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BRAZIL – CERTAIN MEASURES CONCERNING TAXATION AND CHARGES

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Reports of the Appellate Body

Addendum

This *Addendum* contains Annexes A to D to the Report of the Appellate Body circulated as documents WT/DS472/AB/R, WT/DS497/AB/R.

The Notices of Appeal and Other Appeal and the executive summaries of written submissions contained in this Addendum are attached as they were received from the participants and third participants. The content has not been revised or edited by the Appellate Body, except that paragraph and footnote numbers that did not start at one in the original may have been re-numbered to do so, and the text may have been formatted in order to adhere to WTO style. The executive summaries do not serve as substitutes for the submissions of the participants and third participants in the Appellate Body's examination of the appeal.

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NOTICES OF APPEAL AND OTHER APPEALS

ANNEX A-1

BRAZIL'S NOTICE OF APPEAL*

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.

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

* This document, dated 28 September 2017, was circulated to Members as document WT/DS472/8 - WT/DS497/6.

[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.

[2] See Panel Report, paras. 7.83-7.87.

[3] See Panel Report, para. 7.84.

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]

- 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,

[4] See Panel Report, paras. 7.77-7.87, 7.93.
[5] See Panel Report, para. 7.151.
[6] See Panel Report, paras. 7.170-7.172.

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

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.

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[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.
[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.

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]

- 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

[13] See Panel Report, para. 7.696.
[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.

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]
- 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.

[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.
[20] See Panel Report, para. 7.1234.

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]

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

[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.

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]

- 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.

[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.

[27] See Panel Report, para. 6.17.

ANNEX A-2

THE EUROPEAN UNION'S NOTICE OF OTHER APPEAL*

Pursuant to Article 16.4 and Article 17.1 of DSU, the European Union hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel in the dispute *Brazil – Certain Measures Concerning Taxation and Charges* (WT/DS472). Pursuant to Rule 23(1) of the Working Procedures for Appellate Review, the European Union simultaneously files this Notice of Other Appeal with the Appellate Body Secretariat.

For the reasons to be further elaborated in its submissions to the Appellate Body, the European Union appeals, and requests the Appellate Body to reverse or modify the findings and conclusions of the Panel with respect to the errors of law and legal interpretations contained in the Panel Report described below, and where indicated to complete the analysis on the basis of the Panel's findings and uncontested facts on the record:[1]

1. The Panel failed to make an objective assessment of the matter before it in accordance with Article 11 of DSU by exercising false judicial economy in relation to the European Union's request to make findings also on the in-house scenario in the context of the ICT and INOVAR-AUTO programmes.[2] Thus, the European Union requests the Appellate Body *to reverse* the Panel's findings, *to complete the legal analysis* with regard to the in-house scenario and *to find* that the production-step requirements contained in the ICT and INOVAR-AUTO programmes are inconsistent with Articles III:4 of GATT 1994, Article 2.1 of TRIMS Agreement and Article 3.1(b) of SCM Agreement also under the in-house scenario.

2. In the alternative, were the Appellate Body to consider that the Panel correctly exercised judicial economy when failing to make specific findings on the in-house scenario, the European Union requests the Appellate Body *to 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 contained in paragraphs 7.298-7.314 and 7.746-7.751 of its Report, 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 the Panel had already found that those steps are *per se* inconsistent with the covered agreements, since they make an advantage/subsidy contingent upon the use of domestic over imported goods, regardless of whether those domestic goods are manufactured by the accredited company or a third party.[3]

3. Finally, the European Union makes a subordinate claim of error, subject to the Appellate Body rejecting both the first claim of error formulated by the European Union (that the Panel exercised false judicial economy) and the alternative claim of appeal. In that case, the European Union requests the Appellate Body to find that the Panel, by failing to consider the European Union's claims under Article III:4 of GATT 1994, Article 2.1 of TRIMS Agreement and Article 3.1(b) of 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.[4] Accordingly, the European Union requests the Appellate Body *to reverse* the Panel's findings, *to complete the legal analysis* with regard to the in-house scenario and *to find* that the production-step requirements contained in the ICT and INOVAR-AUTO programmes are inconsistent with Articles III:4 of GATT 1994, Article 2.1 of TRIMS Agreement and Article 3.1(b) of SCM Agreement also under the in-house scenario.

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* This document, dated 3 October 2017, was circulated to Members as document WT/DS472/9.

[1] Pursuant to Rule 23(2)(c)(ii)(C) of the Working Procedures for Appellate Review this Notice of Other Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to the ability of the European Union to refer to other paragraphs of the Panel Report in the context of its appeal.

[2] Panel Report, paras. 6.10, 6.11 and 6.13, 7.314, 7.749, and 8.5.

[3] See Panel Report, paras. 6.11, final sentence, 7.292, footnote 683, 7.319, penultimate sentence, 7.500 and 8.5.

[4] Panel Report, paras. 6.10, 6.11 and 6.13, 7.314, 7.749, and 8.5.

ANNEX A-3

JAPAN'S NOTICE OF OTHER APPEAL[*]

Pursuant to Article 16.4 and Article 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 23 of the *Working Procedures for Appellate Review*, Japan hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report in *Brazil – Certain Measures Concerning Taxation and Charges* (WT/DS497/R) and certain legal interpretations developed by the Panel in this dispute.

In particular, Japan seeks review by the Appellate Body of the Panel's findings that it did not need to review the WTO-consistency of the challenged INOVAR-AUTO and ICT programmes under an "in-house" scenario. The Panel's findings to this effect are in error and are based on an erroneous interpretation and application of Article 11 of the DSU, by erroneously exercising judicial economy not to extend findings to the so-called "in-house" scenario. Alternatively, the Panel failed to provide "coherent reasoning as required under Article 11 of the DSU. The paragraphs relating to these errors include paragraphs 6.11, 7.302, 7.308, 7.314 and 7.749 of the Panel Report.

Japan respectfully requests the Appellate Body to reverse and modify the related findings, conclusions and recommendations of the Panel. Moreover, to the extent that it reverses the Panel's findings in this respect, Japan also requests that the Appellate Body complete the legal analysis by extending the Panel's findings regarding the "outsourcing" scenario to the "in-house" scenario, and finding that the accreditation and production step requirements under the INOVAR-AUTO programme and ICT programmes "as a whole" – i.e., under both the "outsourcing" and "in-house" scenarios – are inconsistent with Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement.

In the alternative, should the Appellate Body consider that the Panel did not exercise judicial economy, Japan respectfully requests the Appellate Body to review, pursuant to Article 17.6 of DSU, the legal interpretations developed by the Panel and modify, pursuant to Article 17.13 of the DSU, the findings contained in paragraphs 7.298-7.314 and 7.746-7.751 of the Report, to the extent that they may be understood as referring solely to the "outsourcing" scenario, and clarify that the Panel's findings of the WTO-inconsistency of the challenged INOVAR-AUTO programme and ICT programmes are indeed not limited to the "outsourcing" scenario, but that the Panel made a finding with respect to the accreditation requirement under INOVAR-AUTO programme as a whole, as well as the production-step requirements of the ICT programmes as a whole. To this end, Japan also requests that the Appellate Body complete the analysis, where appropriate.

[*] This document, dated 3 October 2017, was circulated to Members as document WT/DS497/7.

ANNEX B

ARGUMENTS OF THE PARTICIPANTS

ANNEX B-1

EXECUTIVE SUMMARY OF BRAZIL'S APPELLANT'S SUBMISSION*

I. Introduction

1. With the present appeal, Brazil requests that the Appellate Body review and reverse a number of issues of law and legal interpretation contained in Panel Report. Beyond the specific legal provisions under discussion, this appeal concerns more broadly the ability of WTO Members to provide subsidies to domestic producers.

2. Central to the resolution of this dispute is a proper understanding of the role that Article III:8(b) of the GATT 1994 plays in delineating the product-related disciplines of Article III from the subsidy-related disciplines of the SCM Agreement. The Appellate Body recently observed in *US – Tax Incentives* that "Article III:8(b) of the GATT 1994 exempts from the national treatment obligation in Article III 'the payment of subsidies exclusively to domestic producers'."[1] In diametric opposition to this conclusion, the Panel in the present dispute 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."[2]

3. In effect, the Panel interpreted Article III:8(b) of the GATT 1994 as serving only one purpose: to "make[] explicit" that the non-discrimination provisions of Article III do "not require subsidization of foreign producers in tandem with domestic producers".[3] While Article III:8(b) does serve that rather axiomatic purpose, Article III:8(b) also makes clear that subsidies provided to domestic producers, including the effects that those subsidies have on the conditions of competition for domestic versus imported products, are not a basis for finding a violation of the national treatment obligations in Article III.

4. Moreover, and contrary to at least one implication of the Panel's analysis, it is immaterial for purposes of Article III:8(b) what type of subsidy a Member chooses to provide exclusively to domestic producers. Article III:8(b) of the GATT 1994 does not distinguish among different types of producer subsidies. The exemption or remission of indirect taxes—the type of subsidies at issue in the present dispute—is undoubtedly a "subsidy" within the meaning of Article 1 of the SCM Agreement. In addition, the Appellate Body has previously found that the ordinary meaning of the term "payment" encompasses revenue foregone, i.e. the exemption or remission of a tax or other revenue owed to the government. The "payment of subsidies exclusively to domestic producers" under Article III:8(b) therefore includes the exemption or remission of indirect taxes.

5. A proper application of Article III:8(b) of the GATT 1994 would have led the Panel to the conclusion that the measures at issue are producer subsidy measures, not measures that discriminate against imported products on the basis of their origin. The challenged measures provide for the exemption or remission of taxes based on whether a producer carries out certain production steps in Brazil. A producer that manufactures a covered product using 100% imported components will obtain the subsidy if it carries out the required production steps in Brazil, while a producer that manufactures the same product using 100% domestic components will *not* obtain the subsidy if it does not carry out the required production steps in Brazil.

