.

<sup>1228</sup> Brazil's appellant's submission, para. 456.

<sup>1229</sup> Brazil's appellant's submission, para. 457.

<sup>1230</sup> Brazil's appellant's submission, para. 457.

<sup>1231</sup> Brazil's appellant's submission, paras. 458 and 461.

<sup>1232</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 235.

<sup>1233</sup> European Union's response to Panel question No. 83, para. 2; Brazil's comments on the European Union's and Japan's responses to Panel question No. 83, para. 2.

<sup>1234</sup> We note that because this issue was raised during the interim review stage, the information on the record concerning this issue is limited to the Panel's analysis, the parties' responses to Panel question No. 83, and their comments on each other's responses.

<sup>1235</sup> Brazil's appellant's submission, para. 457.

before the Panel that legislative action is absolutely necessary, alleged that Brazil is not only equipped with provisional measures, but also with "other administrative acts at Brazil's disposal that would eliminate the discriminatory elements of the subsidy programmes found to be inconsistent in this case".<sup>1236</sup> As the Panel's description of the challenged programmes states, each of the programmes that were found to grant prohibited subsidies operated through various legal instruments including laws, decrees, implementing orders, interministerial implementing orders, and accreditations granted pursuant to the programmes.<sup>1237</sup> Determining whether it is possible to withdraw the relevant measures at issue through means other than Brazil's normal legislative process would therefore require us to study each of the legal instruments at issue and make our own factual findings about the means of implementation available to Brazil, which would be outside the scope of appellate review. Similarly, we find no undisputed facts on the record concerning the time periods for the legislative process in Brazil<sup>1238</sup>, as well as on the issue of whether provisional measures by Brazil would result in a "permanent" or a "temporary" withdrawal of the measures at issue.<sup>1239</sup>

5.464. In such circumstances, we are unable to complete the legal analysis, as requested by Brazil, and cannot specify the time period within which the prohibited subsidies identified by the Panel must be withdrawn by Brazil. We note, however, that the Panel's recommendations, in paragraphs 8.10 and 8.21, that Brazil withdraw the subsidies identified by the Panel "without delay", stand undisturbed.

## 6 FINDINGS AND CONCLUSIONS

6.1. For the reasons set out in these Reports, the Appellate Body makes the following findings and conclusions.<sup>1240</sup>

### 6.1 Articles III:2 and III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement

#### 6.1.1 Whether the Panel erred in finding that imported finished ICT products were taxed in excess of like domestic finished ICT products inconsistently with Article III:2, first sentence, of the GATT 1994

6.2. Imported finished ICT products are not eligible for either tax reductions or exemptions because foreign producers cannot be accredited under the ICT programmes and, consequently, bear the full tax burden, as opposed to like domestic finished ICT products. In the case of an imported finished ICT product, when an importer sells the imported finished ICT product to a wholesaler, retailer, or distributor, the importer will charge the IPI tax to the wholesaler, retailer, or distributor and remit the tax to the Brazilian Government.<sup>1241</sup> In contrast, in the case of a like domestic finished ICT product that is subject to IPI tax exemption or reduction under the ICT programmes, the seller does not charge any tax or charges a reduced tax, as the case may be, to the wholesaler, retailer,

<sup>1236</sup> European Union's comments on Brazil's response to Panel question No. 83, para. 9.

<sup>1237</sup> Panel Reports, para. 2.38.

<sup>1238</sup> Brazil estimated before the Panel that, following the normal legislative process, "even under the most expeditious scenario the withdrawal of the measures at issue could not be accomplished in less than 18 months from adoption of the DSB recommendations and rulings in this dispute". (Brazil's response to Panel question No. 83) Japan contested the fact that Brazil's normal legislative process must necessarily take longer than 90 days, because "Brazil fails to explain why these processes cannot be accelerated in order to bring itself into compliance with its international legal obligations." (Japan's comments on Brazil's response to Panel question No. 83, para. 4)

<sup>1239</sup> According to Brazil, legislative action is required to withdraw the measures at issue because it must be the case that the term "withdraw the subsidy" in Article 4.7 requires the *permanent* withdrawal of the subsidies, and provisional measures would at most affect only "a *temporary* withdrawal of the measures at issue, and [would] not obviate the need to go through Brazil's ordinary legislative process". (Brazil's comments on the European Union's and Japan's responses to Panel question No. 83, para. 3 (emphasis original)) The European Union and Japan both contested Brazil's position, asserting that Brazil had used provisional measures to introduce or modify several of the prohibited subsidies at issue in this dispute and citing multiple factual examples of such modifications. (See European Union's response to Panel question No. 83, para. 4; Japan's comments on Brazil's response to Panel question No. 83, para. 5)

<sup>1240</sup> One Member of the Division expressed a separate opinion regarding the scope of the term "payment of subsidies" in Article III:8(b) of the GATT 1994. This separate opinion can be found in section 5.2.5 of these Reports.

