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BRAZIL – CERTAIN MEASURES CONCERNING TAXATION AND CHARGES

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY THE EUROPEAN UNION

The following communication, dated 31 October 2014, from the delegation of the European Union to the Chairperson of the Dispute Settlement Body, is circulated pursuant to the Article 6.2 of the DSU.

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My authorities have instructed me to request the establishment of a panel pursuant to Article 6 of the WTO *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) with respect to certain measures concerning taxation and charges imposed by the Federative Republic of Brazil (Brazil) (DS472, *Brazil — Certain Measures Concerning Taxation and Charges*).

On 19 December 2013, the European Union (EU) requested consultations with Brazil, pursuant to Articles 1 and 4 of the DSU, Article XXII of the GATT 1994, Article 4 of the SCM Agreement and Article 8 of the TRIMS Agreement with respect to certain measures concerning taxation and charges imposed by Brazil. The request was circulated on 8 January as document WT/DS472/1, G/L/1061, G/SCM/D100/1, G/TRIMS/D/39.

Consultations were held on 13 and 14 February 2014 with a view to reaching a mutually satisfactory solution. An additional meeting took place on 4 April 2014. Unfortunately, the consultations failed to settle the dispute.

As a result, the EU respectfully requests that a Panel be established with the standard terms of reference as set out in Article 7.1 of the DSU with respect to the following matter:[1]

1. MEASURES IN THE AUTOMOTIVE SECTOR

Brazil has established a "Programme of incentive to the technological innovation and densification of the automotive supply chain" (*Programa de Incentivo à Inovação Tecnológica e Adensamento da Cadeia Produtiva de Veículos Automotores*) also known as "INOVAR-AUTO".[2] Under the INOVAR-AUTO programme, Brazil provides tax advantages with respect to the "Tax on Industrial Products" (*Imposto sobre Produtos Industrializados*, IPI).[3] The tax advantages consist in a reduction of the IPI tax burden on the sale of the products (motor vehicles) covered by the programme.

[1] The EU reserves its rights, including under Article 4.7 of the DSU, with regard to measures identified in its request for consultations which are not the subject of this request for the establishment of a Panel.

[2] The INOVAR-AUTO programme was formally created by Law (*Lei*) n° 12,715 of 17 September 2012. It maintained in force the provisions concerning IPI tax advantages for the automotive sector included in a previous legislative act (Law (*Lei*) nº 12,546 of 14 December 2011). The main implementing measure for both legislative acts is Decree (*Decreto*) n° 7,819 of 3 October 2012, as amended.

[3] The IPI is established under the provisions of Law (*Lei*) n° 5,172 of 25 October 1966 (*Código Tributario Nacional*), as amended, in particular in Chapter IV, Section I; and of Law (*Lei*) n° 4,502 of 30 November 1964, as amended. The provisions of those laws are further developed in Decree (*Decreto*) n° 7,212 of 15 June 2010 and, as regards imports in particular, Decree (*Decreto*) n° 6,759 of 5 February 2009.

To benefit from the INOVAR-AUTO programme, companies need to be "accredited" (*habilitadas*) by means of an administrative decision (*Portaria*).[4] There are three types of "accreditation" (*habilitação*): (i) for domestic manufacturers; (ii) for local distributors without manufacturing activities in Brazil; and (iii) for investors in domestic manufacturing capacity.[5] In order to be "accredited", eligible operators must fulfil certain conditions which concern, depending on the accreditation sought, in particular a minimum number of manufacturing activities in Brazil and/or minimum levels of expenditure in Brazil on research and development, engineering, basic industrial technology and capacity-building of actual and potential suppliers.

Under the INOVAR-AUTO programme, accredited companies can earn tax credits which can be used, under certain conditions, to offset the IPI otherwise due on the domestic sale of motor vehicles covered by the programme. The tax credits are linked to the level of expenditure in Brazil on certain items, including strategic inputs and tools, research and development, or capacity-building of suppliers.[6] Expenditure in Brazil to purchase strategic inputs (automotive components) and tools is the item which translates into the largest tax credit and it is thus decisive as regards the actual tax burden on the sale of motor vehicles.[7] As a result, the advantage of a lower tax burden on finished vehicles is contingent for the greatest part on the use of domestically sourced inputs (or, in other words, the level of domestic content in motor vehicles).

