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BRAZIL – CERTAIN MEASURES CONCERNING TAXATION AND CHARGES

NOTIFICATION OF AN APPEAL BY BRAZIL UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU), AND UNDER RULE 20(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW

The following communication, dated 28 September 2017, from the delegation of Brazil, is being circulated to Members.

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1. Pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review* (WT/AB/WP/6) ("Working Procedures"), Brazil hereby notifies the Dispute Settlement Body of its decision to appeal certain issues of law and legal interpretation in the reports of the Panel in *Brazil – Certain Measures Concerning Taxation and Charges* (WT/DS472, DS497) ("Panel Report").

2. The seven programmes at issue are: (a) the Informatics programme; (b) the programme of Incentives for the Semiconductors Sector ("PADIS programme"); (c) the programme of Support for the Technological Development of the Industry of Digital TV Equipment ("PATVD programme"); (d) the programme for Digital Inclusion ("Digital Inclusion programme"); (e) the programme of Incentive to the Technological Innovation and Densification of the Automotive Supply Chain ("INOVAR-AUTO"); (f) the regime for predominantly exporting companies ("PEC programme"); and the Special Regime for the Purchase of Capital Goods for Exporting Enterprises ("RECAP programme").[1]

3. The issues that Brazil raises in this appeal relate to the Panel's findings and conclusions with respect to the consistency of the challenged programmes with various provisions of the General Agreement on Tariffs and Trade 1994 (GATT 1994), the Agreement on Subsidies and Countervailing Measures (SCM Agreement), and the Agreement on Trade-Related Investment Measures (TRIMS Agreement).

4. Pursuant to Rules 20(1) and 21(1) of the Working Procedures, Brazil files this Notice of Appeal together with its Appellant's Submission with the Appellate Body Secretariat.

5. Pursuant to Rule 20(2)(d)(iii) of the Working Procedures, this Notice of Appeal provides an indicative list of the paragraphs of the Panel Report containing the alleged errors of law and legal interpretation by the Panel, without prejudice to Brazil's ability to rely on other paragraphs of the Panel Report in its appeal.

[1] The complainants explained in their panel requests that these programmes are "set up and implemented", "established and administered" through the measures identified in paragraph 2.38 of the Panel Report.

I. REVIEW OF THE PANEL'S INTERPRETATION AND APPLICATION OF ARTICLE III:8(B) OF THE GATT 1994 TO THE INFORMATICS, PADIS, PATVD, DIGITAL INCLUSION PROGRAMMES ("ICT PROGRAMMES") AND THE INOVAR-AUTO PROGRAMME

6. Brazil seeks review by the Appellate Body of the Panel's finding that domestic production subsidies within the meaning of Article III:8(b) of the GATT 1994 are not exempt from the disciplines of Article III thereof. The Panel's errors of law and legal interpretation include:

- The Panel erred in finding that the scope of Article III:8(b) of the GATT 1994 is limited to the provision of subsidies to domestic producers where those subsidies do not have any component that introduces discrimination between imported and domestic products;[2]

- The Panel erred in finding that Article III:8(b) of the GATT 1994 only serves to clarify that Members are not required to subsidize foreign producers in tandem with domestic producers;[3]

- The Panel erred by failing to determine, in the first instance, whether the measures at issue are product-related measures subject to the disciplines of Article III of the GATT 1994 or, conversely, whether the measures provide subsidies to domestic producers and are therefore subject to the disciplines of the SCM Agreement.

7. For these reasons, Brazil respectfully requests that the Appellate Body *reverse* the Panel's interpretative finding, in paragraphs 7.87, 8.3, and 8.14 of the Panel Report, 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. As a result, Brazil also requests that the Appellate Body *reverse* all of the Panel's consequential findings to this effect in paragraphs 7.93, 7.184, 7.631, and 7.696 of the Panel Report.

8. Brazil respectfully requests that the Appellate Body *find* that the Panel erred by failing to determine, in the first instance, whether the measures at issue are product-related measures subject to the disciplines of Article III of the GATT 1994 or, conversely, whether the measures provide subsidies to domestic producers and are therefore subject to the disciplines of the SCM Agreement.