<sup>1241</sup> Panel Reports, para. 2.14.

or distributor.<sup>1242</sup> At this last stage, the tax rate is thus higher for imported finished ICT products than for like domestic finished ICT products, and the tax burden on the former is necessarily in excess of that on the latter.

6.3. We therefore uphold the Panel's findings, in paragraphs 7.154, 8.5.a, and 8.16.a of the Panel Reports, that imported finished ICT products are subject to a higher tax burden than like domestic ICT products and are consequently taxed in excess of like domestic finished ICT products, contrary to Article III:2, first sentence, of the GATT 1994.

**6.1.2 Whether the Panel erred in finding that imported intermediate ICT products were taxed in excess of like domestic intermediate ICT products inconsistently with Article III:2, first sentence, of the GATT 1994**

6.4. Under the credit-debit system, purchases of non-incentivized imported intermediate ICT products involve the payment of a tax upfront that is not faced by companies that purchase incentivized like domestic intermediate ICT products, which are exempted from the relevant taxes.<sup>1243</sup> Even in the case of tax reductions, companies purchasing incentivized like domestic intermediate ICT products have to pay a lower tax compared to companies purchasing non-incentivized imported intermediate ICT products. We fail to see how these situations do not have the effect of limiting the availability of cash flow for companies purchasing non-incentivized imported intermediate ICT products. The fact that purchasers of imported intermediate ICT products have to pay the relevant taxes under the ICT programmes, irrespective of the point in time, in comparison to purchasers of incentivized like domestic intermediate ICT products, who do not have to pay the relevant tax or pay a reduced amount, "limit[s] the availability of cash flow"<sup>1244</sup>, resulting in a higher effective tax burden on imported intermediate ICT products. Moreover, the value of the tax credit that is generated upon the payment of the relevant tax on the sale of a non-incentivized imported intermediate ICT product will depreciate over time until it is used or adjusted. To that extent, in as much as there is a time lag between the accrual of the tax credit and the adjustment or use thereof, it necessarily results in the value of money (in the form of accrued tax credits) depreciating over time. Therefore, imported intermediate ICT products, the purchase of which is subject to a payment of tax upfront, bear a higher tax burden than that faced by the incentivized like domestic intermediate ICT products, which benefit from tax exemption or reduction.

6.5. We therefore uphold the Panel's findings, in paragraphs 7.172, 8.5.a, and 8.16.a of the Panel Reports, that imported intermediate ICT products are taxed in excess of like domestic incentivized intermediate ICT products contrary to Article III:2, first sentence, of the GATT 1994.

**6.1.3 Whether the Panel erred in finding that the accreditation requirements under the ICT programmes accord treatment less favourable to imported products than that accorded to like domestic products inconsistently with Article III:4 of the GATT 1994**

6.6. The aspect of the ICT programmes challenged by the complaining parties as being inconsistent with Article III:4 of the GATT 1994 concerned the accreditation requirements, the fulfilment of which enabled the obtaining of the relevant tax exemption, reduction, or suspension on the sales or purchases of ICT products. It is undisputed that in order to be eligible for the tax exemption, reduction, or suspension under the ICT programmes, companies must fulfil the accreditation requirements. The accreditation requirements under the ICT programmes therefore result in less favourable treatment for imported ICT products in the form of the differential tax burden that imported ICT products are subjected to by virtue of the fact that foreign producers cannot be accredited under the ICT programmes. The consequence being, as the Panel also noted, that foreign producers "can never qualify for the tax exemptions, reductions or suspensions".<sup>1245</sup> We note that the aspects of the ICT programmes found to be inconsistent with Article III:2, first sentence, and Article III:4 are distinct. In the case of Article III:2, first sentence, the aspect of the ICT programme found to be inconsistent is the differential tax treatment that results in a higher tax burden on imported ICT products, i.e. imported ICT products are taxed in excess of like domestic ICT products. Whereas, for the purposes of Article III:4, the aspect of the ICT programmes found to be

<sup>1242</sup> Panel Reports, para. 2.15.

<sup>1243</sup> Panel Reports, para. 7.170.

<sup>1244</sup> Panel Reports, para. 7.170.

<sup>1245</sup> Panel Reports, para. 7.223.

inconsistent is the accreditation requirements that result in less favourable treatment in the form of the differential tax treatment for imported ICT products.

6.7. We therefore uphold the Panel's findings, in paragraphs 7.225, 8.5.b, and 8.16.c of the Panel Reports, that the accreditation requirements of the ICT programmes, by restricting access to the tax incentives only to domestic products, modify the conditions of competition to the detriment of imported products and result in less favourable treatment being accorded to imported ICT products than to like domestic ICT products inconsistently with Article III:4 of the GATT 1994.