Tax credits can be used to offset up to 30 percentage points of IPI tax due on the sale of motor vehicles.[8] Any excess tax credit can be used to offset the IPI due on the domestic commercialisation of imported vehicles, but only up to a maximum number of products.[9] Tax credits are not used to offset the IPI tax at the border, which is generally due with limited exceptions.[10] However, motor vehicles from a limited number of WTO Members[11] benefit from a special reduction in IPI rates that apply both at the point of importation and in subsequent sales.[12]

Companies accredited as investors in domestic manufacturing capacity are subject to specific rules as regards the earning and the use of tax credits, with a maximum limit of imported vehicles for which the IPI tax can be offset.[13]

Special provisions also apply to companies producing certain vehicles by fitting vehicle bodies on a chassis.[14]

The EU understands that the INOVAR-AUTO programme is set up and implemented through the following:

- Law (*Lei*) n°12,546 of 14 December 2011;[15]

[4] Article 40 of Law *(Lei)* n° 12,715 of 17 September 2012, as amended; Chapter III of Decree (*Decreto*) n° 7,819 of 3 October 2012, as amended. For the sake of clarity, the EU notes that the references made to specific provisions of Brazilian legal instruments in this request are for explanatory purposes and are without prejudice to the examination in the proceedings of other relevant provisions of the specific legal instruments cited herein.

[5] Article 40 §2 of Law *(Lei)* n° 12,715 of 17 September 2012, as amended; Article 2 of Decree (Decreto) n° 7,819 of 3 October 2012, as amended. The EU understands that the list of accredited companies can be found at http://www.mdic.gov.br/sitio/interna/interna.php?area=2&menu=3824&refr=327.

[6] Article 41 of Law *(Lei)* n° 12,715 of 17 September 2012, as amended; Article 12 of Decree (Decreto) n° 7,819 of 3 October 2012, as amended.

[7] Article 12 of Decree (*Decreto*) n° 7,819 of 3 October 2012, as amended.

[8] Article 14 §1 of Decree (*Decreto*) n° 7,819 of 3 October 2012, as amended.

[9] Article 14 §2 of Decree (*Decreto*) n° 7,819 of 3 October 2012, as amended; special rules and exceptions are envisaged in Article 14 §5 §6 and §7.

[10] See in particular Article 22, item II (reduced IPI rates up to a maximum number of vehicles per year), and Article 30 (suspension of tax) of Decree (*Decreto*) n° 7,819 of 3 October 2012, as amended.

[11] In particular those countries covered by the heading (caput) of Article 21, as well as item I of the heading (*caput*) of Article 22, of Decree (*Decreto*) n° 7,819 of 3 October 2012, as amended.

[12] Articles 21 and 22, and Annex VIII, of Decree (*Decreto*) n° 7,819 of 3 October 2012, as amended.

[13] Article 41 §3 of Law *(Lei)* n° 12,715 of 17 September 2012, as amended; in particular, Articles 13 and 16 of Decree (*Decreto*) n° 7,819 of 3 October 2012, as amended.

[14] Article 23 of Decree (*Decreto*) n° 7,819 of 3 October 2012, as amended.

[15] The EU understands that the latest amendment to date of the relevant provisions was by Law (*Lei*) n° 12,844 of 19 July 2013. For the sake of clarity, the EU notes that the references made to the latest

- Law *(Lei)* n° 12,715 of 17 September 2012;[16]
- Decree (*Decreto*) n° 7,819 of 3 October 2012;[17]
- *Portaria MCTI* n° 296 of 1 April 2013;
- *Portaria MDIC* n° 106 of 11 April 2013;
- *Portaria MDIC* n° 113 of 15 April 2013;
- Portaria Interministerial MCTI/MDIC n° 772 of 12 August 2013;
- *Portaria MDIC* n° 280 of 4 September 2013;
- *Portaria MDIC* n° 297 of 30 September 2013;
- accreditations (*habilitações*) granted pursuant to the INOVAR-AUTO programme;
- as well as any amendments or extensions, any replacement measures, any renewal measures, any implementing measures, and other related measures of the foregoing.

The INOVAR-AUTO programme, as embodied and developed in the above-mentioned instruments and also as applied by the relevant Brazilian authorities, is inconsistent with Brazil's obligations under the GATT 1994, the SCM Agreement and the TRIMS Agreement. In particular, the programme is inconsistent with:

- Article I:1 of the GATT 1994, because motor vehicles originating in the EU are not accorded immediately and unconditionally any advantage, favour, privilege or immunity granted to like products originating in certain other countries.
- Article III:2 of the GATT 1994, because motor vehicles of the EU imported into Brazil are subject to a IPI tax burden in excess of that borne by like domestic products.
- Article III:4 of the GATT 1994, because motor vehicles, automotive components and tools of the EU imported into Brazil are accorded less favourable treatment than that accorded to like products of Brazilian origin, as a result of the conditions for accreditation to the programme and the rules on the earning and use of tax credits.
- Article III:5 of the GATT 1994, because conditions relating to the minimum number of manufacturing activities which manufacturers of motor vehicles need to perform in Brazil amount to an internal quantitative regulation relating to the processing of products, and such conditions require a specified proportion of the final product from domestic sources; and because the conditions relating to the minimum number of manufacturing activities in Brazil also amount to an internal quantitative regulation that is applied so as to afford protection to domestic production.
- Articles 3.1(b) and 3.2 of the SCM Agreement, because the programme provides tax advantages that are subsidies within the meaning of Article 1.1 of the SCM Agreement which are provided contingent upon the use of strategic inputs and tools from Brazil over similar goods imported from other WTO Members, including the EU.
- Article 2.1 of the TRIMS Agreement, in conjunction with Article 2.2 and with paragraph 1(a) of the Agreement's Illustrative List, because by requiring the purchase or use of strategic inputs and tools of Brazilian origin or from Brazilian sources in order to benefit

amendments to the relevant legal instruments cited in this request are without prejudice to the possible examination of other amendments to the extent necessary to secure a positive solution to the dispute.