6. The Panel committed the same basic errors of interpretation and application in its assessment of the complainants' claims under Article 3.1(b) of the SCM Agreement pertaining to the ICT programmes. Unable to identify any respect in which the ICT programmes condition the provision of a subsidy upon the use of domestic over imported goods, either in the text of the measures at issue or by necessary implication thereof, the Panel based its finding of prohibited import substitution entirely on the effect that the subsidies at issue might have on producers' sourcing decisions. The Appellate Body expressly rejected this line of reasoning in *US - Tax Incentives*, ruling that the fact

* Total word count: 5542
[1] Appellate Body Report, *US – Tax Incentives*, para. 5.16.
[2] Panel Report, para. 7.87.
[3] Ibid. para. 7.79.

that a domestic production subsidy might affect input sourcing decisions is not a sufficient basis to conclude that it is contingent upon the use of domestic over imported goods.

7. A proper delineation of the national treatment obligations of Article III of the GATT 1994 and the subsidy disciplines of the SCM Agreement is essential to preserving the rights that the covered agreements reserve for Members to subsidize domestic producers. The Panel Report in the present dispute, if adopted, would impermissibly constrain the right of Members to subsidize domestic production. It would, moreover, result in arbitrary distinctions among the *means* by which Members subsidize domestic production, favouring methods of subsidization more commonly practiced by developed Members (such as outright grants) over methods of subsidization that are more readily available to developing Members (such as, in this case, the exemption or remission of indirect taxes based on whether certain production steps take place within the country).

8. These are not the only important systemic issues presented by this appeal. Another example relates to the Panel's finding that the ICT programmes and the PEC and RECAP programmes result in "revenue foregone" within the meaning of the SCM Agreement, based entirely on the flawed notion that "implicit interest income" is tax revenue that is "due" to a government when a government decides, for reasons of tax administration, either to collect a tax at a later point in time or to forgo the collection of a tax that the government would later need to refund. This interpretation, if accepted, would draw the covered agreements into the realm of tax administration in ways that would have far-reaching consequences for WTO Members.

II. The Panel Erred in Its Interpretation and Application of Article III:8(b) of the GATT 1994 to the ICT programmes and to INOVAR-AUTO and Its Relationship with the Other Provisions of Article III of the GATT 1994

9. The Panel erred in its interpretation and application of Article III:8(b) of the GATT 1994 to the ICT programmes and to INOVAR-AUTO by failing to determine, at the threshold, that these measures are producer subsidy measures subject to the disciplines of the SCM Agreement, rather than to the product-related disciplines of Article III of the GATT 1994.

10. Article III:8(b) makes clear that subsidies provided to domestic producers, *including* the effects that those subsidies might have on the conditions of competition for domestic versus imported *products*, are not a basis for finding a violation of the product-related disciplines of Article III. Production subsidies and their effects are to be analysed under the SCM Agreement, not under Article III of the GATT 1994.

11. In contrast, the concern with origin-based discrimination is reflected in Articles III:2 and III:4 of the GATT 1994. In both cases, the discipline applies to *products*, and guards against discriminatory treatment of imported products ("products of the territory of any contracting party imported …") relative to products of national origin ("domestic products", "products of national origin"). Articles III:2 and III:4 do not apply, by force of Article III:8(b), to differences in treatment that may result from payment of subsidies exclusively to domestic producers.

12. The Panel conflated 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. A harmonious interpretation of these different provisions requires any panel evaluating claims under Article III to determine, in the first instance, whether the measure at issue is a product-related measure subject to the disciplines of Article III or, conversely, whether that measure provides a subsidy to domestic producers under Article III:8(b), and is therefore subject to the disciplines of the SCM Agreement.

13. The Panel did not undertake this threshold inquiry. It simply assumed that, because the challenged programmes resulted in imported products not having access to the subsidy provided therein to domestic producers, the subsidy would not be exempted from the national treatment obligations of Article III and, therefore, would automatically constitute a violation of Articles III:2 and III:4 of the GATT 1994 and of Article 2.1 of TRIMs.

14. Accordingly, the Appellate Body should *reverse* the Panel's interpretative finding that measures providing subsidies exclusively to domestic producers "are not *per se* exempted from the

disciplines of Article III of the GATT 1994"[4], and to *reverse* its ultimate conclusion that, because the ICT programmes and INOVAR-AUTO are not available to foreign *producers*, they are necessarily inconsistent with Articles III:2 and III:4 of the GATT 1994, and Article 2.1 of the TRIMs Agreement.[5]

III. The Panel Erred in Finding that the ICT programmes Are Inconsistent with Article III:2, First Sentence, of the GATT 1994

15. The Panel erred in finding that the ICT programmes result in imported finished and intermediate products being subject to taxation in excess of domestic like products, within the meaning of Article III:2, first sentence, of the GATT 1994, in three distinct respects.

16. First, the Panel erred in failing to establish, at the threshold, that the ICT programmes constitute the "payment of subsidies to domestic producers" under Article III:8(b) of the GATT 1994 and therefore are not subject to the disciplines of Article III:2 of the GATT 1994. In ruling that Article III:8(b) authorized the provision of domestic production subsidies "so long as they do not have any component that introduces discrimination between imported and domestic products"[6], the Panel effectively held that such subsidies can *never* take the form of reductions or exemptions of indirect taxes. However, the terms "subsidies" in Article III:8(b) encompasses all types of subsidies listed in Article 1.1 of the SCM Agreement, including foregoing of government revenue otherwise due under Article 1.1(a)(1)(ii) of the SCM Agreement, in the form of the exemption or remission of indirect taxes. Moreover, tax expenditures such as the exemption or remission of indirect taxes unquestionably constitute a "payment" of subsidies under Article III:8(b), and the negotiating history referred to the Panel is of little interpretative value considering that it precedes the definition of subsidies contained in the SCM Agreement.

17. In addition, the Panel failed to recognize that the list of measures in Article III:8(b) is merely illustrative, and does not exhaustively define the type of permissible domestic production subsidies. The Panel also erred in finding that Articles III:8(b) and Article III:2 have overlapping scopes of application. Contrary to the Panel's finding to this effect, the Appellate Body expressly held in *US – Tax Incentives* that Article III:8(b) *exempts* domestic production subsidies from the product disciplines of Article III.

18. Second, the Panel erred in finding that the complainants had established that the ICT programmes result in imported *finished* products being subject to taxes in excess of domestic like products. Setting aside the Panel's failure to determine the threshold applicability of Article III:8(b) to the ICT programmes, it was still incumbent upon the Panel to hold the complainants to their burden of proof of establishing that the ICT programmes result in *finished* imported products being subject to taxation in excess of domestic like products. The Panel simply assumed that, because foreign producers are ineligible for the subsidies, the ICT programmes *de jure* discriminated against imported products. However, because importers are also subject to the application of the debit/credit rule under Brazil's non-cumulative tax system, the payment of taxes on purchases of non-incentivized products generates a corresponding credit that may be offset against the importer's liability. Accordingly, the fact that foreign producers are ineligible for the tax incentives does not establish, without more, that imported finished products are taxed in excess of domestic like products.

19. Third and finally, the Panel erred in finding that the ICT programmes result in imported *intermediate* ICT products being taxed in excess of domestic like products by virtue of "cash flow" and "time value of money" effects allegedly generated on the purchase of incentivized products. At most, such unsubstantiated effects would benefit *producers*, and the complainants did not produce, and the Panel did not examine, any evidence tending to demonstrate that these effects resulted in higher taxation of imported intermediate *products*. Under Brazil's non-cumulative tax system, the relevant taxes are not paid upfront but are rather levied each month pursuant to the credits and debits recorded in the taxpayer's accounting books. As a general rule all credits are offset against debits in the same taxation period, and are neither tax nor product-specific. Thus the purchase of

[4] Panel Report, para. 7.87.
[5] Panel Report, paras. paragraphs 7.174, 7.318, 7.319, 7.365, 7.688, 7.772, 7.773, 7.806, 8.5(a), 8.5(b), 8.5(d), 8.6(a), 8.6(b) and 8.6(d).
[6] Panel Report, para. 7.83.

non-incentivized products neither reduces the availability of cash flow by the purchaser, nor does the value of the tax credit diminishes over time.

20. For these reasons, the Appellate Body should *reverse* the Panel's finding that the ICT programmes result in taxation of imported like products in excess of domestic like products, inconsistently with Article III:2, first sentence, of the GATT 1994.[7]

IV. The Panel Erred in Finding that the ICT Programmes Accord to Imported Products Treatment Less Favourable than that Accorded to Like Domestic Products, Inconsistent with Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement

21. Since the Panel erred in failing to determine the threshold applicability of Article III:8(b) of the GATT 1994 to the ICT programmes, it misconstrued the relationship of that provision with Article III:4 of the GATT 1994. Consistent with the analytical framework adopted by the Appellate Body in *US – Tax Incentives* and by previous panels, domestic production subsidies are *exempt* from the product disciplines of Article III:4 of the GATT 1994. Under the Panel's erroneous interpretation, it is unclear under what circumstances a WTO Member would *ever* be able to provide subsidies that do not distort the conditions of competition in the marketplace to the detriment of imported products. Quite the contrary, as the Panel itself recognized, the very purpose of providing a domestic production subsidy is to provide a competitive advantage exclusively to domestic producers.

22. For this reason, the Panel erred in finding that accreditation requirements under the ICT programmes are inconsistent with Article III:4 because they result in foreign producers not being eligible to the subsidies. A corollary of Article III:8(b) is that only producers that produce domestically will benefit from the subsidies. The accreditation requirements merely define the producers that are eligible to the subsidies (i.e. those that undertake certain production steps in Brazil), and in and of itself do not reflect any regulatory discrimination between imported and domestic products. In this respect, the Panel impermissibly conflated tax discrimination under Article III:2 with regulatory discrimination under Article III:4, insofar as purported discrimination really stems from the reduction or exemption of indirect taxes for eligible producers. Moreover, because the accreditation requirements apply at the *producer* level pursuant to the authorization contained in Article III:8(b), by definition they cannot be implicated by the product disciplines of Article III:4 of the GATT 1994.