**6.1.4 Whether the Panel erred in finding that the ICT programmes are inconsistent with Article III:4 of the GATT 1994 by virtue of the lower administrative burden on companies purchasing incentivized domestic intermediate products**

6.8. Under the credit-debit system, purchasers of imported intermediate ICT products that are not incentivized under the ICT programmes will have to anticipate and pay the full amount of tax due on such imported intermediate ICT products. Although any such tax paid on the purchase of imported intermediate ICT products will generate a corresponding tax credit in favour of the purchaser, nonetheless, offsetting this tax credit entails an *administrative burden* that is not faced, or faced to a lesser extent, by a purchaser of domestic intermediate ICT products that are incentivized.<sup>1246</sup> This is the case because under the credit-debit system, "if the tax credit cannot be offset by debits after three taxation periods", the process of compensating the tax credit with other federal taxes, or reimbursement thereof can "be burdensome for companies, and can take years."<sup>1247</sup>

6.9. We therefore uphold the Panel's findings, in paragraphs 7.255, 8.5.b, and 8.16.c of the Panel Reports, that the ICT programmes are inconsistent with Article III:4 of the GATT 1994, because they accord to imported intermediate ICT products treatment less favourable than that accorded to like domestic intermediate ICT products, due to the lower administrative burden imposed on firms purchasing incentivized domestic intermediate ICT products.

**6.1.5 Whether the Panel erred in finding that the PPBs and other production-step requirements under the ICT programmes are contingent upon the use of domestic goods, inconsistently with Article III:4 of the GATT 1994**

6.10. We agree with the Panel that the PPBs and other production-step requirements under the Informatics, PATVD, PADIS, and Digital Inclusion programmes provide an incentive to use domestic ICT products. We therefore uphold the Panel's findings, in paragraphs 7.299, 7.301-7.302, 7.308, 7.311, 7.313, 7.317, 7.319, 8.5.b, and 8.16.c of the Panel Reports, that the Informatics, PATVD, PADIS, and Digital Inclusion programmes accord less favourable treatment to imported intermediate ICT products than that accorded to like domestic products.

**6.1.6 Whether the Panel erred in finding that the ICT programmes are inconsistent with Article 2.1 of the TRIMs Agreement**

6.11. On appeal, Brazil does not make any specific arguments in connection with the Panel's finding under Article 2.1 of the TRIMs Agreement. Rather, Brazil's request for reversal of the Panel's finding under that provision is premised on us reversing the Panel's findings under Article III:4 of the GATT 1994.<sup>1248</sup> We have, however, for the reasons stated above, upheld the Panel's findings that certain aspects of the ICT programmes are inconsistent with Article III:4 of the GATT 1994.

<sup>1246</sup> We note that purchasers of incentivized intermediate domestic ICT products, in most cases, will not need to anticipate the tax due on the purchase of such intermediate ICT products since the Informatics, PATVD, PADIS, and Digital Inclusion programmes provide for tax exemptions, through zero rates, to accredited companies selling domestic intermediate ICT products. It is only in the context of the IPI tax reduction provided under the Informatics programme that purchasers of domestic intermediate ICT products may have to anticipate and pay the reduced amount of IPI tax due.

<sup>1247</sup> Panel Reports, para. 7.251 (referring to Brazil's first written submission to the Panel, para. 702 (DS497)).

<sup>1248</sup> Brazil's appellant's submission, para. 172.



6.12. Consequently, we uphold the Panel's findings, in paragraphs 7.363, 8.5.d, and 8.16.e of the Panel Reports, that those aspects of the ICT programmes found to be inconsistent with Article III:4 of the GATT 1994 are also inconsistent with Article 2.1 of the TRIMs Agreement.

**6.1.7 Whether the Panel erred in finding that the accreditation requirements under the INOVAR-AUTO programme are inconsistent with Article III:4 of the GATT 1994 because they are more burdensome for companies seeking accreditation as importers/distributors as opposed to domestic manufacturers**

6.13. It is undisputed that, in order for companies to obtain any sort of accreditation under the INOVAR-AUTO programme, which entitles them to accruing and using presumed IPI tax credits, they must either be located and operate in Brazil, in the case of domestic manufacturers and importers/distributors, or be in the process of establishing in the country as domestic manufacturers, in the case of investors.<sup>1249</sup> The only viable way for foreign manufacturers to be able to enjoy the benefit of the presumed IPI tax credits in reducing their IPI tax liability under the INOVAR-AUTO programme is to become accredited as importers/distributors. However, in order to do so, foreign manufacturers must, first and foremost, be located and operate in Brazil.<sup>1250</sup> This indicates that foreign manufacturers seeking accreditation as importers/distributors face a corresponding burden that necessarily comes with having to operate in, or establish themselves in, Brazil, unlike domestic manufacturers, who already operate or are established in Brazil. Moreover, we note that in order to become accredited as importers/distributors, a company shall comply with the following three specific requirements: (i) investments in R&D in Brazil; (ii) expenditure on engineering, basic industrial technology, and capacity-building of suppliers in Brazil; and (iii) participation in the vehicle-labelling programme by INMETRO.<sup>1251</sup> A fourth requirement also exists, which calls for the performance in Brazil of certain manufacturing steps.<sup>1252</sup> These activities cannot be considered to be typical for foreign manufacturers seeking to import motor vehicles into Brazil. The fact that foreign manufacturers have to undertake these activities to get accredited as importers/distributors implies that foreign manufacturers face a burden that domestic manufacturers do not face. Almost all of these requirements can be considered to be typical of the nature of activity carried out by a domestic manufacturer. Indeed, any domestic manufacturer will carry out and perform a minimum number of manufacturing activities in Brazil, and, in that process, it is likely to make investments in R&D in Brazil and make expenditures in the categories indicated in the INOVAR-AUTO programme. The INOVAR-AUTO programme is thus designed in such a manner that the accreditation requirements thereunder adversely modify the competitive conditions for imported products in comparison to like domestic products.