[16] The EU understands that the latest amendment to date of the relevant provisions was by Law (*Lei*) n° 12,996 of 18 June 2014.

[17] The EU understands that the latest amendment to date was by Decree (*Decreto*) n° 8,294 of 12 August 2014.

from tax advantages, the programme is a trade-related investment measure inconsistent with Article III:4 of the GATT 1994.

2. MEASURES RELATING TO INFORMATION AND COMMUNICATION TECHNOLOGY, AUTOMATION AND RELATED GOODS

2.1 Measures at issue

Brazil has adopted and maintains legislation granting advantages in relation to taxes, duties, contributions and charges, which are contingent upon domestic production and technological development of information and communication technology (ICT), automation and related goods in Brazil. The set of advantages primarily consist in tax exemptions or reductions applied in connection with taxes levied on the sale of the relevant goods or on the revenue generated through those sales. These advantages apply in relation to a limited number of accredited companies established in Brazil.

This system of advantages is embodied in and applied through a comprehensive set of inter-related measures: (1) the Informatics Law (*Lei de Informatica*) and its implementing measures, hereafter collectively referred to as the "Informatics programme"; (2) the "Programme of Incentives for the Semiconductors Sector" (PADIS, *Programa de Incentivos ao Setor de Semicondutores*); (3) the "Programme of Support to the Technological Developments of the Industry of Digital TV Equipment" (PATVD, *Programa de Apoio ao Desenvolvimento Tecnológico da Indústria de Equipamentos para TV Digital*); and (4) the "Programme for Digital Inclusion" (*Inclusão Digital*).

2.1.1. Informatics programme

Under the so-called "Informatics Law" (*Lei de Informatica),*[18] domestic companies may benefit from certain tax advantages if those companies achieve specific investment targets in research and development and, concomitantly, produce ICT, automation or related goods in Brazil.[19] In particular, the tax benefits consist of a reduction or exemption of the IPI tax otherwise due on the sale of the manufactured products, coupled with the preservation and use of the tax credits linked to the purchase by beneficiaries of raw materials, intermediate products and packing materials used for industrialising the covered products.[20] These tax advantages vary over time and across Brazilian states and regions.[21]

To benefit from the tax advantages under the *Lei de Informatica*, companies need to be "accredited" (*habilitadas*) by means of an administrative decision (*Portaria*) granted jointly by the Ministry for Development, Industry and Trade and the Ministry of Science and Technology. In order to be accredited, eligible operators must invest in Brazil in relevant research and development (reaching a minimum investment target expressed as a percentage of their domestic turnover).[22] They must also demonstrate that they produce in Brazil in accordance with the terms of the "Basic Productive Process" (PPB, *Processo Productivo Basico*).[23]

PPBs determine the minimum manufacturing steps and conditions that need to be fulfilled at a manufacturing facility for a product to be considered as effectively "industrialised" in Brazil. They are issued by inter-ministerial decision (*Portaria*) at the initiative of the company seeking the tax advantages. PPBs aim at maximising domestic added value through "intensification" of the productive chain, while also increasingly requiring that components incorporated into the final product be, in all or in part, also produced in Brazil (including in accordance with their respective PPBs).

[18] Law (*Lei*) n°8,248 of 23 October 1991, as amended.

[19] The precise product scope is determined in Decree (*Decreto*) n° 5,906 of 26 September 2006, as amended.

[20] As regards the maintenance of tax credits, see Article 4(3) of the *Lei de Informatica*.

[21] IPI reductions are set out in Article 4 §1A and §5 of the *Lei de Informatica*, and vary across regions in accordance with Articles 3 and 4 of Decree n°5,906. For products that are also "developed" in Brazil, percentages of IPI reduction are set out in Article 4(7) of the *Lei Informatica*.

[22] Articles 4 and 11 of the *Lei de Informatica*; Article 1 and Chapter III of Decree (*Decreto*) nº 5.906. of 26 September 2006, as amended.

[23] Article 4 §1C of the *Lei de Informatica*; Article 6 and item III of the heading (*caput*) of 22 of Decree (*Decreto*) nº 5.906. of 26 September 2006, as amended.