23. The Panel's finding that the ICT programmes are inconsistent with Article III:4 because imported intermediate products are purportedly subject to more onerous administrative burdens is also in error, and reflects a misapprehension of Brazil's non-cumulative tax system. Regardless of whether they purchase incentivized or non-incentivized products, all companies in Brazil are required to keep and operate a ledger in which all purchases of inputs and sales of final goods are recorded, and debits and credits are offset. The suspension, exemption, or reduction of indirect taxes under the ICT programmes do not alter in any way the administrative burden incurred by companies to assess their monthly tax liabilities, irrespective of their sourcing decisions.

24. Finally, the Panel erred in finding that the PPBs and other production-step requirements are tantamount to a requirement to use domestic goods within the meaning of Article III:4 of the GATT 1994. The PPBs and other production step requirements are entirely silent as to the origin of the inputs used in the production process. A producer using 100% of imported components will be eligible for the subsidies, provided that it undertakes the relevant production steps in Brazil. The Panel's rationale that production step requirements are tantamount to a requirement to use domestic goods in respect of a producer's component or sub-assemblies sourcing decisions has been expressly addressed – and rejected – by the Appellate Body in *US – Tax Incentives*. In that dispute, the Appellate Body expressly held that domestic 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."[8] For this reason, the "siting criterion" imposed by the production step requirements under the ICT programmes, even when it involves the outsourcing of certain steps, does not constitute a requirement to use domestic

[7] Panel Report, paras. 7.174, 8.5(a), and 8.16(a).
[8] Appellate Body Report, *US – Tax Incentives*, para. 5.15.

products to the detriment of imported products in a manner inconsistent with Article III:4 of the GATT 1994.

25. Accordingly, the Appellate Body should *reverse* the Panel's finding that in respect of (i) accreditation requirements; (ii) purported lower administrative burdens on purchases of domestic intermediate products; and (iii) PPBs and other production step requirements, the ICT programmes accord to imported products treatment less favourable than that accorded to domestic like products, inconsistently with Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement.[9]

V. The Panel Erred in Finding that the ICT programmes Provide Subsidies that Are Contingent upon the Use of Domestic over Imported Goods under Article 3.1(b) of the SCM Agreement

26. The Panel erred in finding that the ICT programmes provide prohibited import substitution subsidies under Article 3.1(b) of the SCM Agreement in two respects.

27. First, the Panel erred in finding that the exemptions, suspensions and reductions of taxes provided under the ICT programmes on the sale of intermediate goods and on the purchase of raw materials, intermediate goods, packaging materials, inputs, capital goods and computational tools (collectively, "inputs") provide a subsidy under Article 1.1 of the SCM Agreement. More specifically, the Panel erred in finding that the ICT programmes provide a financial contribution in the form of government revenue that is otherwise due and is foregone and not collected under Article 1.1(a)(1)(ii) of the SCM Agreement. By focusing on the exceptional scenario in which the taxpayer is unable to fully offset the total amount of taxes paid in the same taxation period, the Panel impermissibly failed to compare the treatment of the group of taxpayers in the benchmark treatment with the treatment of taxpayers under the ICT programmes. Moreover, the "implicit interest income" that the Brazilian government allegedly foregoes under the ICT programmes as compared to the situation of that subset of taxpayers is not a "government revenue" that is "due" within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement.

28. Second, the Panel erred in finding that the ICT programmes are contingent upon the use of domestic over imported goods under Article 3.1(b) of the SCM Agreement because the PPBs and other production step requirements imply a contingency upon production in Brazil. As the Appellate Body held in *US – Tax Incentives*, "*something more than mere subsidization of domestic production* is required for finding an import substitution subsidy."[10] The contingencies set out in the PPBs and similar production step requirements relate to the location of certain manufacturing operations in Brazil, and do not prevent the possibility of using imported inputs in the manufacturing process.

29. The Panel reasoned that because PPBs provide that outsourced components must be produced domestically, such condition imposes, in respect of the accredited producer of the incentivized finished product, a requirement to use domestic over imported goods. This line of argument was expressly addressed and rejected by the Appellate Body in *US – Tax Incentives*, where the Appellate Body categorically held that, in situations where both an input and the finished product are subsidized, the consequences of a requirement to produce an input domestically in respect of the producer's input-sourcing decisions, and the fact that the producer is likely to use a domestic product in its downstream production activities is insufficient, without more, to establish a condition requiring the use of domestic over imported goods under Article 3.1(b) of the SCM Agreement.[11]

30. For these reasons, the Appellate Body should *reverse* the Panel's finding that the exemptions, reductions, and suspensions of taxes granted under the ICT programmes are subsidies contingent upon the use of domestic over imported goods within the meaning of Articles 3.1(b) and 3.2 of the SCM Agreement.[12]

[9] Panel Report, paras. 7.318, 7.319, 7.365, 8.5(b), 8.5(d), 8.16(c) and 8.16(e).
[10] Appellate Body Report, *US – Tax Incentives*, para. 5.16. (emphasis added)
[11] See Appellate Body Report, *US – Tax Incentives*, para. 5.49; see also ibid. para. 5.76.
[12] Panel Report, paras. 7.500, 8.5(e) and 8.16(f).

VI. The Panel Erred in Finding that Certain Aspects of the Accreditation Requirements under INOVAR-AUTO 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 and Article 2.1 of the TRIMs Agreement

31. Similar to the Panel's finding in respect of the ICT programmes, the Panel's finding that certain accreditation requirements under INOVAR-AUTO are inconsistent with Article III:4 of the GATT 1994 is based on the incorrect assumption that Article III:8(b) does not exempt domestic production subsidies from the product disciplines of Article III. In so finding, the Panel failed to recognize that Articles III:8(b) and III:4 have distinct scopes of application. While the former concerns producer subsidy measures, the latter concern regulatory discrimination as between imported and domestic *products*. Consequently, any adverse effects that domestic production subsidies may have on the competitive opportunities for imported products should fall within the purview of Part III of the SCM Agreement.

32. The Panel's failure to determine, at the threshold, that INOVAR-AUTO constituted a domestic production subsidy under Article III:8(b) effectively converted permissible domestic production subsidies into *per se* violations of Article III:4 of the GATT 1994. Had the Panel properly interpreted and applied Articles III:8(b) and III:4 of the GATT 1944 to INOVAR-AUTO, it would have concluded that the conditioning of domestic production subsidies to the performance of certain production steps in Brazil is insufficient, without more, to establish regulatory discrimination under Article III:4 of the GATT 1994.

33. Moreover, the requirement to perform certain manufacturing steps in Brazil and to invest in R&D and/or engineering in Brazil in order to benefit from the tax incentives established in the INOVAR-AUTO programme are imposed on *producers*, and not on the products themselves. As such, these requirements cannot be deemed in violation of the product disciplines of Article III:4 of the GATT 1994.

34. The Panel also erred in finding that different accreditation requirements for domestic manufacturers vis-à-vis the categories of "investors" or "importer/distributors" entail a more burdensome requirement in respect of imported products. The requirement that domestic producers undertake certain manufacturing or investment activities in Brazil is a natural corollary of Brazil's right under Article III:8(b) of the GATT to pay subsidies exclusively to domestic producers. The Panel impermissibly undertook a quantitative assessment of the INOVAR-AUTO requirements, rather than a qualitative assessment. Had the Panel adopted a qualitative approach instead, it would have recognized that the differences set forth in the INOVAR-AUTO programme with respect to "companies that manufacture vehicles in Brazil" and "companies that do not manufacture but market vehicles in Brazil" are not discriminatory because the differences are inherent to the level of contribution made by both manufacturing and distributing companies to the programme's objectives.

35. For these reasons, the Appellate Body should *reverse* the Panel's finding 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 and Article 2.1 of the TRIMs Agreement.[13]

36. Moreover, to the extent that the Panel concluded that domestic production requirements alone are sufficient to establish that INOVAR-AUTO is "contingent upon the use of domestic over imported goods" within the meaning of Article 3.1(b) of the SCM Agreement, Brazil further requests that the Appellate Body *reverse* the Panel's finding that INOVAR-AUTO is a prohibited import substitution subsidies under Article 3.1(b) and 3.2 of the SCM Agreement.[14]

[13] Panel Report, paras. 7.773, 7.806, 8.6(b), 8.6(d), 8.17(c) and 8.17(e).
[14] Panel Report, paras. 7.751, 7.823, 7.847, 8.6(e), and 8.17(f).

VII. The Panel Erred in Finding that the Tax Suspensions under the PEC and RECAP Programmes Are Subsidies Contingent Upon Export Performance Under Article 3.1(a) of the SCM Agreement

37. The Panel erred in finding that PEC and RECAP provide subsidies 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, in three different respects.

38. First, the Panel erred in failing to use the treatment of structural credit accumulators as the benchmark treatment for comparison with the tax treatment under the PEC and RECAP programmes. The Panel erroneously sought to ascertain whether a "general rule" of taxation existed under Brazilian law pursuant to which *all* suspensions and exemptions of taxes on inputs and capital goods is directly linked to the problem of structural credit accumulation, rather than ascertain the "comparably situated taxpayers" that make up the relevant normative benchmark for comparison. Had the Panel applied a proper analytical framework, it would have concluded that all structural credit accumulators are comparably situated, as it is evident from the relevant statute. The fact that sectors whose products were formerly subject to high taxation may also be eligible for tax suspensions confirms rather than disproves the existence of this normative benchmark, insofar as companies in those sectors became structural tax credit accumulators by virtue of exemptions or suspensions granted in other programmes.

39. Second, the Panel erred in failing to compare the tax treatment applicable to the *group* of taxpayers subject to the benchmark treatment with the tax treatment of the *group* of taxpayers under PEC and RECAP. The Panel arbitrarily distinguished between taxpayers subject to the benchmark treatment, disregarding the overwhelming majority of taxpayers that are able to fully offset their tax credits in the same taxation period, focusing instead on the small subset of taxpayers who are unable to do so. In doing so, the Panel found the foregoing of revenue where there is none.