9. Consequently, Brazil also requests that the Appellate Body *reverse* the Panel's findings in paragraphs 7.174, 7.318, 7.319, 7.688, 7.772, 7.773, 8.5(a), 8.5(b), 8.6(a), 8.6(b), 8.16(a), 8.16(c), 8.17(a), and 8.17(c) of the Panel Report that the ICT programmes and INOVAR-AUTO are inconsistent with Articles III:2 and III:4 of the GATT 1994. The Appellate Body should also *reverse* the Panel's findings in paragraphs 7.365, 7.806, 8.5(d), 8.6(d), 8.16(e), and 8.17(e) of the Panel Report that the ICT programmes and INOVAR-AUTO are inconsistent with Article 2.1 of the TRIMs Agreement.

II. REVIEW OF THE PANEL'S INTERPRETATION AND APPLICATION OF ARTICLE III:2 OF THE GATT 1994 TO THE ICT PROGRAMMES

10. Brazil seeks review by the Appellate Body of the Panel's finding that production-step requirements under the ICT programmes, and the requirement for products to obtain the status of "developed" 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, first sentence, of the GATT 1994. The Panel's errors of law and legal interpretation include:

- The Panel erred in failing to determine that the ICT programmes constitute "payments of subsidies exclusively to domestic producers" within the meaning of Article III:8(b) of the GATT 1994;[4]

[2] See Panel Report, paras. 7.83-7.87.
[3] See Panel Report, para. 7.84.
[4] See Panel Report, paras. 7.77-7.87, 7.93.

- The Panel erred in finding that the complainants had demonstrated that imported products were taxed in excess of domestic like products under the ICT programmes within the meaning of Article III:2;[5]

- The Panel erred in finding that the "cash flow" and the "time-value of money" effects under the ICT programmes result in a higher tax burden on imported intermediate products.[6]

11. For these reasons, Brazil requests further that the Appellate Body *reverse* the Panel's findings in paragraphs 7.174, 8.5(a), and 8.16(a) of the Panel Report that the ICT 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.

12. As a result, Brazil also requests that the Appellate Body *reverse* the Panel's consequential finding in paragraphs 7.365, 8.5(d), and 8.16(e) of the Panel Report that the ICT programmes are inconsistent with Article 2.1 of the TRIMS Agreement.

III. REVIEW OF THE PANEL'S INTERPRETATION AND APPLICATION OF ARTICLE III:4 OF THE GATT 1994 TO THE ICT PROGRAMMES

13. Brazil seeks review by the Appellate Body of the Panel's 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. The Panel's errors of law and legal interpretation include:

- The Panel erred in failing to determine that the ICT programmes constitute "payments of subsidies exclusively to domestic producers" within the meaning of Article III:8(b) of the GATT 1994;[7]

- The Panel erred in finding that the accreditation requirements under the ICT programmes are inconsistent with Article III:4 of the GATT 1994;[8]

- The Panel erred in finding that the ICT programmes are inconsistent with Article III:4 of the GATT 1994 by virtue of purported administrative burdens on intermediate products;[9]

- The Panel erred in finding that the PPBs and other production step requirements under the ICT programmes are inconsistent with Article III:4 of the GATT 1994 because they require the use domestic products.[10]

14. For these reasons, Brazil respectfully requests that the Appellate Body *reverse* the Panel's finding in paragraphs 7.318, 7.319, 8.5(b), and 8.16(c) of the Panel Report 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.

15. As a result, Brazil also requests that the Appellate Body reverse the Panel's consequential finding in paragraphs 7.365, 8.5(d), and 8.16(e) of the Panel Report that the ICT programmes are inconsistent with Article 2.1 of the TRIMS Agreement.

IV. REVIEW OF THE PANEL'S INTERPRETATION AND APPLICATION OF ARTICLE 3.1(B) OF THE SCM AGREEMENT TO THE ICT PROGRAMMES

16. Brazil seeks review by the Appellate Body of the Panel's finding that the ICT programmes provide subsidies that are contingent upon the use of domestic over imported goods under

[5] See Panel Report, para. 7.151.
[6] See Panel Report, paras. 7.170-7.172.
[7] See Panel Report, paras. 7.77-7.87, 7.184.
[8] See Panel Report, para. 7.220-7.225.
[9] See Panel Report, paras. 7.252-7.255.
[10] See Panel Report, paras. 7.288, 7.299-7.301; and 7.311-7-313.