In addition, products that are considered as "developed" in Brazil benefit from greater tax advantages. Products are considered "developed" in Brazil when they meet the specifications, rules and standards laid down in Brazilian law and when the related specifications, projects and developments are carried out by residents in Brazil, in conformity with *Portaria* n° 950 of 12 December 2006. In order to benefit from this characterisation, such status needs to be recognised ("*reconhecimento*") by means of an administrative decision by the Ministry of Science, Technology and Innovation.

The EU understands that the Informatics programme is set up and implemented through the following:

- Law *(Lei)* n° 8,248 of 23 October 1991;[24]
- Law *(Lei)* n° 10,176 of 11 January 2001;
- Decree (*Decreto)* n° 5,906 of 26 September 2006;[25]
- Decree *(Decreto)* n° 6,759 of 5 February 2009 (final and transitional provisions), as amended by subsequent acts;[26]
- Decree *(Decreto)* n° 7,212 of 15 June 2010 (especially Chapter VI, Section II);
- Portaria Interministerial *MDIC/MCTI* nº 177 of 18 October 2002;
- *Portaria MCT* n° 950 of 12 December 2006;
- Portaria Interministerial MCTI/MDIC/MF nº 148 of 19 March 2007;
- Portaria Interministerial MCTI/MDIC nº 685 of 25 October 2007**;**
- Portaria Interministerial MDIC/MCT nº 170 of 4 August 2010;
- *Portaria MDIC* n° 267 of 30 August 2013;
- *Portaria SDP/MDIC* n° 1 of 18 September 2013;
- *Portaria MCT n° 1,309* of 19 December 2013;
- Portaria Interministerial MCTI/MDIC nº 202 of 13 February 2014;
- *Portarias* adopting PPBs pursuant to the provisions of the above mentioned instruments;[27]
- accreditations (*habilitações*) granted pursuant to the Informatics programme;
- as well as any amendments or extensions, any replacement measures, any renewal measures, any implementing measures, and other related measures of the foregoing.

[24] The EU understands the latest amendment to date was by Law (*Lei*) nº 13,023, of 8 August 2014.

[25] The EU understands that the latest amendment to date of the relevant provisions was by Decree (*Decreto*) n° 8,072 of 14 August 2013.

[26] The EU understands that the latest amendment to date of the relevant provisions was by Decree (*Decreto*) n° 8,010 of 16 May 2013.

[27] The administrative acts establishing PPBs (*portarias interministeriais*) are published in the Brazilian Official Journal (DOU). The texts are accessible through the website of the Brazilian Ministry of Science, Technology and Innovation (see http://www.mct.gov.br/index.php/content/view/3781/Portarias_Interministeriais.html).

2.1.2. PADIS and PATVD programmes

Both PADIS and PATVD were established by Law (*Lei*) n° 11,484 of 31 May 2007.[28]

PADIS grants exemptions from several taxes, duties and contributions to companies conditional upon performing in Brazil certain development and production steps (including design, creation, development, manufacturing, final assembling and testing) relating to: (i) semiconductors, as defined in the relevant law; (ii) LCD, LED, plasma and other displays; and (iii) inputs and equipment for the production of semiconductors or displays, in accordance with PPB requirements. Under PATVD these same exemptions are granted to companies that develop and manufacture in Brazil equipment for Digital TV. Such equipment must be produced in accordance with the relevant PPB or it must be developed domestically, as defined by *Portaria* n° 950 of 12 December 2006.

In order to benefit from the tax and duty exemptions under both programmes, companies also require "accreditation" (*habilitação*) by the relevant Ministries. To be accredited, the company carrying out the activities described above must allocate to research and development in Brazil a percentage of turnover from its gross domestic sales of the final products.

Upon accreditation, the domestic sales or imports of machinery, tools, instruments, and equipment, as well as of software and inputs, destined for any of the development and production activities mentioned above, are exempted from certain taxes or charges,[29] including IPI, PIS/PASEP,[30] COFINS,[31] PIS/PASEP-*Importação,*[32] COFINS-*Importação,*[33] as well as from ordinary customs duties. In addition, accredited companies that perform the required production and development activities in Brazil may sell their products free of PIS/PASEP, COFINS and IPI.[34]

The EU understands that the PADIS and PADTV programmes are set up and implemented through the following:

PADIS programme

- Law (*Lei)* n° 11,484 of 31 May 2007;[35]
- Decree (*Decreto)* n° 6,233 of 11 October 2007;[36]
- *Instrução Normativa RFB* nº 852 of 13 June 2008;

[28] PADIS is established in Articles 1 – 11, whereas PATVD is established in Articles 12 – 21 of Law n° 11,484, as amended by Law (*Lei*) n° 12,715 of 17 September 2012 and further developed by, *inter alia*, Decree (*Decreto*) n° 6,233 of 11 October 2007 (on PADIS) and by Decree (*Decreto*) n° 6,234 of 11 October 2007 (on PATVD).