40. Third, the Panel erred in finding that alleged "implicit interest income" that the Brazilian government purportedly "foregoes" under PEC and RECAP constitutes "government revenue" that is otherwise "due" and foregone or not collected under Article 1.1(a)(1)(ii) of the SCM Agreement. The terms "government revenue" that is "due" refer to government income that is owed or payable to the government as an obligation or debt by the taxpayer (such as taxes or charges), and does not encompass any "implicit interest" that the Brazilian Government supposedly "foregoes" as a result of tax administration measures which do not alter the amount of taxes due.

41. Should the Appellate Body consider nonetheless that PEC and RECAP provide a subsidy within the meaning of Article 1.1 of the SCM Agreement, Brazil then claims that the Panel acted inconsistently with Article 11 of the DSU in its assessment of the evidence on export contingency, and therefore erred in finding that the PEC and RECAP programmes are contingent upon export performance within the meaning of Article 3.1(a) of the SCM Agreement.

42. On the basis of the foregoing, the Appellate Body should *reverse* the Panel's finding that PEC and RECAP are subsidies contingent upon export performance under Articles 3.1(a) and 3.2 of the SCM Agreement.[15]

VIII. The Panel Erroneously Found that the Tax Reduction Accorded to Imports from Argentina, Mexico and Uruguay under INOVAR-AUTO Is Not Justified under Paragraphs 2(b) or 2(c) of the Enabling Clause

43. The Panel erred in finding that the tax reduction accorded to imports from MERCOSUR countries under INOVAR-AUTO are inconsistent with Article I:1 of the GATT 1994 and not justified under paragraphs 2(b) or 2(c) of the Enabling Clause.

44. The Panel preliminarily erred in finding that the complainants' claim under Article I:1 of the GATT 1994 was properly within its terms of reference. The measures had unquestionably been notified under paragraph 4(a) of the Enabling Clause, and contrary to what the Panel found, any

[15] Panel Report, paras. 7.1211, 7.1212, 7.1238, 8.7 and 8.18.

substantive disagreement as to the proper characterization of the measures did not alleviate the complainants' burden of invoking the Enabling Clause in their panel requests.

45. The Panel also erred in failing to examine whether the notification of the Treaty of Montevideo and the ECAs 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) of the Enabling Clause. The Panel adopted an impermissibly restrictive interpretation of the Enabling Clause, failing to recognize that paragraph 4(a) does not impose on Members any requirement to precisely identify the basis pursuant to which it notifies its measures. This suggests that the drafters of the Enabling Clause provided some flexibility in such notification provisions.

46. The Panel also erred in limiting the scope of paragraph 2(b) of the Enabling Clause to the S&D provisions in the covered agreements other than the GATT itself. The GATT 1994 is unquestionably an "instrument multilaterally negotiated under the auspices of the GATT" within the meaning of paragraph 2(b). The Panel's restrictive interpretation to the contrary impermissibly renders the provision effectively *inutile*, insofar as the S&D provisions provided for in the agreements in Annex 1A of the Marrakesh Agreement are mostly hortatory and impose no substantive obligations.

47. Finally, the Panel impermissibly conflated the notification requirements with the substantive requirements imposed under paragraph 2(c) of the Enabling Clause. The challenged treatment had been duly notified under paragraph 2(c). The Treaty of Montevideo, the ECAs, and the LAIA clearly comprise internal taxation measures, and as the dissenting Panelist correctly observed, refer to both "regional integration" and to tariff preferences in the automotive sector. Internal taxation measures are unquestionably "non-tariff measures" within the meaning of paragraph 2(c) of the Enabling Clause, and the Panel erred in failing to undertake a substantive analysis of whether the challenged treatment satisfied the requirements of that provision.

48. Accordingly, the Appellate Body should *reverse* the Panel's conclusion that the complainants did not have an obligation to invoke the Enabling Clause in their panel requests, and *reverse* the Panel's consequential finding that the complainants' claims under Article I:1 of the GATT 1994 were within the Panel's terms of reference.[16]

49. The Appellate Body should also *reverse* the Panel's finding that the differential tax treatment at issue was not properly notified under paragraph 4(a) of the Enabling Clause; *reverse* the Panel's finding that the tax treatment at issue is not justified under paragraphs 2(b) or 2(c) of the Enabling Clause; *complete the legal analysis* and find that the differential tax treatment is justified under paragraphs 2(b) or 2(c) and complies with paragraph 3 of the Enabling Clause.[17]

IX. The Panel Acted Inconsistently with Articles 11 and 12.7 of the DSU in Recommending that Brazil Withdraw the Alleged Prohibited Subsidies in 90 Days

50. Should the Appellate Body uphold the Panel's finding that the measures at issue are prohibited subsidies under Article 3.1(a) and 3.1(b) of the SCM Agreement, Brazil then claims, in the alternative, that the Panel acted inconsistently with its duties under Articles 11 and 12.7 of the DSU in recommending pursuant to Article 4.7 of the SCM Agreement that Brazil withdraws these measures in 90 days.

51. The fact that the Appellate Body has said that "the expedited remedy provided under Article 4.7 of the SCM Agreement is an 'important consideration'"[18] does not constitute a "reasoned and adequate explanation" for the Panel's 90-day recommendation, because it does not explain why the Panel believed that a 90-day timeframe was appropriate. In order for the Panel to provide a "reasoned and adequate explanation" or "basic rationale" for its conclusion, the Panel needed 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. The Panel's failure to provide such an explanation cannot be reconciled with the Panel's obligations under Articles 11 and 12.7 of the DSU.

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[16] Panel Report, paras. 7.1083, 7.1120, 8.6(h), and 8.17(i).

[17] Panel Report, paras. 7.1079, 7.1081, 7.1083, 7.1096, 7.115, 7.119, 8.6(i) and 8.17(j).

[18] Panel Report, para. 6.17 (quoting Appellate Body Report, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.7) (referring to Appellate Body Report, *EC – Export Subsidies on Sugar*, paras. 332-335).

52. Brazil therefore requests that the Appellate Body *reverse* the Panel's recommendation that Brazil withdraw the measures within 90 days[19], *complete the legal analysis*, and recommend, in light of the nature of the measures at issue and the length of the legislative process that will be required, withdrawal within 18 months.

[19] Panel Report, paras. 8.11 and 8.22.

ANNEX B-2

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S OTHER APPELLANT'S SUBMISSION[1]

1. The European Union brings this other appeal in the interest of clarifying the scope of Brazil's implementing obligations in this dispute. The Panel's findings lack clarity as to Brazil's obligations under Articles III:4 of GATT 1994, Article 2.1 of TRIMS Agreement and Article 3.1(b) of SCM Agreement with regard to the in-house scenario.

2. First, the European Union submits that the Panel failed to make an objective assessment of the matter before it in accordance with Article 11 of DSU by exercising false judicial economy in relation to the European Union's request to make findings also on the in-house scenario in the context of the ICT and INOVAR-AUTO programmes. Thus, the European Union requests the Appellate Body *to reverse* the Panel's findings, *to complete the legal analysis* with regard to the in-house scenario and *to find* that the production-step requirements contained in the ICT and INOVAR-AUTO programmes are inconsistent with Articles III:4 of GATT 1994, Article 2.1 of TRIMS Agreement and Article 3.1(b) of SCM Agreement also under the in-house scenario.

3. Second, in the alternative, were the Appellate Body to consider that the Panel correctly exercised judicial economy when failing to make specific findings on the in-house scenario, the European Union requests the Appellate Body *to 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 contained in paragraphs 7.298-7.314 and 7.746-7.751 of its Report, 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 the Panel had already found that those steps are *per se* inconsistent with the covered agreements, since they make an advantage/subsidy contingent upon the use of domestic over imported goods, regardless of whether those domestic goods are manufactured by the accredited company or a third party.

4. Finally, the European Union makes a subordinate claim of error, subject to the Appellate Body rejecting both the first claim of error formulated by the European Union (that the Panel exercised false judicial economy) and the alternative claim of appeal. In that case, the European Union requests the Appellate Body to find that the Panel, by failing to consider the European Union's claims under Article III:4 of GATT 1994, Article 2.1 of TRIMS Agreement and Article 3.1(b) of 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. Accordingly, the European Union requests the Appellate Body *to reverse* the Panel's findings, *to complete the legal analysis* with regard to the in-house scenario and *to find* that the production-step requirements contained in the ICT and INOVAR-AUTO programmes are inconsistent with Articles III:4 of GATT 1994, Article 2.1 of TRIMS Agreement and Article 3.1(b) of SCM Agreement also under the in-house scenario.

[1] Total number of words (including footnotes but excluding executive summary) = 12 851; total number of words of the executive summary = 511.

ANNEX B-3

EXECUTIVE SUMMARY OF JAPAN'S OTHER APPELLANT'S SUBMISSION[1]

1. Japan's Other Appellant Submission is focused on one single issue only where, in Japan's view, the Panel could and should have done more. As the Panel appears to have applied judicial economy with respect to the INOVAR-AUTO programme and ICT programmes, Japan submits that the Panel erred by (1) distinguishing the scenario in which a company undertakes minimum production processes by itself ("in-house"), from that in which the company delegates these activities to a third party ("outsourcing") and (2) refraining from addressing the former, which is inconsistent with Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement.

2. First, Panel explicitly finds that the production-step requirements and the accreditation requirements formulated under the relevant legal instruments implementing the challenged programmes do not themselves distinguish between an "in-house" and an "outsourcing" scenario. The Panel draws this distinction merely as an analytical one to facilitate and organize its own analysis.

3. Second, as the Panel itself acknowledged, the complainants challenged the programmes' production-step requirements as a whole WTO-inconsistent, irrespective of which scenario applies. In Japan's view, the Panel's failure to make findings with respect to each accreditation and production step requirements as a whole would lead to a partial resolution of the matter.