6.14. We therefore uphold the Panel's findings, in paragraphs 7.772, 8.6.b, and 8.17.c of the Panel Reports, that, under the INOVAR-AUTO programme, the conditions for accreditation in order to receive presumed tax credits accord less favourable treatment to imported products than that accorded to like domestic products inconsistently with Article III:4 of the GATT 1994.

**6.1.8 Whether the Panel erred in finding that the INOVAR-AUTO programme is inconsistent with Article 2.1 of the TRIMs Agreement**

6.15. On appeal, Brazil does not make any specific arguments in connection with the Panel's finding under Article 2.1 of the TRIMs Agreement. Rather Brazil's request for reversal of the Panel's finding under Article 2.1 of the TRIMs Agreement is premised on us reversing the Panel's findings under Article III:4 of the GATT 1994.<sup>1253</sup> We have, however, for the reasons stated above, upheld the Panel's findings that certain aspects of the INOVAR-AUTO programme are inconsistent with Article III:4 of the GATT 1994.

6.16. Consequently, we uphold the Panel's findings, in paragraphs 7.804, 8.6.d, and 8.17.e of the Panel Reports, that those aspects of the INOVAR-AUTO programme found to be inconsistent with Article III:4 of the GATT 1994 are also inconsistent with Article 2.1 of the TRIMs Agreement.

<sup>1249</sup> Panel Reports, para. 7.657 (referring to Brazil's responses to Panel questions Nos. 28 and 57).

<sup>1250</sup> Panel Reports, para. 7.660 (referring to Brazil's response to Panel question No. 57).

<sup>1251</sup> Panel Reports, para. 7.658.

<sup>1252</sup> Panel Reports, fn 1056 to para. 7.658.

<sup>1253</sup> Brazil's appellant's submission, para. 294.



## 6.2 Article III:8(b) of the GATT 1994<sup>1254</sup>

6.17. Insofar as the payment of subsidies exclusively to domestic producers of a given product affects the conditions of competition between such a product and the like imported product, the resulting inconsistency with the national treatment obligation under Article III is justified under Article III:8(b), provided that the conditions thereunder are met. Moreover, conditions for eligibility for the payment of subsidies that define the class of eligible "domestic producers" by reference to their activities in the subsidized products' markets are also justified under Article III:8(b). By contrast, a requirement to use domestic over imported goods in order to have access to the subsidy is not covered by the exception in Article III:8(b) and would therefore continue to be subject to the national treatment obligation in Article III. Furthermore, an examination of the text and context of Article III:8(b), in light of its object and purpose and as confirmed by the negotiating history, suggests that the term "payment of subsidies" in Article III:8(b) does not include within its scope the exemption or reduction of internal taxes affecting the conditions of competition between like products. Instead, as noted by the Appellate Body in *Canada – Periodicals*, Article III:8(b) "was intended to exempt from the obligations of Article III only the payment of subsidies which involves the expenditure of revenue by a government".<sup>1255</sup>

6.18. The Panel's interpretation and application of Article III:8(b) to the measures at issue obfuscate the distinction between the effects of the payment of a subsidy to a domestic producer on the conditions of competition in the relevant product markets and the conditions for eligibility attaching thereto, on the one hand, and any other effects arising from requirements to use domestic over imported inputs in the production process, on the other hand. Moreover, at no stage did the Panel undertake an assessment of whether the measures at issue constitutes the "payment of subsidies exclusively to domestic producers" within the meaning of Article III:8(b).

6.19. Because of these shortcomings in the Panel's reasoning, we reverse the Panel's overly broad and unqualified findings, in paragraphs 7.87-7.88 of the Panel Reports, that "subsidies that are provided exclusively to domestic producers pursuant to Article III:8(b) ... are not *per se* exempted from the disciplines of Article III" and that "aspects of a subsidy resulting in product discrimination (including requirements to use domestic goods, as prohibited by Article 3.1 of the SCM Agreement) are not exempted from the disciplines of Article III pursuant to Article III:8(b)." Under a proper interpretation of Article III:8(b), none of the measures at issue in this dispute are capable of being justified under that provision because they all involve the exemption or reduction of internal taxes affecting the conditions of competition between like products and therefore cannot constitute the "payment of subsidies" within the meaning of Article III:8(b).