[29] Articles 3 and 14 of Law n° 11,484.

[30] *Programa de Integração Social* ("Social Integration Programme" - PIS) and *Programa de Formação do Patrimônio do Servidor Público* ("Civil Service Asset Formation Program" - PASEP), as laid down in Law (*Lei*) n° 9,718 of 27 November 1998 and Law (*Lei*) n° 10,637 of 30 December 2002, and their subsequent amendments.

[31] *Contribuição para o Financiamento da Seguridade Social* ("Contribution to Social Security Financing" - COFINS), as laid down in Law (*Lei*) n° 9,718 of 27 November 1998 and in Law (*Lei*) n° 10,833 of 29 December 2003, and their subsequent amendments.

[32] *Programa de Integração Social e de Formação do Patrimônio do Servidor Público incidente na Importação de Produtos Estrangeiros ou Serviços* ("Social Integration and Civil Service Asset Formation Programmes applicable to Imports of Foreign Goods or Services"), as laid down in Law (*Lei*) n° 10,865 of 30 April 2004, as subsequently amended. This contribution is regulated in Decree (*Decreto*) n° 6,759 of 5 February 2009, *Livro* III, Title II. The formulae for calculating the charges due are laid down in Normative Instruction (*Instrução Normativa*) RFB nº 1,401 of 9 October 2013.

[33] *Contribuição para o Financiamento da Seguridade Social incidentes sobre a importação de bens e serviços* ("Contribution to Social Security Financing applicable to Imports of Goods or Services"), as laid down in Law (*Lei*) n° 10,865 of 30 April 2004, as subsequently amended. This contribution is regulated in Decree (*Decreto*) n° 6,759 of 5 February 2009, *Livro* III, Title II. The formulae for calculating the charges due are laid down in Normative Instruction (*Instrução Normativa*) RFB nº 1,401 of 9 October 2013.

[34] Article 4 and 15 of Law n° 11,484.

[35] The EU understands that the latest amendment to date of the relevant provisions was by Law (*Lei*) n°12,767 of 27 December 2012.

[36] The EU understands that the latest amendment to date of the relevant provisions was by Decree (*Decreto*) n°8,247 of 23 May 2014.

- Decree (*Decreto)* n° 7,212 of 15 June 2010 (especially Chapter VI, Section III);
- Decree (*Decreto*) n° 6,759 of 5 February 2009 (especially *Livro* III, Title II, Chapter VII, Section VII), as amended by subsequent acts;
- accreditations (*habilitações*) granted pursuant to the PADIS programme;
- as well as any amendments or extensions, any replacement measures, any renewal measures, any implementing measures, and other related measures of the foregoing.

PATVD programme

- *Lei* n° 11,484 of 31 May 2007;
- Decree (*Decreto)* n° *6,234* of 11 October 2007;
- Instrução Normativa RFB nº 853 of 13 June 2008;
- Decree (*Decreto)* n° 7,212 of 15 June 2010 (especially Chapter VI, Section IV);
- Decree (*Decreto*) n° 6,759 of 5 February 2009 (especially *Livro* III, Title II, Chapter VII, Section VIII);
- accreditations (*habilitações*) granted pursuant to the PATVD programme;
- as well as any amendments or extensions, any replacement measures, any renewal measures, any implementing measures, and other related measures of the foregoing.

2.1.3. Programme for Digital Inclusion (*Inclusão Digital*)

Under the provisions of Law (*Lei*) n° 11.196 of 21 November 2005, as amended,[37] concerning the Programme for Digital Inclusion, Brazil exempts retail sales, and sales to companies or public entities, of a large number of so-called "digital products" (such as computers, input and output units, routers, smartphones and other hardware) from payment of PIS/PASEP[38] and COFINS,[39] provided that such products are produced in Brazil in accordance with their respective PPBs.

The EU understands that the Digital Inclusion programme is set up and implemented through the following:

- *Lei* n° 11.196 of 21 November 2005;[40]
- *Decreto* n° 5,602 of 6 December 2005;[41]
- *Portaria MC* nº 87 of 10 April 2013;
- *Portaria STE* n° 2 of 26 August 2013;

[37] The Programme for Digital Inclusion is disciplined under Articles 28 to 30 of Law (*Lei*) n° 11,196. The provisions of Law (*Lei*) n° 11,196 are further developed in Decree (*Decreto*) n° 5,602 of 6 December 2005, as amended, and in other acts adopted by the relevant authorities.

[38] *Programa de Integração Social* ("Social Integration Programme" - PIS) and *Programa de Formação do Patrimônio do Servidor Público* ("Civil Service Asset Formation Program" - PASEP), as laid down in Law (*Lei*) n° 9,718 of 27 November 1998 and Law (*Lei*) n° 10,637 of 30 December 2002, and their subsequent amendments.