4. Third, because the Panel limited its finding to the "outsourcing" scenario, a positive solution to the dispute is not secured. Due to the lack of necessary findings in the Panel report with respect to the "in-house" scenario, the Panel leaves open the possibility of disagreement between the Parties within the meaning of Article 21.5 of the DSU. This will undermine the "effective resolution of disputes to the benefit of all Members" under Article 21.1 of the DSU. Such failure constitutes "false judicial economy" and constitutes a breach of the panel's obligation under Article 11 of the DSU.

5. Therefore, Japan respectfully asks the Appellate Body to reverse the Panel's decision to limit its finding to the "outsourcing" scenario and complete the legal analysis by finding that the accreditation and production step requirements "as a whole," encompassing both the "outsourcing" and "in-house" scenarios, are inconsistent with Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement.

6. Should the Appellate Body consider the Panel's application of judicial economy to be unwarranted, Japan requests that the Appellate Body complete the legal analysis to find the production step requirements under the challenged programmes, as a whole, to be inconsistent with Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement. The Panel's findings were sufficient for the Appellate Body to complete the analysis and to make such findings. Moreover, much of the evidence is in fact identical or substantially the same for the "outsourcing" and "in-house" scenarios. Thus, the Appellate Body can complete the analysis as needed.

7. Japan underscores that the each production step requirement under the INOVAR-AUTO and the ICT programmes extends accreditation to the companies that carry out the production steps in Brazil by themselves, as well as to the companies that outsource to third parties within Brazil. This necessarily implies that the programmes offer subsidies based on the use of domestic products, rather than carrying out a particular production steps. Accordingly, they constitute "a condition requiring" manufacturers to use Brazilian products as a precondition to receiving tax benefits, which are inconsistent with Article 3.1(b) of the SCM Agreement.

8. Alternatively, should the Appellate Body find that the Panel did not exercise judicial economy with respect to the "in-house" scenario, Japan respectfully requests the Appellate Body to find that the Panel's finding of the WTO-inconsistency of the accreditation and the production-step requirements under INOVAR-AUTO and the ICT programme are interpreted to cover the challenged

[1] Other Appellant Submission 7,434 words, Executive Summary 670 words.

two measures as a whole including both the "outsourcing" and "in-house" scenarios and the Panel erred by failing to provide "coherent reasoning" as required under Article 11 of the DSU.

ANNEX B-4

EXECUTIVE SUMMARY OF JAPAN'S APPELLEE'S SUBMISSION[1]

I. INTRODUCTION

1. Japan notes that the Panel's findings did *not* put into question Brazil's or any other country's ability to adopt policies to promote development, support domestic research and development (R&D), and/or develop human capital. The Panel found that Brazil's measures fall into the much more narrowly defined categories of measures that are covered by the National Treatment obligations of Article III: 2 and III:4 of the GATT 1994, the prohibitions on export subsidies and import-substitution subsidies in Articles 3.1(a), 3.1(b) and 3.2 of the SCM Agreement, and Article 2.1 of the TRIMS Agreement.

II. THE PANEL DID NOT ERR IN ITS INTERPRETATION AND APPLICATION OF ARTICLE III:8(b) OF THE GATT 1994 TO THE ICT AND INOVAR-AUTO PROGRAMMES

2. Contrary to Brazil's assertion, as the Panel found, the mere fact that a subsidy was provided exclusively to domestic producers is not sufficient for it to be exempt from Articles III:2 and III:4 of the GATT 1994. Brazil's argument is not only legally incorrect but very far-reaching in its potential consequences, which would lead to a wide loophole for countries to circumvent the disciplines under Articles III:2 and III:4 of the GATT 1994.

3. By its ordinary meaning, Article III:8(b) does not constitute a blanket exemption for subsidies paid exclusively to domestic producers. Instead, measures that take the forms of subsidies paid exclusively to domestic producers may still be subject to the disciplines under Article III of the GATT 1994 if they result in discrimination between products. Brazil also appears to take issue with the Panel's interpretation of the term "payment" in Article III:8(b). Its argument, however, is entirely circular.

4. In addition, Brazil claims that while the Panel did not rely on it, Japan and the EU, as co-complainants misinterpreted the Appellate Body's findings in *Canada – Periodicals*. Contrary to Brazil's argument, however, the Appellate Body made clear that a reduction of tax rates is not covered by Article III:8(b). Because INOVAR-AUTO and the ICT programmes both involve a reduction of tax rates, Article III:8(b) does not apply.

III. THE PANEL PROPERLY FOUND THAT THE ICT PROGRAMMES ARE INCONSISTENT WITH ARTICLE III:2, FIRST SENTENCE, OF THE GATT 1994

5. As a threshold argument, Brazil alleges that the tax treatment at issue was not within the scope of Article III:2. Again, Brazil's interpretation of Article III:8(b) of the GATT 1994, and its relationship to the substantive disciplines of Article III, is incorrect.

6. Further, Brazil alleges that the Panel failed to "carefully scrutinize the design, structure and operation of the ICT programmes in applying Article III:2 of the GATT 1994 to the facts of this dispute." The Panel, however, conducted a thorough analysis of the ICT programmes, and correctly found that the tax burden on imported finished products is in excess of that on domestic like products.

7. Additionally, Brazil argument that 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 is flawed. Brazil's domestic manufacturers of intermediate products must pay certain taxes on inputs, which are subsequently offset by revenues from selling downstream products. Thus, during the lag between purchase of inputs and sale of outputs, funds related to the payment of taxes are temporarily unavailable. However, the ICT programmes mitigate the negative financial consequences of this lag, by reducing or eliminating the required taxes otherwise due when

[1] Appellee Submission 27,908 words, Executive Summary 2,202 words.

domestic manufacturers of intermediate goods purchase inputs covered by the ICT programmes, and thus are not consistent with Article III:2.

IV. THE PANEL PROPERLY FOUND THAT THE ICT PROGRAMMES ARE INCONSISTENT WITH ARTICLE III:4 OF THE GATT 1994 AND ARTICLE 2.1 OF THE TRIMS AGREEMENT

8. Brazil's argument once again that Article III:8(b) shields a measure from being found to be WTO-inconsistent is flawed. Japan also disagrees with Brazil's claim that the Panel conflated Articles III:2 and IIII:4 of the GATT 1994. A violation of Article III:4 of the GATT 1994 can be found when an underlying measure is tax.

9. Brazil also disputes the Panel's finding that the requirements to perform a series of production steps under the ICT programmes require the use of domestic products. However, the Panel correctly found such requirements to be 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."

V. THE PANEL PROPERLY FOUND THAT CERTAIN ASPECTS OF THE ICT PROGRAMMES ARE INCONSISTENT WITH ARTICLE 3.1(b) OF THE SCM AGREEMENT

10. The Panel applied the correct benchmark in finding that the tax exemptions under the ICT programmes constitute financial contributions within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement. The Panel determined that, *at least in some factual situation*s, accredited companies benefiting from the ICT Programmes are better off than those within the benchmark, and the Brazilian Government, by contrast, is foregoing revenue that would be otherwise due.

11. Brazil also claims that the Panel committed legal error when it found that the "cash availability" and "implicit interest" constituted revenue "due" that could have been forgone within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement. At the outset, Japan notes that Brazil appears to be asking for a *de novo* review of the facts or to accept certain facts that are simply not supported by the Panel's findings. Further, there is no basis for Brazil's argument that the interest foregone by the Brazilian government is not in fact a form of current or future revenue. Brazil's claim also appears to rest on the premise that it is only in "exceptional" cases but the Panel record, makes clear that such a situation is "rather frequent".

12. Brazil argues that the Panel erred in finding that the production-step requirements under the ICT programmes require the use of domestic over imported goods. However, the production-step requirements under each of the challenged ICT programmes and ultimately concluded that the structure of accreditation requirements demonstrated that the challenged measures "give rise to a contingency on the use of domestic over imported goods in the sense of Article 3.1(b) of the SCM Agreement."

VI. THE PANEL PROPERLY FOUND THAT THE INOVAR-AUTO PROGRAMME ACCORDS TREATMENT LESS FAVOURABLE TO IMPORTS THAN TO LIKE DOMESTIC PRODUCTS, INCONSISTENT WITH ARTICLE III:4 OF THE GATT 1994 AND ARTICLE 2.1 OF THE TRIMS AGREEMENT

13. Brazil's assertions against the Panel's findings on the measure's inconsistency with Article III:4 of the GATT 1994 are premised on the flawed claim that Article III:8 shields a measure from being found to be WTO-inconsistent, so long as the challenged measure is in the form of a subsidy provided exclusively to domestic producers.

14. Brazil challenges what it calls the Panel's "quantitative" analysis and appears to request the Appellate Body to engage in a weighing and balancing of the facts before the Panel to determine the burden that INOVAR-AUTO's requirements imposed on foreign manufactures. This appears to be a request for *de novo* review of the facts and thus the Appellate Body should reject Brazil's argument.

15. The Panel consider[ed] that foreign companies seeking accreditation under the INOVAR-AUTO programme must go through a more burdensome accreditation process than domestic manufacturers." Additionally, the level of taxation applied to imported motor vehicles, sold by foreign companies that are not accredited, exceed that applied to domestic vehicles sold by accredited

domestic manufacturers. Japan underscores that the conditions for accreditation accord less favourable treatment to foreign *products* imported into Brazil than that accorded to like *products* of Brazilian origin.

VII. THE PANEL PROPERLY FOUND THAT THE TAX SUSPENSIONS GRANTED UNDER THE PEC AND RECAP PROGRAMME ARE CONTINGENT UPON EXPORT PERFORMANCE,

16. According to Brazil, the Panel incorrectly applied Article 1.1(a)(1)(ii) of the SCM Agreement because it failed to identify the treatment of structural accumulators as the proper benchmark treatment with respect to PEC and RECAP programmes.