## 6.3 Article 3.1(a) of the SCM Agreement

6.20. In its identification of the benchmark treatment for the three categories of the treatments under the PEC and RECAP programmes, the Panel sought to determine the existence of a general rule for companies that structurally accumulate credits. The Panel limited its analysis to seeking to identify the existence of a general rule of taxation to which the challenged treatment would be an exception. Instead of doing so, however, the Panel should have determined the tax treatment of comparably situated taxpayers, as the legal standard under Article 1.1(a)(1)(ii) of the SCM Agreement requires.

6.21. We therefore reverse the Panel's conclusions, in paragraphs 7.1171-7.1172, 7.1186-7.1187, and 7.1199-7.1200 of the Panel Reports, that Brazil has not demonstrated that the tax suspensions are the benchmark for comparison and that the appropriate benchmark is, instead, the treatment applicable to purchases by non-accredited companies of the relevant products. As a result, we also reverse the Panel's findings, in paragraphs 7.1211, 7.1223, and 7.1238, as well as in paragraphs 8.7 and 8.18 of the Panel Reports, that the tax suspensions granted to registered or accredited companies under the PEC and RECAP programmes constitute financial contributions in the form of government revenue otherwise due that is foregone or not collected and are hence subsidies within the meaning of Article 1.1 of the SCM Agreement and contingent upon export performance within the meaning of Article 3.1(a) of the SCM Agreement.

<sup>1254</sup> For the separate opinion on this issue, see section 5.2.5 of these Reports.

<sup>1255</sup> Appellate Body Report, *Canada – Periodicals*, p. 34.

#### 6.4 Article 3.1(b) of the SCM Agreement

6.22. With respect to Brazil's claim that the Panel erred in its comparison of the treatment of intermediate goods and inputs under the ICT programmes with the benchmark treatment by arbitrarily distinguishing between taxpayers within the benchmark, we disagree with Brazil's approach to comparing the challenged treatment to the selected benchmark treatment. As we see it, the Panel did not treat only one subset of taxpayers (i.e. those that are unable to offset the amount of the tax paid during the same taxation period) as the benchmark for the purposes of comparison. Rather, having explained in detail how the mechanism of credits and debits under the principle of non-accumulation works, the Panel concluded that, under the normal rule of general application of Brazil's tax system, there are two possible factual scenarios: one in which the buyer of non-incentivized products will be able to offset the amount of the tax paid during the same taxation period, and the other one when this would not be possible. We consider that, in comparing the challenged tax treatment to the benchmark treatment, the Panel correctly examined both possible factual scenarios that result from the application of the normal rules of Brazil's tax system.

6.23. With respect to Brazil's claim that the Panel erred in finding that cash availability and implicit interest constitute revenue "otherwise due" under Article 1.1(a)(1)(ii) of the SCM Agreement, we consider that, in the present dispute, when the tax exemptions and reductions apply, the Brazilian Government does not collect in full the tax revenue when it normally would, or collects it in part. The fact that, ultimately, the amount of the tax collected under the benchmark treatment and the challenged treatment may nominally be the same does not detract from the fact that, under the benchmark treatment, in the scenario when non-accredited companies are unable to offset their credits immediately, the Brazilian Government would collect and retain, for a certain period, the amount of tax payable to it. During this period of time, the Brazilian Government can enjoy the cash available to it and earn interest on it. By contrast, when tax exemptions and reductions are applied, the Brazilian Government collects the tax later in time and does not enjoy the availability of cash as it otherwise would under the benchmark treatment. Thus, under the challenged treatment, the Brazilian Government would not collect the tax at the time it normally would under the benchmark treatment. By doing so, in our view, the Brazilian Government would not collect the revenue that would be otherwise due to it.

6.24. In light of the above, we do not consider that the Panel erred in finding that the tax treatment of intermediate products and inputs under the ICT programmes constitutes a subsidy under Article 1.1 of the SCM Agreement. We thus uphold the Panel's findings, in paragraphs 7.436, 7.444, 7.454, 7.463, 7.473, 7.489-7.490, and 7.495 of the Panel Reports, that each of the challenged tax exemptions, reductions, and suspensions granted to accredited companies on (i) the sales of intermediate goods that they produce, and (ii) the purchases of raw materials, intermediate goods, and packaging materials (under the Informatics programme) and inputs, capital goods, and computational goods (under the PADIS and PATVD programmes) constitutes financial contributions where "government revenue that is otherwise due is foregone or not collected" under Article 1.1(a)(1)(ii) of the SCM Agreement.