[39] *Contribuição para o Financiamento da Seguridade Social* ("Contribution to Social Security Financing" - COFINS), as laid down in Law (*Lei*) n° 9,718 of 27 November 1998 and in Law (*Lei*) n° 10,833 of 29 December 2003, and their subsequent amendments.

[40] The EU understands that the latest amendment to date of the relevant provisions was by Law (*Lei*) n° 12,715 of 17 September 2012. Provisional Measure (*Medida Provisoria*) nº 656 of 7 October 2014 extends the Programme until 1 December 2018.

[41] The EU understands that the latest amendment to date of the relevant provisions was by Decree (*Decreto*) nº 7,981 of 8 April 2013.

- as well as any amendments or extensions, any replacement measures, any renewal measures, any implementing measures, and other related measures of the foregoing.

2.2 Legal Basis

The set of advantages contingent upon domestic production and technological development of information and communication technology (ICT), automation and related goods in Brazil, as embodied and developed in the Informatics, PADIS, PATVD and Digital Inclusion programmes and also as applied by the relevant Brazilian authorities, are inconsistent with Brazil's obligations under the GATT 1994, the SCM Agreement and the TRIMS Agreement. In particular, the set of advantages described above, as contained in the mentioned programmes, are inconsistent with:

- Article III:2 of the GATT 1994 because, by the operation of tax exemptions or reductions, they impose a tax burden on imported ICT, automation and related products in excess of that applied to like domestic products.

- Article III:4 of the GATT 1994, because the conditions for accreditation necessary for ICT, automation and related goods to benefit from the exemptions or reductions result in less favourable treatment granted to imported products than that accorded to like domestic products; and because, by imposing, under the terms of the corresponding PPBs, an obligation to use local inputs and equipment in the production of ICT, automation and related products, as a condition to benefit from the exemptions or reductions, these measures afford less favourable treatment to imported inputs and equipment than that accorded to like domestic products.

- Article III:5 of the GATT 1994, because the conditions imposed under the terms of the corresponding PPBs regarding the minimum number of processing activities that producers of ICT, automation and related products need to perform in Brazil in order to benefit from the exemptions or reductions amount to an internal quantitative regulation relating to the processing of products, which requires a specified proportion of the final product to be sourced locally; and because the conditions relating to the minimum number of processing activities in Brazil amount to an internal quantitative regulation that is applied so as to afford protection to domestic production.

- Articles 3.1(b) and 3.2 of the SCM Agreement, because the exemptions or reductions granted in relation to ICT, automation and related products that comply with the terms of the PPBs are subsidies within the meaning of Article 1.1 of the SCM Agreement that are provided contingent upon the use of domestic over imported inputs and equipment.

- Article 2.1 of the TRIMS Agreement, in conjunction with Article 2.2 and with paragraph 1(a) of the Agreement's Illustrative List, because by requiring, under the terms of the PPBs, the purchase or use of inputs and manufacturing equipment of Brazilian origin or from Brazilian sources in order to benefit from the exemptions or reductions, they constitute trade-related investment measures inconsistent with Article III: 4 of the GATT 1994.

2.3 Alternative claim

Products imported into Brazil, including from the EU, are subject to charges collected at the border under the instruments known as PIS/PASEP *Importação*[42] and COFINS *Importação*.[43] The EU notes that Brazil levies in parallel the "contributions" known as PIS/PASEP and COFINS on the turnover of domestic companies. *PIS/PASEP Importação* and *COFINS Importação* were introduced several

[42] *Programa de Integração Social e de Formação do Patrimônio do Servidor Público incidente na Importação de Produtos Estrangeiros ou Serviços* ("Social Integration and Civil Service Asset Formation Programmes applicable to Imports of Foreign Goods or Services"), as laid down in Law (*Lei*) n° 10,865 of 30 April 2004, as subsequently amended. The formulae for calculating the charges due are laid down in Normative Instruction (*Instrução Normativa*) RFB nº 1,401 of 9 October 2013.

[43] *Contribuição para o Financiamento da Seguridade Social incidentes sobre a importação de bens e serviços* ("Contribution to Social Security Financing applicable to Imports of Goods or Services"), as laid down in Law (*Lei*) n° 10,865 of 30 April 2004, as subsequently amended. The formulae for calculating the charges due are laid down in Normative Instruction (*Instrução Normativa*) RFB nº 1,401 of 9 October 2013.

years after the creation of PIS/PASEP and COFINS. The EU understands that Brazil considers the *PIS/PASEP Importação* and *COFINS Importação* as charges which form part of Brazil's system of internal taxes, rather than as "other duties or charges" on imports (within the meaning of Article II:1(b) of the GATT 1994).