17. In conducting its benchmark analysis, contrary to Brazil's assertion, the Panel did not attempt to identify a "general rule" of taxation under Brazilian law pursuant to which *all* suspensions and exemptions of taxes on inputs and capital goods *relate to the problem of structural credit accumulation*, but rather, responded to Brazil's assertion about the "rule". Based on its analysis, the Panel correctly found that there was no basis for defining the benchmark as narrowly as Brazil proposed.

18. As an alternative argument, Brazil asserts that even if the Appellate Body finds that non-accredited companies are the correct benchmark, the Panel incorrectly "opted to compare the treatment under PEC and RECAP with what it erroneously termed the "rather frequent" scenario in which non-accredited companies are unable to fully offset their tax credits in the same taxation period, and have to formally request the reimbursement of taxes paid." Japan has already explained why Brazil's argument is flawed in the analogous in the context of the ICT programmes is flawed. The same reasoning applies here.

19. Further, Brazil's claim, asserting that the Panel erred in the interpretation and application of Article 1.1(a)(1)(ii) of the SCM Agreement when 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 a kind of revenue otherwise 'due' by the taxpayer, is flawed.

20. Brazil also argues that the Panel failed to properly assess a table it submitted to show that the PEC and RECAP programmes were indeed providing subsidies to credit-accumulating companies and not in contingency with exportation under Article 3.1(a) of the SCM Agreement, and thus acted inconsistently with Article 11 of the DSU. However, it is very clear that the Panel performed an objective assessment consistent with that provision. Brazil's argument should be rejected because it is effectively seeking a de novo review of the facts, but has failed to show any failure by the Panel to meet the standard reflected in Article 11 of the DSU.

VIII. THE PANEL PROPERLY FOUND THAT THE TAX REDUCTION ACCORDED TO IMPORTS FROM ARGENTINA, MEXICO AND URUGUAY UNDER INOVAR-AUTO IS NOT JUSTIFIED UNDER PARAGRAPHS 2(b) OR 2(c) OF THE ENABLING CLAUSE

21. Paragraph 4 of the Enabling Clause in particular, explicitly requires the Member taking an action under the Enabling Clause to notify, *ex ante*, other Members. A complaining party cannot be obliged to invoke the Enabling Clause in its panel request, unless it is appropriately notified. If the Appellate Body were to follow Brazil's overly broad approach, this would effectively mean that Members are required to simply guess whether some past action by another Member was or was not meant as a measure taken pursuant to the Enabling Clause.

22. Brazil also takes issue with the Panel's substantive rejection of its ex post facto attempts at an Enabling Clause-based justification. However, Brazil does not even assert, much less establish, that INOVAR-AUTO provides for an exception with respect to such provisions. In particular, with respect to paragraph 2(c), Japan notes that Brazil's claim appears to be that the Panel did not properly analyse and weigh the facts. In addition, Japan also notes that the INOVAR-AUTO programme did not have a close and genuine link to the Treaty of Montevideo or ECAs, as the Panel correctly concluded.

23. Finally, Japan also notes, that in any event, the preferential treatment for other MERCOSUR countries and Mexico is contrary to paragraph 3 of the Enabling Clause. Pursuant to paragraph 3(a), measures taken under the Enabling Clause "shall be designed to facilitate and promote the trade of

developing countries and not to raise barriers or to create undue difficulties for the trade of any other contracting parties".

IX. THE PANEL'S RECOMMENDATION THAT BRAZIL WITHDRAW THE ALLEGED PROHIBITED SUBSIDIES IN 90 DAYS IS CONSISTENT WITH ARTICLES 11 AND 12.7 OF THE DSU

24. With its final ground for appeal, Brazil submits that the Panel erred in recommending 90 days as the appropriate time period for Brazil to withdraw the prohibited subsidies. At the outset, Japan notes that panels do not need to address in their reports every argument or evidence raised by the parties. Similarly, panels must set forth explanations and reasons sufficient to disclose the essential, or fundamental, justification for those findings and recommendations, in light of Article 12.7 of the DSU. This does not, however, necessarily imply that Article 12.7 requires panels to expound at length on the reasons for their findings and recommendations.

25. In any event, Japan observes that, the Panel explicitly explained that it had taken into account the procedures that may be required to implement the recommendation on the one hand, and the requirement that Brazil withdraw its subsidies "without delay" on the other hand, when recommending that Brazil shall withdraw the subsidies identified in paragraphs 8.16(f), 8.17(f), and 8.18 within 90 days. Brazil's appeal, if anything, appears to be simply an effort to re-litigate the question.

X. CONCLUSION

26. As discussed and for the reasons set out above, Brazil's claims of error are all without merit and Japan respectfully requests the Appellate Body to reject them.

ANNEX B-5

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S APPELLEE'S SUBMISSION[1]

1. The European Union considers that overall the Panel made balanced findings in relation to the challenged programmes as a whole as well as several specific elements thereof, on issues which, to certain extent, are a *déjà vu* for the GATT/WTO system: the use of discriminatory taxation and local content requirements as a tool to boosting industrial policy development, coupled with tax reliefs for companies that achieve an export threshold. Far from disputing each and every legal finding made by the Panel, Brazil appears to concede some of these findings and conclusions by not raising an appeal against them. In contrast, Brazil's appeal is premised on seeking to spot weakness in how the Panel interpreted and applied the law to the relevant facts, whilst in reality, the Panel's assessment is reasoned and reasonable. At times, Brazil also appears to question how the Panel weighted all the evidence on specific matters without raising a claim under Article 11 of the DSU. The European Union considers that, whilst Brazil may disagree with the Panel's appreciation of the facts and ultimate conclusions, Brazil has failed to show the existence of any reversible error.

1.1 Article III:8(b) as a threshold issue

2. The Panel properly interpreted and applied Article III:8(b) of the GATT 1994 as not excluding *per se* from the disciplines of Article III subsidies granted to domestic producers. Article III:8(b) of the GATT 1994 exempts payments to domestic *producers* from the national treatment obligation, but only to the extent that e.g. those payments do not discriminate between domestic and imported *goods*. Brazil's formalistic attempt to isolate the disciplines under the SCM Agreement from the national treatment rules under Article III of the GATT 1994 should be rejected as it goes against the principle that the covered agreements should be interpreted in a coherent and consistent manner, giving meaning to all applicable provisions harmoniously.

1.2 ICT programmes

1.2.1 Article III:2 of the GATT 1994

3. With the first claim of appeal under Article III:2 of the GATT Brazil in substance repeats its line of argument that the Panel erred when finding that domestic production subsidies do not fall *per se* outside the purview of the disciplines of Article III (including paragraph 2 of that Article) and it adds a few more arguments. The European Union notes first that the expression "domestic production subsidies" is not contained in the WTO treaties, which shows that Brazil's claim in predicated on an undefined concept, perhaps in the hope that the Appellate Body will make the case for Brazil. Second, the European Union notes that the Panel found that Article III:8(b) does not carve out from the disciplines of Article III:2 subsidies provided exclusively to domestic producers *per se*, since aspects of a subsidy resulting in product discrimination may fall within that provision. Hence the Panel did not need to discuss whether or not Article III:8(b) of the GATT 1994 applies to the provision of subsidies in the form of reductions in indirect taxes. Therefore, the Appellate Body does not need to examine Brazil's allegation that term "subsidies" in Article III:8(b) of the GATT 1994 encompasses all types of subsidies included in Article 1.1 of the SCM Agreement, as that legal issue is not covered by the Panel's findings. In any event, the European Union submits that Brazil's argument is also incorrect as a matter of law.

4. Brazil's second claim of appeal under Article III:2 of the GATT relates to the findings of the Panel concerning the taxation of finished incentivised products as opposed to like imported finished products. However, Brazil's claim is predicated on a number of false premises, which are contradicted by factual findings of the Panel and what Brazil conceded before the Panel, which Brazil does not challenge. The Panel analysis of the parties arguments concerning incentivised finished products under Article III:2, first sentence, of the GATT 1994 reflects the rules on the allocation of the burden of proof in WTO law. Hence, Brazil's claim boils down to criticizing the Panel for not having made the case for Brazil. In any case, Brazil's claim is wrong on substance: a lower tax rate imposed on

[1] Total number of words of the executive summary = 3 744.

incentivised finished products (i.e. domestic) results in a lower fiscal burden for those products compared to like imported finished products.

5. Brazil's third claim of appeal under Article III:2 of the GATT is in essence that 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 compared to like incentivised intermediate domestic products. Brazil's claim of appeal is however based on a wrong reading of the Panel Report. First, nowhere the Panel agreed with Brazil that the nominal amount of taxes is decisive, but it clearly indicated that it was concerned with determining the effective tax burden and for that purpose it took into account the functioning of the credit-debit system governing Brazil's direct taxes at issue. The Panel found that the application of the rule of credits and debits for purchases of imported (and, therefore, non-incentivized) intermediate ICT products involves the payment of a tax that is not faced by companies purchasing incentivized intermediate domestic ICT products. This payment of the tax upfront 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. Moreover, imported intermediate ICT products are subject to a higher tax burden than like incentivized domestic intermediate ICT products, due to depreciation in the value of the tax credits over time. The Panel's analysis reflects elementary concepts of economics or rather simple common sense considerations and is confirmed by WTO case law. Moreover, Brazil does not assert that the Panel failed to make an objective assessment of the facts when describing the functioning of the credit-debit system governing Brazil's direct taxes at issue.

1.2.2 Article III:4 of the GATT 1994

6. The first claim of appeal by Brazil under Article III:4 of the GATT relate again to Brazil's reading of Article III:8(b) as exempting domestic production subsidies *per se* from the disciplines of Article III (including obviously Article III:4). The European Union has already explained that this reading Article III:8(b) is unwarranted and will not repeat the same reasoning.