6.25. With respect to the main PPBs that incorporate nested PPBs under the Informatics programme, we consider that they contain a condition requiring the use of domestic components and subassemblies, which must be fulfilled in order for the relevant products to benefit from the tax incentives. We therefore agree with the Panel's conclusion that the main PPBs that incorporate nested PPBs contain a requirement to use domestic goods, i.e. the components and subassemblies covered by the nested PPBs, under Article 3.1(b) of the SCM Agreement. Accordingly, we uphold the Panel's findings, in paragraphs 7.299-7.300, 7.302, 7.313, 7.319, 8.5.e, and 8.16.f of the Panel Reports, that the main PPBs that incorporate nested PPBs under the Informatics programme are inconsistent with Article 3.1(b) of the SCM Agreement.

6.26. With respect to the main PPBs that do not contain nested PPBs under the Informatics programme, we consider that they do not provide for more than a collection of production steps, which must be carried out in Brazil, in order for a company to benefit from the tax incentives with respect to the product subject to the PPB under the relevant programme. Although compliance with the production steps set out in the PPBs is likely to result in the use of domestic components and subassemblies, such use of domestic products will be a consequence of the requirement to perform the production steps in Brazil. Accordingly, we reverse the Panel's findings, in paragraphs 7.301-7.302, 7.313, 7.319, 8.5.e, and 8.16.f of the Panel Reports, that the main PPBs without

nested PPBs under the Informatics programme are contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b) of the SCM Agreement.

6.27. With respect to the PATDV programme, we understand that the PPBs under that programme follow the same structure and logic as those under the Informatics programme. Accordingly, for the same reasons as under the Informatics programme, to the extent the main PPBs under the PATVD programme incorporate nested PPBs, we consider them to require the use of domestic over imported goods inconsistently with Article 3.1(b) of the SCM Agreement. However, we do not consider that the main PPBs that do not contain nested PPBs contain a condition requiring the use of domestic over imported goods. We thus uphold the Panel's findings concerning the PATVD programme, in paragraphs 7.308, 7.313, 7.317, 7.319, 8.5.e, and 8.16.f of the Panel Reports, to the extent they relate to the main PPBs that contain nested PPBs, and we reverse the Panel's findings, contained in the same paragraphs of the Panel Reports, to the extent they relate to the main PPBs that do not contain nested PPBs.

6.28. With respect to the PADIS programme, we do not consider that the eligibility requirements under that programme constitute a contingency requirement to use domestic over imported goods under Article 3.1(b) of the SCM Agreement.

6.29. With respect to the Digital Inclusion programme, our review of the Panel's findings demonstrates that the Panel did not have a proper basis to conclude that the Digital Inclusion programme contains a requirement to use domestic over imported goods inconsistent with Article 3.1(b) of the SCM Agreement.

6.30. In light of the above, we reverse the Panel's findings, in paragraphs 7.313, 7.317, 7.319, 8.5.e-f of the Panel Reports, that the PADIS and Digital Inclusion programmes require the use of domestic over imported goods inconsistently with Article 3.1(b) of the SCM Agreement.

6.31. With respect to the INOVAR-AUTO programme, we note that the requirement to perform a minimum number of manufacturing steps in Brazil under that programme operates in a way similar to the main PPBs that do not incorporate nested PPBs under the ICT programmes. Thus, having reversed the Panel's findings with respect to the main PPBs that do not incorporate nested PPBs under the ICT programmes, we also reverse the Panel's findings of inconsistency with Article 3.1(b) with respect to the manufacturing steps under the INOVAR-AUTO programme, contained in paragraphs 7.751, 7.823, 7.847, 8.6.e, and 8.17.f of the Panel Reports.

6.32. With respect to the European Union's and Japan's appeals of the Panel's findings concerning the in-house scenario, we note that, for purposes of establishing an inconsistency with Article 3.1(b) of the SCM Agreement, whether a company produces goods in-house or whether it outsources their production is not decisive. What matters, instead, is whether such measure reflects a condition requiring the use of domestic over imported goods. We thus consider that it did not matter, for purposes of the Panel's analysis, what factual scenarios were available for compliance with the requirements under the ICT and INOVAR-AUTO programmes. We thus reverse the Panel's findings, in paragraphs 7.303-7.304 and 7.314 of the Panel Reports, made in the context of its analysis under ICT programmes, to the extent that they can be understood as suggesting that the in-house scenario was not covered by the Panel's findings. We also reverse the Panel's findings, in paragraphs 7.749-7.750, and 7.770 of the Panel Reports, made in the context of INOVAR-AUTO programme and referring to the mentioned Panel's findings under the ICT programmes, to the extent that they can also be understood as suggesting that the in-house scenario was not covered by the Panel's findings. We thus consider that the Panel's findings, in paragraphs 7.319, 7.772-7.773, 8.5.e, 8.6.b, 8.6.e, 8.16.c, 8.16.f, 8.17.c, and 8.17.f of the Panel Reports, also apply the in-house scenario.