In the event that Brazil submits (and/or the Panel deems) that the PIS/PASEP *Importação* and COFINS *Importaçao* are not internal taxes falling under Article III:2 of the GATT 1994, the EU submits that the imposition of the PIS/PASEP *Importação* and COFINS *Importação* on ICT, automation and related goods imported from the EU violates Article II:1(b) of the GATT 1994 because "other duties and charges" are imposed on imported products in excess of the duties and charges set forth in Brazil's Schedule of Tariff Concessions.

3. MEASURES PROVIDING TAX ADVANTAGES TO EXPORTERS

Brazil has put in place certain programmes that confer benefits to "predominantly exporting companies" in the form of a suspension, and ultimately an exemption, of taxes otherwise due in relation to their supplies.

3.1 The RECAP Programme

Brazil has introduced a "Special Regime for the Purchase of Capital Goods for Exporting Enterprises" (RECAP, *Regime Especial de Aquisição de Bens de Capital para Empresas Exportadoras*). Under this programme, Brazil suspends (and ultimately exempts) the application of the "contributions" (*contribuições*) known as PIS/PASEP, COFINS, PIS/PASEP *Importação* and COFINS *Importação* with regard to purchases by legal persons that are "predominantly exporting companies", that is, those companies that exported at least 50 percent of their gross turnover over the preceding year.[44]

In order to benefit from the RECAP programme, "predominantly exporting companies" must obtain "accreditation" (*habilitação*) from the Secretariat of the Federal Revenue in the Ministry of Finance (*Secretaria da Receita Federal* of the *Ministério de Fazenda*).[45]

"Contributions" are suspended as regards the domestic purchase or importation by accredited companies of machinery, tools, instruments and other equipment.[46] The suspension is not limited to the equipment, or the proportion thereof, that is to be used in the production of goods for export (which can be exempted from indirect taxes), but it applies generally (i.e. also as regards the capital goods, or the proportion thereof, used in the production of goods to be sold domestically). The suspension becomes a zero rate (thus, an exemption from the "contributions") when certain conditions are met, namely the verification of the respect during the relevant time period of the required export threshold.[47] If an accredited company does not incorporate the capital goods to its fixed assets or if it sells the goods before the conversion of the suspension into a zero rate, it can be required to pay the suspended contributions as well as interests and penalties.[48] If the export threshold is not achieved, only interest and penalties are due, proportionally to the difference between the exports actually made and the export threshold.[49]

Companies admitted to the RECAP programme enjoy those benefits on condition that they undertake to maintain for the following two years a level of exports equal to or higher than 50 percent of their output.[50] In addition, the RECAP programme is also available to those companies that, even if their export activities did not reach 50 percent of their gross turnover over the course of the preceding year, commit to match or exceed this threshold for the following three years.[51]

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[44] Article 13 of Law (*Lei*) n° 11,196 of 25 November 2005, as amended.
[45] Chapter II of Decree (*Decreto*) n° 5,649 of 29 December 2005, as amended. The EU understands that the list of accredited companies can be found at:
http://www.receita.fazenda.gov.br/Legislacao/RegimeAquisicao/RelacaodasPJIN605.htm.
[46] Article 14 of Law (*Lei*) n° 11,196 of 25 November 2005, as amended.
[47] Article 14 §8 of Law (*Lei*) n° 11,196 of 25 November 2005, as amended.
[48] Article 14, §4 and §6 (item II), of Law (*Lei*) n° 11,196 of 25 November 2005, as amended.
[49] Article 14, §6 (item I) and §10, of Law (*Lei*) n° 11,196 of 25 November 2005, as amended
[50] Heading (*caput*) of Article 13 of Law (*Lei*) n° 11,196 of 25 November 2005, as amended.
[51] Article 13§2 of Law (*Lei*) n° 11,196 of 25 November 2005, as amended.

The EU understands that the RECAP programme is set up and implemented through the following:

- Law (*Lei*) n° 11,196 of 25 November 2005;[52]
- Decree (*Decreto*) n° 5,649 of 29 December 2005;[53]
- Decree (*Decreto*) n° 5,789 of 25 May 2006;[54]
- Decree (*Decreto*) n° 6,759 of 5 February 2009 (especially *Livro* III, Title II, Chapter VII, Section IV;
- Normative Instruction (*Instrução normativa*) *SRF* n° 605 of 4 January 2006;
- accreditations (*habilitações*) granted pursuant to the RECAP programme;
- as well as any amendments or extensions, any replacement measures, any renewal measures, any implementing measures, and other related measures of the foregoing.

The RECAP programme, as embodied and developed in the above-mentioned instruments and also as applied by the relevant Brazilian authorities, is inconsistent with Brazil's obligations under the SCM Agreement. In particular, the programme provides advantages that are subsidies within the meaning of Article 1.1 of the SCM Agreement and which are inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement because they are contingent upon export performance.