7. With its second claim of appeal under Article III:4 of the GATT, Brazil argues in substance that the Panel conflated tax discrimination under Article III:2 with regulatory discrimination under Article III:4. However, a careful reading of the Panel Report is sufficient to reject Brazil's claim. Indeed, the Panel clearly recalled the Appellate Body jurisprudence which admits that the same measure, or certain aspects of the same measures, can fall both within Article III:4 and Article III:2. The Panel hence analysed the complainants claims in detail and checked weather the complainants demonstrated that the challenged ICT programmes met all the conditions for finding a violation of Article III:4, which Brazil does not seriously contest. The fact that one instance of less favourable treatment accorded to imported products results from the different tax burden imposed on those products vis-à-vis like domestic products is simply a consequence of the characteristics of the regulatory measure examined by the Panel. At the same time, it is entirely possible that the same measure or certain aspects of the same measure also violate Article III:2, without that demonstrating that the Panel made any error in its analysis.

8. With its third claim of appeal under Article III:4 of the GATT, Brazil contests the Panels finding that requirements related to production of a product may fall within Article III:4 of the GATT, because according to Brazil they would fall under Article III:8(b) of the GATT. However, Brazil does not appeal Section 7.2.1 of the Report, where the Panel found that that the scope of Article III:4 extends to measures presented in the form of requirements for producers as opposed to direct requirements on products. Brazil does not even formulate any argument trying to distinguish this case from a long line of cases, which confirms the Panel's findings. Therefore, Brazil's appeal appears pointless as it is limited to affirming some errors in the Panel Report without challenging the legal and factual premises for those findings. For the rest Brazil is making some undemonstrated assertions and ultimately is subsuming its first general defence before the Panel about "pre-market" requirements in its second general defence according to which the challenged ICT programmes are exempted from the disciplines of Article III, by virtue of Article III:8(b). Hence, Brazil's arguments are based again on the wrong premise that, just because Brazil grants subsidies only to domestic producers, it is entitled to introduce any differences in treatment between domestic and foreign producers and products together with those subsidies.

9. With the fourth claim of appeal under Article III:4 of the GATT, Brazil challenges the Panel findings that the challenged ICT programmes result in a heavier administrative burden on imported product inconsistent with Article III:4. However, the Panel reasoning is firmly grounded on the

functioning of the credit-debit system as described in the Panel Report and on what Brazil acknowledged before the Panel. At the same time. Brazil does not even argue (let alone demonstrate) 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.

10. With its fifth claim of appeal under Article III:4 of the GATT, Brazil challenges the Panel's 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 of domestic products to the detriment of imported products, when accredited companies outsource the production of components and subassemblies to be used in the production of incentivised products. The European Union thinks that the Panel's findings concerning the so called "outsourcing scenario" are correct. The complainants claimed before the Panel that the challenged ICT programmes impose on the companies accredited for the production of a given incentivised product (intermediate or finished) a condition to use components and subassemblies produced in Brazil (hence domestic products) in order to obtain a tax advantage/subsidy in relation with the production of the incentivised product. This condition or requirement results from the production step requirements (contemplated by the ICT programmes), which are specific to each incentivised product, and which must be complied with in order for a company to be accredited and be eligible for the tax advantages in relation to that product. Some of those production steps require the manufacturing in Brazil of components or subassemblies for the incentivised product. Hence, those components or subassemblies are domestic products that must be used in the production of the incentivised product.

11. Brazil confirms that the conditions for companies to obtain accreditation define the condition of eligibility for the tax advantages provided for under the challenged ICT programmes and it does not claim that the Panel made whatever error in the description of the functioning of the PPBs or the production steps requirements more generally. Brazil also confirms that the production steps requirements contained in the challenged programmes result in the production of specific components or subassemblies in Brazil and it does not question that these products should be considered as domestic.

12. Accordingly, the Panel did not err in finding that the certain production step requirements under the challenged ICT programme require that domestic components and subassemblies be incorporated into the incentivised (finished or intermediate product), as a condition for receiving the tax advantages in relation with that product. Given that accredited companies are required to use domestic components if they want to benefit of tax advantages in relation to their incentivised products, this condition or requirement distorts the conditions of competition between domestic components and subassemblies and like imported components and subassemblies and therefore accords less favourable treatment to imported components and subassemblies.

13. Brazil's argument that under the ICT programmes accredited producers are free to source inputs from foreign producers provided that the relevant production steps are undertaken in Brazil is simply missing the point, since the claim adjudicated by the Panel does not encompass raw materials and other basic components, but the domestic components and subassemblies that result from the performance in Brazil of certain production steps.

14. Brazil is also wrong in arguing that the Panel's conclusions imply that the only national production process that could be subsidized in a WTO-consistent manner is the assembly of inputs, not their production.

15. It follows from the above that Brazil's claims of appeal under Article III:4 of the GATT (to the exception of the claim based on the interpretation of Article III:8(b)) do not concern the Panel's findings contained in Section 7.3.2.1.4.2 relating to the mechanism for the calculation of the amount of resources required to be invested in R&D under the Informatics and PADIS programmes. Indeed, none of the arguments formulated by Brazil take issue with anything the Panel found in that Section. Hence, it must necessarily be concluded that Brazil does not challenge the Panel's finding in paragraph 7.243 of the Report, according to which 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.

16. In light of the foregoing, the European Union submits that Brazil has failed to show the existence of any reversible error when the Panel found that the ICT programmes were inconsistent with Article III:4 of the GATT 1994.

1.2.3 Article 1.1(a)(1)(ii) of the SCM Agreement

17. Brazil wrongly argues that the Panel made errors when finding that the ICT programmes amounted to prohibited subsidies under Article 3.1(b) of the SCM Agreement. The Panel properly interpreted and applied Article 1.1(a)(1)(ii) of the SCM Agreement when finding that the tax exemptions, suspensions and reductions granted under the ICT programmes amounted to "government revenue that is otherwise foregone or not collected". In fact, the Panel carried out a balanced assessment when comparing the tax treatment of similarly situated taxpayers in accordance with Brazil's general and predominant rules of taxation in relation to non-accredited companies.

1.2.4 Article 3.1(b) of the SCM Agreement

18. With this claim of appeal Brazil argues that the Panel erred in finding that the tax exemptions, reductions and suspensions granted under the ICT programmes are prohibited import substitution subsidies within the meaning of Article 3.1(b) of the SCM Agreement. However, the Panel defined and applied the correct legal standard under Article 3.1(b) of the SCM agreement. In line with the Appellate Body's findings in *US – Tax Incentives*, the Panel focussed its analysis from the very beginning on the conditions for companies to obtain accreditation and thereby be eligible for the tax exemptions, reductions or suspensions under the programmes. The Panel stressed that element of conditionality all along its analysis. Therefore, it is not correct to say 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. The 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 steps requirements, in order to obtain the subsidy in relation to the production of the incentivised products. At the same time there is no dispute that the components and subassemblies at issue in the present case are domestic because they are produced in Brazil (regardless of the origin of their raw materials or inputs).

19. It is also worth recalling that there are some key differences between this case and the situation in *US – Tax Incentives* and the Appellate Body itself clarified that whether a subsidy is conditional upon the use by the subsidy recipient of domestic over imported goods, should be assessed on a case-by-case basis. The production steps requirements at issue in the present case are not limited to simply specifying the location of an assembly operation of the incentivised product, rather they concern the production in Brazil of component and subassemblies of the incentivised product. Moreover, those subsidies are not granted because the accredited companies are engaged in the production of the components of the incentivised product, but they are explicitly made contingent upon the use of certain components or subassemblies made in Brazil (by the accredited company or a third company). Hence, this case (unlike the *US-Tax Incentives* case) concerns subsidies granted exclusively for the production of the incentivised products (the final goods) and not for the production of their inputs, too. Finally, the components that are manufactured in Brazil in order to comply with the production step requirements of the ICT programmes must, by definition, be used in the production of the incentivised products.

20. In nutshell all of Brazil's claims of appeal in respect of the Panel's findings with regard to the imposition of local content requirements boil down to say that if a requirement for granting a subsidy is drafted in terms of production activity, it is indifferent, for the purpose of Article 3.1(b) of the SCM Agreement, if such production activity results in the creation of a domestic component that *must be used* in the production of the incentivised product. As Brazil would have it, Article 3.1(b) of the SCM Agreement would prohibit Brazil from requiring accredited companies to "use *domestic* component and subassemblies" when producing incentivised products. However, it would leave it completely free to require the same companies to "use component and subassemblies *produced in Brazil*" when producing incentivised products. It goes without saying that this cannot be the correct interpretation of Article 3.1(b) of the SCM Agreement.

1.3 INOVAR-AUTO PROGRAMME

21. In essence, Brazil claims that the Panel erred by excluding the application of Article III:8(b) of GATT 1994 and when it found that the accreditation requirements are inconsistent with Article III:4. It also maintains that the Panel erred in finding that the different 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 of GATT 1994. The European Union will explain below why all those claims should be rejected by the Appellate Body.

22. Brazil's arguments should be rejected entirely. Far from just being a subsidy programme exclusively for domestic producers, the INOVAR-AUTO programme discriminates between domestic and imported vehicles. Foreign companies seeking accreditation under the INOVAR-AUTO programme should opt for becoming "importers/distributors" by establishing in Brazil in order to carry out certain marketing and sale activities in the Brazilian market for the imported vehicles to benefit from the same presumed IPI credits granted to domestic vehicles produced by domestic manufacturers or investors in Brazil accredited under the programme. Therefore, the Panel properly found that the accreditation requirements under the INOVAR-AUTO modify the conditions of competition to the detriment of imported motor vehicles and in favour of like domestic motor vehicles.