## **6.5 Article I:1 of the GATT 1994 and the Enabling Clause**

### **6.5.1 Whether the Panel erred in finding that the claims raised by the European Union and Japan under Article I:1 of the GATT 1994 were within its terms of reference**

6.33. Paragraph 4(a) of the Enabling Clause envisages a degree of specificity in the notification adopted thereunder. At a minimum, a notification pursuant to paragraph 4(a) should state under which particular provision of the Enabling Clause the differential and more favourable treatment has been adopted so as to put other Members on notice. A notification pursuant to paragraph 4(a) speaks

to and has a direct bearing on a complaining party's knowledge. Consequently, it speaks to whether the complaining party is required to raise the Enabling Clause and identify the relevant provision(s) thereof in its panel request and assert that an arrangement or a measure adopted by the responding party is inconsistent not only with Article I:1 of the GATT 1994, but also with the relevant provisions of the Enabling Clause. While it is for the complaining party to raise the Enabling Clause and identify the relevant provision(s) thereof in its panel request, the burden to prove that the measure satisfies the conditions set out in the Enabling Clause remains on the responding party relying on the Enabling Clause as a defence.

6.34. With respect to whether the measure at issue (i.e. differential tax treatment under the INOVAR-AUTO programme in the form of internal tax reductions accorded to some but not other Members) was notified pursuant to paragraph 4(a) as having been adopted under paragraph 2(b) of the Enabling Clause, our review of the Panel's findings indicates that Brazil has not demonstrated that the differential tax treatment under the INOVAR-AUTO was notified to the WTO as adopted under paragraph 2(b), as required pursuant to paragraph 4(a) of the Enabling Clause.

6.35. We therefore uphold the Panel's finding, in paragraphs 7.1082-7.1083 of the Panel Reports, that Brazil has not demonstrated that the differential tax treatment under the INOVAR-AUTO programme was notified to the WTO as adopted pursuant to paragraph 2(b), and therefore, in the circumstances of this case, there was no burden on the complaining parties to raise and identify paragraph 2(b) of the Enabling Clause in their panel requests.

6.36. With respect to whether the measure at issue (i.e. the differential tax treatment under the INOVAR-AUTO programme in the form of internal tax reductions accorded to some but not other Members) was notified pursuant to paragraph 4(a) as having been adopted under paragraph 2(c) of the Enabling Clause, our review of the Panel's findings indicates that Brazil has not demonstrated that the 1980 Treaty of Montevideo and the ECAs notified to the WTO have a genuine link to the INOVAR-AUTO programme providing for the differential and more favourable treatment at issue, and consequently, the differential and more favourable treatment at issue was not notified to the WTO as adopted under paragraph 2(c), as required pursuant to paragraph 4(a) of the Enabling Clause.

6.37. We therefore uphold the Panel's finding, in paragraph 7.1119 of the Panel Reports, that the differential tax treatment under the INOVAR-AUTO programme was not notified as adopted under paragraph 2(c), as required pursuant to paragraph 4(a). Consequently, we also uphold the Panel's finding, in paragraph 7.1120 of the Panel Reports, that, in the circumstances of this case, there was no burden on the complaining parties to raise and identify paragraph 2(c) of the Enabling Clause in their panel requests.

6.38. For these reasons, we uphold the Panel's findings, in paragraphs 8.6.h and 8.17.i of the Panel Reports, that there was no burden on the complaining parties to raise and identify the relevant provisions of the Enabling Clause in their panel requests, and their claims under Article I:1 of the GATT 1994 were therefore within the Panel's terms of reference.

#### **6.5.2 Whether the Panel erred in its interpretation of paragraph 2(b) of the Enabling Clause and in finding that the differential tax treatment under the INOVAR-AUTO programme was not justified under that provision**

6.39. Paragraph 2(b) provides for the granting of "[d]ifferential and more favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT". Paragraph 2(b) provides for the adoption of a limited category of differential and more favourable treatment, namely treatment that concerns "non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices" of the GATT, as an institution. The phrase "non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT", at the time of the adoption of the Enabling Clause, concerned non-tariff measures taken pursuant to the S&D treatment provisions of the Tokyo Round Codes and not the provisions of the GATT 1947. Following the entry into force of the WTO Agreement, paragraph 2(b) of the Enabling Clause provides for the adoption of a limited category of differential and more favourable treatment, namely treatment that concerns non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the WTO. The GATT 1994, while an integral part of

the WTO Agreement, was not negotiated under the auspices of the WTO. These considerations read in light of the text, context, and circumstances surrounding the adoption of the Enabling Clause, and thereafter the establishment of the WTO, indicate that paragraph 2(b) does not concern non-tariff measures governed by the provisions of the GATT 1994. Instead, paragraph 2(b) speaks to non-tariff measures taken pursuant to S&D treatment provisions of "instruments multilaterally negotiated under the auspices of the [WTO]".