3.2 Export contingent subsidies concerning the purchase of raw materials, intermediate goods and packaging materials

Brazil suspends (and ultimately exempts) the application of the taxes and "contributions" (*contribuições*) known as IPI, PIS/PASEP, PIS/PASEP *Importação*, COFINS and COFINS *Importação* with regard to certain supplies to accredited[55] or registered[56] legal persons that are "predominantly exporting companies", that is, producers that exported at least 50 percent of their gross turnover over the preceding year.[57] These benefits are therefore conditional on those companies achieving or exceeding a certain export target, expressed as a percentage of the companies' turnover. The benefits apply in relation to purchases of raw materials, intermediate goods and packaging materials by the beneficiaries of the scheme. The suspension is not limited to the inputs to be used in the production of goods for export (which can be exempted from indirect taxes), but it applies also as regards inputs processed or otherwise used in the production of goods for the domestic market.

The suspension of the PIS/PASEP, PIS/PASEP *Importação*, COFINS and COFINS *Importação* contributions expires (and the contributions become definitively non-due) upon exportation or sale on the domestic market of the final goods incorporating the raw materials, intermediate goods and

[52] The EU understands that the latest amendment to date of the relevant provisions was by Law (*Lei*) n° 12,715 of 17 September 2012.

[53] The EU understands that the latest amendment to date was by Decree (*Decreto*) n° 6,887 of 25 June 2009.

[54] The EU understands that the latest amendment to date was by Decree (*Decreto*) n° 6,581 of 26 September 2008.

[55] Under Normative Instruction (*Instrução Normativa*) SRF nº 595 of 27 December 2005. The EU understands that a list of accredited companies can be found at http://www.receita.fazenda.gov.br/Legislacao/RegimeSuspensao/RelacaodasPJIN595.htm.

[56] Under Normative Instruction (*Instrução Normativa*) RFB nº 948 of 15 June 2009. The individual administrative acts (*Atos Declaratórios Executivos*) concerning the registration of companies are adopted by the Revenue Service (*Receita Federal*) at sub-central level and are published in the Brazilian Official Journal (D.O.U.). The EU is not aware of a publicly accessible compilation of such administrative acts.

[57] Article 29 of Law (*Lei*) n° 10,637 of 30 December 2002; Article 40 of Law (*Lei*) n° 10,865 of 30 April 2004.

packaging materials.[58] In other cases, however, the taxes and contributions become payable, together with interests and penalties.[59] A similar rule applies in the case of the IPI tax.[60]

The EU understands that the scheme described above is set up and implemented through the following:

- Law (*Lei*) n° 10,637 of 30 December 2002;[61]
- Law (*Lei*) n° 10,865 of 30 April 2004;[62]
- Decree (*Decreto*) n° 6,759 of 5 February 2009 (especially *Livro* III, Title I, Chapter VII, and *Livro* III, Title II, Chapter VII, Section V);
- Normative Instruction (*Instrução Normativa*) SRF nº 595 of 27 December 2005;[63]
- Normative Instruction (*Instrução Normativa*) RFB nº 948 of 15 June 2009;[64]
- accreditations (*habilitações*) or registration (*registro*) of individual "predominantly exporting companies" pursuant to the scheme;
- as well as any amendments or extensions, any replacement measures, any renewal measures, any implementing measures, and other related measures of the foregoing.

This scheme, as embodied and developed in the above-mentioned instruments and also as applied by the relevant Brazilian authorities, is inconsistent with Brazil's obligations under the SCM Agreement. In particular, the scheme provides advantages that are subsidies within the meaning of Article 1.1 of the SCM Agreement and which are inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement because they are contingent upon export performance.

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The EU asks that this request be placed on the agenda for the meeting of the Dispute Settlement Body expected to be held on 18 November 2014.

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[58] Article 9 of Normative Instruction (*Instrução Normativa*) SRF nº 595 of 27 December 2005.

[59] Article 9 §1 of Normative Instruction (*Instrução Normativa*) SRF nº 595 of 27 December 2005; Article 20, sole paragraph, of Normative Instruction (*Instrução Normativa*) RFB nº 948 of 15 June 2009.

[60] Article 20 of Normative Instruction (*Instrução Normativa*) RFB nº 948 of 15 June 2009.

[61] The EU understands that the latest amendment to date of the relevant provisions was by Law *(Lei)* n° 12,715 of 17 September 2012.

[62] The EU understands that the latest amendment to date of the relevant provisions was by Law *(Lei)* n° 12,715 of 17 September 2012.

[63] The EU understands that the latest amendment to date was by Normative Instruction (*Instrução Normativa*) RFB nº 1.424, of 19 December 2013.

[64] The EU understands that the latest amendment to date was by Normative Instruction (*Instrução Normativa*) RFB nº 1.424, of 19 December 2013.