Article 3.1(b) of the SCM Agreement. The Panel's errors of law and legal interpretation include:

- 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;[11]

- The Panel erred in finding that the tax exemptions, reductions and suspensions granted under the ICT programmes are prohibited subsidies within the meaning of Article 3.1(b) of the SCM Agreement;[12]

17. For these reasons, Brazil respectfully requests that the Appellate Body *reverse* the Panel's findings in paragraphs 7.489 and 7.490 that the exemptions, suspensions and reductions of taxes on the sales of intermediate products and on the purchases of inputs by accredited companies under the ICT programmes constitute financial contributions in the form of "government revenue that is otherwise due is foregone or not collected" within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement.

18. Consequently, the Appellate Body should also *reverse* the Panel's finding in paragraphs 7.493 and 7.494 that the exemption, reduction and suspension of taxes on sales of intermediate products and on purchases of inputs by accredited companies under the ICT programmes confer a benefit on the recipient under Article 1.1(b) of the SCM Agreement. As a result, the Appellate Body should also *reverse* the Panel's ultimate conclusion in paragraphs 7.495, 8.5(e), and 8.16(f) that the that the exemption, reduction and suspension of taxes on sales of intermediate products and on purchases of inputs by accredited companies under the ICT programmes constitutes subsidies within the meaning of Article 1 of the SCM Agreement.

19. Brazil further requests that the Appellate Body *reverse* the Panel's finding in paragraphs 7.500, 8.5(e), and 8.16(f) that the exemptions, reductions, and suspensions granted under the ICT programmes are subsidies 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 Article 3.1(b) and 3.2 of the SCM Agreement.

20. Consequently, Brazil also respectfully requests that the Appellate Body *declare moot and of no legal effect* the Panel's recommendation under Article 4.7 of the SCM Agreement that Brazil withdraw the ICT programs in 90 days, as reflected in paragraphs 8.11 and 8.22 of the Panel Report.

V. REVIEW OF THE PANEL'S INTERPRETATION AND APPLICATION OF ARTICLE III:4 OF THE GATT 1994 TO THE INOVAR-AUTO PROGRAMME

21. Brazil seeks review by the Appellate Body of the Panel's finding that certain aspects of the accreditation requirements under the INOVAR-AUTO Programme related to investments in R&D expenditures on engineering, basic industrial technology and to the performance of certain manufacturing steps in Brazil accord less favourable treatment to imported products than that accorded to like domestic products, inconsistently with Article III:4 of the GATT 1994. The Panel's errors of law and legal interpretation include:

- The Panel erred in failing to determine that the INOVAR-AUTO Programme constitutes "payments of subsidies exclusively to domestic producers" within the meaning of Article III:8(b);[13]

[11] See Panel Report, paras. 7.432-7.433, 7.444-7.445; 7.454-7.455; 7.463-7.464; 7.473-7.474; and 7.495.
[12] See Panel Report, paras. 7.274-7.302, 7.319.
[13] See Panel Report, para. 7.696.

- The Panel erred in failing to conclude that because the accreditation requirements under the INOVAR-AUTO Programme do not relate to products, they cannot be *per se* inconsistent with Article III:4 of the GATT 1994 or Article 2.1 of the TRIMs Agreement;[14]

- The Panel erred in finding that accreditation requirements to perform a minimum number of manufacturing steps in Brazil are *per se* inconsistent with Article III:4 of the GATT 1994;[15]

- The Panel erred in finding that the different accreditation processes for companies seeking accreditation as "domestic manufacturers" and companies seeking accreditation as "investors" or "importers/distributors" would *per se* result in less favourable treatment being accorded to imported finished motor vehicles, under Article III:4.[16]

22. For these reasons, Brazil respectfully requests that the Appellate Body *reverse* the Panel's finding, in paragraph 7.696 of the Panel Report, that Article III:8(b) of the GATT 1994 "does not exempt from the disciplines of Article III components of [domestic] production subsidies that introduce product discrimination in the form of less favourable treatment on imported like products."

23. Brazil also requests that the Appellate Body *reverse* the Panel's finding in paragraphs 7.773, 8.6(b) and 8.17(c) of the Panel Report that the accreditation requirements under INOVAR-AUTO to: (a) perform a minimum number of manufacturing steps in Brazil; and (b) invest in R&D in Brazil and make expenditures on engineering, basic industrial technology and capacity-building of suppliers in Brazil accord less favourable treatment to imported products than that accorded to like domestic products, inconsistently with Article III:4 of the GATT 1994.

24. As a result, Brazil requests that the Appellate Body also 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 accreditation requirements are inconsistent with Article 2.1 of the TRIMS Agreement.