6.40. We therefore uphold the Panel's finding, in paragraph 7.1096 of the Panel Reports, that "a non-tariff measure within the scope of paragraph 2(b) must be governed by specific provisions on special and differential treatment, that are distinct from the provisions of the GATT 1994 incorporating the GATT 1947."<sup>1256</sup> We also uphold the Panel's findings, in paragraphs 7.1097, 8.6.i, and 8.17.j of the Panel Reports, that the tax reductions accorded under the INOVAR-AUTO programme to imported products from Argentina, Mexico, and Uruguay and found to be inconsistent under Article I:1 of the GATT 1994 are not justified under paragraph 2(b) of the Enabling Clause.

### **6.5.3 Whether the Panel erred in its interpretation of paragraph 2(c) of the Enabling Clause and in finding that the differential tax treatment under the INOVAR-AUTO programme was not justified under that provision**

6.41. Paragraph 2(c) excepts differential and more favourable treatment accorded pursuant to "[r]egional or global arrangements entered into amongst" developing country Members from a finding of inconsistency with Article I:1 of the GATT 1994. To the extent that the Panel relied on its earlier analysis concerning whether or not the INOVAR-AUTO programme, according the differential and more favourable treatment (i.e. the differential tax treatment in the form of internal tax reductions accorded to some but not other Members), had a genuine link to "the arrangement notified to the WTO" in determining if the differential and more favourable treatment was substantively justified under paragraph 2(c), we find no error in the Panel's approach. Indeed, if there is no genuine link between the measure at issue according the differential and more favourable treatment and the arrangements notified to the WTO, we find it difficult to see how the measure at issue could be substantively justified under paragraph 2(c).

6.42. We therefore uphold the Panel's finding, in paragraph 7.1118 of the Panel Reports, to the extent that the Panel found that Brazil has not identified any arrangement with a genuine link to the differential tax treatment envisaged under the INOVAR-AUTO programme. Consequently, we also uphold the Panel's findings, in paragraphs 7.1121, 8.6.i, and 8.17.j of the Panel Reports, that the tax reductions accorded under the INOVAR-AUTO programme to imported products from Argentina, Mexico, and Uruguay and found to be inconsistent under Article I:1 of the GATT 1994 are not justified under paragraph 2(c) of the Enabling Clause.

## **6.6 Article 4.7 of the SCM Agreement**

6.43. The term "without delay" in Article 4.7 is not used in the sense of requiring *immediate* compliance. Nor does the term "without delay", combined with the requirement that the panel specify a time period, impose a single standard or time period applicable in all cases. Instead, Article 4.7 requires a panel to specify a time period that constitutes "without delay" within the realm of possibilities in a given case and considering the domestic legal system of the implementing Member. In determining the time period under Article 4.7 that constitutes "without delay", a panel should typically take into account the nature of the measure(s) to be revoked or modified and the domestic procedures available for such revocation or modification. These domestic procedures include any extraordinary procedures that may be available within the legal system of a WTO Member. The Panel did not establish a sufficient link between the time period of 90 days specified by it for the withdrawal of the subsidies at issue and the domestic procedure within Brazil for such withdrawal. Instead, the Panel treated the practice of specifying 90 days by some prior panels as the *de facto* standard to be applied in all cases.

6.44. We, therefore, find that by failing to provide a "reasoned and adequate explanation" or a "basic rationale" in recommending a time period of 90 days under Article 4.7 of the SCM Agreement in the present case, the Panel acted inconsistently with Articles 11 and 12.7 of the DSU. Consequently, we reverse the Panel's conclusions, in paragraphs 8.11 and 8.22 of the Panel Reports,

<sup>1256</sup> Panel Reports, para. 7.1096. (fn omitted)




that Brazil withdraw the prohibited subsidies identified at paragraphs 8.5.e, 8.6.e, 8.7, 8.16.f, 8.17.f, and 8.18 of the Panel Reports within 90 days.

6.45. Furthermore, we are unable to complete the legal analysis, as requested by Brazil, and cannot specify the time period within which the prohibited subsidies identified by the Panel must be withdrawn by Brazil. We note, however, that the Panel's recommendations, in paragraphs 8.10 and 8.21 of the Panel Reports, that Brazil withdraw the subsidies identified by the Panel "without delay", stand undisturbed.

## 6.7 Recommendation

6.46. The Appellate Body recommends that the DSB request Brazil to bring its measures, found in these Reports, and in the Panel Reports as modified by these Reports, to be inconsistent with Articles I:1, III:2, and III:4 of the GATT 1994, Article 2.1 of the TRIMs Agreement, and Article 3.1(b) of the SCM Agreement into conformity with its obligations under those Agreements.

Signed in the original in Geneva this 15th day of October 2018 by:

  
\_\_\_\_\_  
Thomas R. Graham  
Presiding Member  
\_\_\_\_\_  
Peter Van den Bossche  
Member  
\_\_\_\_\_  
Hong Zhao  
Member