25. To 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, Brazil requests that the Appellate Body *reverse* the Panel's findings in paragraphs 7.751, 7.823, 7.847, 8.6(e), and 8.17(f) of the Panel Report that INOVAR-AUTO constitutes a prohibited import substitution subsidy under Article 3.1(b) and 3.2 of the SCM Agreement.

VI. REVIEW OF THE PANEL'S FINDINGS INTERPRETATION AND APPLICATION OF ARTICLES 1.1 AND 3.1(A) OF THE SCM AGREEMENT TO THE TAX SUSPENSIONS GRANTED UNDER THE PEC AND RECAP PROGRAMMES

26. Brazil seeks review by the Appellate Body of the Panel's finding that the tax suspensions granted under the PEC and RECAP programmes 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. The Panel's errors of law and legal interpretation include:

- The Panel erred in failing to use the tax treatment of structural tax accumulators as the benchmark treatment;[17]

- The Panel erred in its comparison of its preferred benchmark treatment with the challenged treatment under PEC and RECAP;[18]

- The Panel erred in finding that "cash availability" and "implicit interest income" are government revenue otherwise due;[19]

[14] See Panel Report, para. 7.70.
[15] See Panel Report, paras. 7.737-7.751.
[16] See Panel Report, paras. 7.658-7.661, 7.732.
[17] See Panel Report, paras. 7.1167, 7.1169, and 7.183.
[18] See Panel Report, paras. 7.1175, 7.1179, 7.1203, 7.1207.
[19] See Panel Report, para. 7.1179, 7.1190, 7.1194.

- The Panel acted inconsistently with Article 11 of the DSU in its assessment of the evidence of export contingency;[20]

27. For these reasons, Brazil respectfully requests that the Appellate Body *reverse* the Panel's conclusions in paragraph 7.1211 of the Panel Report that the PEC and RECAP programmes constitute financial contributions in the form of government revenue that is otherwise due and is foregone or not collected within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement.

28. As a result, the Appellate Body should also *reverse* the Panel's finding in paragraph 7.1212 of the Panel Report that the PEC and RECAP programmes confer a benefit under Article 1.1(b) of the SCM Agreement, and its ultimate conclusion in paragraphs 7.1223, 8.7, and 8.18 that the tax suspensions under the PEC and RECAP programmes constitute subsidies within the meaning of Article 1.1 of the SCM Agreement.

29. Brazil respectfully requests that the Appellate Body *find* that the Panel acted inconsistently with its duty to conduct an objective assessment of the matter under Article 11 of the DSU in examining the evidence on export contingency.

30. Brazil also respectfully requests that the Appellate Body *reverse* the Panel's finding in paragraphs 7.1238, 8.7, and 8.18 that the tax suspensions granted under the PEC and RECAP programmes are subsidies that are contingent upon export performance within the meaning of Article 3.1(a) of the SCM Agreement.

31. As a consequence, Brazil respectfully requests that the Appellate Body declare *moot and of no legal effect* the Panel's recommendation under Article 4.7 of the SCM Agreement in paragraphs 8.11 and 8.22 that Brazil withdraws these alleged subsidies within 90 days.

VII. REVIEW OF THE PANEL'S INTERPRETATION AND APPLICATION OF THE ENABLING CLAUSE TO THE TAX TREATMENT OF MERCOSUR COUNTRIES UNDER INOVAR-AUTO

32. Brazil seeks review by the Appellate Body of the Panel's finding that the complainants' claims under Article I:1 of the GATT 1994 were within the Panel's terms of reference, that the differential tax treatment accorded to Mexico, Argentina, and Uruguay under INOVAR-AUTO was not properly notified to the WTO, and that this differential tax treatment is not justified under paragraphs 2(b) and 2(c) of the Enabling Clause. The Panel's errors of law and legal interpretation include:

- The Panel erred in finding that the complainants were not on notice that the differential tax treatment at issue was adopted (and, in Brazil's view, justified) under the Enabling Clause, such that the complainants were required to invoke the Enabling Clause in their panel requests in order for the complainants claims under Article I:1 of the GATT 1994 to be within the Panel's terms of reference;[21]

- The Panel erred in finding that Brazil had not properly notified the differential tax treatment at issue under paragraph 4(a) of the Enabling Clause;[22]

- The Panel erred in finding that for a non-tariff measure to be within the scope of paragraph 2(b) of the Enabling Clause, it 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;[23]

- The Panel erred by conflating the substantive analysis under paragraph 2(c) with the obligation to notify under paragraph 4(a), concluding that the differential tax treatment at issue is not justified under paragraph 2(c) of the Enabling Clause for the same reason that it concluded that the differential tax treatment was not properly notified.[24]

[20] See Panel Report, para. 7.1234.
[21] See Panel Report, paras. 7.1076-7.1083, 7.1108-7.1115, 7.1120.
[22] See Panel Report, paras. 7.1076-7.1083, 7.1108-7.1115, 7.1119.
[23] See Panel Report, paras. 7.1088-7.1097.
[24] See Panel Report, paras. 7.1108-7.1118.

33. For these reasons, Brazil respectfully requests that the Appellate Body *reverse* the Panel's conclusions in paragraphs 7.1083, 7.1120, 8.6(h), and 8.17(i) that the complainants did not have an obligation to invoke the Enabling Clause in their panel requests, and reverse the Panel's consequential conclusion that the complaints' claims under Article I:1 of the GATT 1994 were within the Panel's terms of reference.

34. Consequently, Brazil requests that the Appellate Body *declare moot and of no legal effect* the Panel's findings under paragraphs 8.6(g) and 8.17(h) that the tax reductions accorded to imported products from Argentina, Mexico and Uruguay under INOVAR-AUTO 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.

35. In case the Appellate Body were to find that the complainants' claim under Article I:1 was properly within the Panel's terms of reference, Brazil respectfully requests that the Appellate Body *reverse* the Panel's conclusions in paragraphs 7.1079, 7.1081, 7.1083, 7.115 and 7.119 that the differential tax treatment at issue was not properly notified under paragraph 4(a) of the Enabling Clause.

36. Brazil respectfully requests that the Appellate Body *reverse* the Panel's conclusion in paragraphs 7.1096 that a non-tariff measure within the scope of paragraph 2(b) of the Enabling Clause 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. Brazil also requests that the Appellate Body *reverse* the Panel's consequential finding in paragraphs 7.1097, 8.6(i), and 8.17(j) 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.

37. Brazil further requests that the Appellate Body *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.

38. Brazil respectfully requests that the Appellate Body *reverse* the Panel's conclusion in paragraph 7.1118 that Brazil did not meet its burden of proof in respect of the substantive requirements of paragraph 2(c) of the Enabling Clause, and the Panel's ultimate conclusion in paragraphs 8.6(i) and 8.17(j) 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.

39. Brazil further requests that the Appellate Body *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.

VIII. REVIEW OF THE PANEL'S RECOMMENDATION UNDER ARTICLE 4.7 OF THE SCM AGREEMENT

40. If the Appellate Body were to uphold 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, Brazil then seeks review by the Appellate Body of the Panel's recommendation that Brazil withdraw the subsidies identified in paragraphs 8.5(e), 8.6(e), 8.7, 8.16(f), 8.17(f), and 8.18 of the Panel's Report within 90 days.[25] The Panel's errors of law and legal interpretation include:

- The Panel erred by failing to provide "reasoned and adequate explanations and coherent reasoning" for its 90-day recommendation, as required by Article 11 of the DSU;[26]

[25] Brazil notes that the Panel refers to the prohibited subsidies in paragraphs 8.5(f) and paragraphs 8.6(f) in paragraphs 8.11 and 8.22 of the Panel Report, but the relevant paragraphs are in fact 8.5(e) and 8.6(e).

[26] See Panel Report, para. 6.17.

- The Panel erred by failing to provide the "basic rationale" for its 90-day recommendation, as required by Article 12.7 of the DSU;[27]

41. For these reasons, Brazil respectfully requests that the Appellate Body *find* that the Panel acted inconsistently with Articles 11 and 12.7 of the DSU in making its recommendations under Article 4.7 of the SCM Agreement and *reverse* the Panel's recommendation in paragraphs 8.11 and 8.22 of the Panel Report that Brazil withdraw the subsidies identified in paragraphs 8.5(e), 8.6(e), 8.7, 8.16(f), 8.17(f), and 8.18 within 90 days.

42. Brazil further requests that the Appellate Body *complete the analysis*, and specify a time period of 18 months for implementation pursuant to Article 4.7 of the SCM Agreement.

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[27] See Panel Report, para. 6.17.