1.4 PEC and RECAP programmes

23. Brazil raises four claims against the Panel's findings that the PEC and RECAP programmes amounted to prohibited export subsidies under Article 3.1(a) of the SCM Agreement. In particular, Brazil disputes the Panel's conclusions that the tax treatment granted through the PEC and RECAP programmes amounted to "revenue otherwise due that is foregone or not collected", as well as the Panel's conclusions on export contingency. Brazil's four claims of error should be rejected. The Panel properly applied the test developed by the Appellate Body in *US – Large Civil Aircraft (2nd Complaint)* when, having examined the structure and organising principles of Brazil's tax system, the Panel found that the benchmark for comparison was the tax treatment of non-registered/non-accredited companies under the PEC/RECAP programmes, as similarly situated taxpayers in comparable transactions. The Panel did not err either when examining the tax treatment of those taxpayers including the rather frequent scenario where there is tax credit accumulation. The Panel properly interpreted and applied Article 1.1(a)(1)(ii) of the SCM Agreement when finding that the cash availability and the implicit interest income that the Brazilian Government could earn (had the tax been paid in advance and not offset) fall under the terms "revenue otherwise due is foregone or not collected". Finally, the European Union considers that the Panel properly weighted all the evidence in accordance with its duties under Article 11 of the DSU when finding that the PEC/RECAP programmes were contingent upon export performance, in particular in view of the clear requirement for companies to have more than 50% of their revenues derived from exports.

1.5 Enabling Clause

24. The European Union considers that Brazil's claims of error with respect to the Panel's findings on the Enabling Clause should be rejected by the Appellate Body. First, the Panel correctly found that a complaining party cannot be under an obligation to invoke the Enabling Clause in its panel request, unless that complaining party is appropriately informed that the responding party considers the challenged measure to have been adopted pursuant to (and justified under) the Enabling Clause. Second, the Panel correctly established that the conditions in paragraphs 2(b) and 2(c) of the Enabling Clause are not met by the Brazilian measures in the present case. In addition, whilst Brazil complaints about the Panel's assessment and characterisation of the facts (such as the Panel's finding that the accreditation process under the INOVAR-AUTO programme is more burdensome to foreign manufacturers than to domestic ones), Brazil has no claim under Article 11 of DSU with respect to the Panel's assessment of Brazil's invocation of the Enabling Clause under paragraph 2(c).

1.6 Article 4.7 of the SCM Agreement

25. The European Union maintains that, contrary to Brazil's allegations, the Panel did not make an error under Articles 11 or 12.7 of the DSU when recommending, pursuant to Article 4.7 of the SCM Agreement, that Brazil withdraw the prohibited subsidies found within 90 days. The Panel's

rationale and explanations are sufficiently evident from the Panel Report. Brazil's disagreement on substance should not be construed as a reversible error.

ANNEX B-6

EXECUTIVE SUMMARY OF BRAZIL'S APPELLEE'S SUBMISSION[1]

1. Brazil requests that the Appellate Body reject all of the claims of error raised by the European Union and Japan in their other appeals, for the following reasons:

2. First, the complainants failed to establish that the Panel acted inconsistently with Article 11 of the DSU in failing to address their *arguments* that in the "in-house" scenario the ICT programmes and INOVAR-AUTO give rise to a contingency on the use of domestic over imported goods under Articles III:4 of the GATT 1994, Article 2.1 of the TRIMs Agreement, and Article 3.1(b) of the SCM Agreement. The Panel's decision not to address the complainants' *arguments* in this respect could not be properly characterized as exercise of judicial economy, which occurs when a panel decides not to address multiple *claims* raised by a WTO Member in respect of the same measure. The Panel clearly examined and made findings in respect of all of the legal claims raised by the complainants in respect of the ICT programmes and INOVAR-AUTO. In any event, the Panel acted within the bounds of its discretion under Article 11 of the DSU in deciding not to address the complainants' *arguments* that in the "in-house" scenario the ICT programmes and INOVAR-AUTO allegedly gave rise to a requirement to use domestic over imported goods.

3. Second, the European Union's "subordinate claim" that the Panel erred in its application of Articles 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 address arguments concerning the "in-house" scenario is not properly within the scope of appellate review. The European Union's allegation that the Panel failed to consider "all relevant facts of the case" is directed at the Panel's appreciation of the facts, and therefore should have been brought under Article 11 of the DSU. The European Union's failure to bring its "subordinate" appeal claim under Article 11 of the DSU is dispositive, and for this reason alone should be rejected by the Appellate Body.

4. Third, the complainants remain unable to establish that in the "in-house" scenario, both the ICT programmes and INOVAR-AUTO 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. The complainants' interpretation that these provisions prohibit subsidies contingent upon domestic production in-country renders Article III:8(b) of the GATT 1994 entirely meaningless. Moreover, the complainants' arguments in respect of both the "in-house" and "outsourcing" scenarios are based on the proposition expressly rejected by the Appellate Body in *US – Tax Incentives* that subsidies contingent on producing certain goods domestically *per se* constitute prohibited import-substitution subsidies.

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[1] Total word count: 463

ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS

ANNEX C-1

EXECUTIVE SUMMARY OF ARGENTINA'S THIRD PARTICIPANT'S SUBMISSION

1. Argentina has a strong interest in the proper interpretation of the Enabling Clause and, in particular, in the development of an effective and coherent approach to interpreting its paragraphs.

2. Argentina will refer to the following issues: (1) Whether the Panel erred in finding that the claims under Article I:1 of the GATT 1994 were properly included in the terms of reference; (2) Whether the challenged treatment accorded to imports from Argentina, Mexico and Uruguay under INOVAR-AUTO is justified under paragraph 2(b) of the Enabling Clause; (3) Whether the challenged treatment accorded to imports from Argentina, Mexico and Uruguay under INOVAR-AUTO is justified under paragraph 2(c) of the Enabling Clause.

3. In particular, Argentina considers that the differential treatment accorded through Decree 7,819/2012 is *part of* a notified regional arrangement and therefore does not require additional notification.[1] As *part of* that notified arrangement, Argentina considers that the complainants should have been on notice that Brazil could invoke the Enabling Clause as a justification for the differential treatment granted under INOVAR-AUTO notwithstanding the provisions of Article I:1 of the GATT 1994.

4. Argentina shares the view of Brazil that the Panel´s interpretation renders paragraph 2(b) useless, since it would limit its provisions to what is already established in the covered agreements. Hence, Argentina considers that the analysis under this paragraph should be reversed and completed by the Appellate Body.

5. Regarding the "criteria or conditions for the mutual reduction or elimination of non-tariff measures", paragraph 2(c) uses the phrase "may be prescribed". Argentina considers that a correct interpretation of this phrase would result in concluding that it does not constitute a positive obligation. The fact that in the last 38 years WTO Members have not established such criteria and conditions demonstrated that this phrase cannot be interpreted as a prohibition to apply the provisions in paragraph 2(c) related to non-tariff measures.

[1] See Brazil's second written submission, para. 181; see also Brazil's first written submission (DS472), paras. 638-639.

ANNEX C-2

EXECUTIVE SUMMARY OF AUSTRALIA'S THIRD PARTICIPANT'S SUBMISSION

1. Australia considers that the Panel was correct in finding that, while subsidies provided exclusively to domestic producers under Article III:8(b) of the GATT 1994 do not *per se* violate Article III:2,[1] such a subsidy could still violate Article III:2 if designed and applied in a manner that discriminates between imported and domestic products.[2]

2. A panel is therefore not required to undertake a 'threshold inquiry' as to whether a subsidy is product-related or production-related because the disciplines of Article III apply to both types of subsidies.[3]

3. Australia shares the concerns of Japan and the EU that the Panel's use of judicial economy casts doubt on whether the Panel found that the measures in their entirety, or merely as they operated in the outsourcing scenario, violated Brazil's WTO obligations.

4. In Australia's view, a panel's mandate under the DSU to make an objective assessment of the matter before it – with a view to its positive resolution – limits the degree to which a panel can exercise judicial economy; and requires a panel to ensure its findings can lead to a satisfactory settlement of the dispute.

[1] Panel Report, *Brazil – Taxation*, para. 7.77
[2] Panel Report, *Brazil – Taxation,* paras. 7.85 and 7.88.
[3] Panel Report, *Brazil – Taxation,* para. 7.88.

ANNEX C-3

EXECUTIVE SUMMARY OF THE UNITED STATES' THIRD PARTICIPANT'S SUBMISSION

I. GATT 1994 ARTICLE III:8(B)[1]

1. A measure conditioning an advantage, such as a subsidy, on the use of a domestic good would breach Article III:4. In light of Article III:8(b), Article III:4 must be interpreted as not prohibiting the provision of subsidies *because of* the exclusion of foreign producers as eligible subsidy recipients. Such a payment should not be understood, on the basis of this exclusion alone, to be in conflict with Article III:4 (including its requirement of national treatment for measures affecting the "use" of a product).

2. SCM Agreement Article 3.1(b) and GATT 1994 Article III share similar disciplines. Subsidies contingent on the use of domestic over imported products would be inconsistent with *both* provisions. The Panel thus correctly analyzed the disputed programs under both Article III and Article 3.1(b).

3. While Members must be free to define the domestic producers who are to receive subsidies, including the productive activities that make them a domestic producer, we consider that subsidies conditioned not solely on domestic production, but also the use of domestic products, fall outside Article III:8(b)'s derogation.

II. GATT 1994 ARTICLE III:4

4. The Panel found that "nested" PPBs—which require the use of inputs that themselves conform to another PPB—contain an explicit requirement to use domestic over imported goods. Brazil has not appealed these findings. Such a requirement is inconsistent with Article III:4.

III. SCM AGREEMENT ARTICLE 3.1(B)

5. With respect to intermediate goods, we note that if a measure *exempts* taxes, government revenue, otherwise due, is clearly foregone under SCM Agreement Article 1.1(a)(1)(ii). If a measure *suspends* taxes that are later paid, a financial contribution is still provided: at the time when government revenue would otherwise be due, it is foregone (albeit temporarily). In addition, implicit interest may also be foregone.

6. Brazil has not appealed the Panel's factual findings regarding the disputed programs. Those facts show that the tax advantages under the programs are contingent on the use of domestic over imported goods under Article 3.1(b) with respect to nested PPBs.

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[1] This executive summary contains a total of 382 words (including footnotes), and the U.S. third participant submission contains 3831 words (including footnotes).

ANNEX D

PROCEDURAL RULING

ANNEX D-1

PROCEDURAL RULING OF 12 OCTOBER 2017

1. On 28 September 2017, Brazil filed a Notice of Appeal in the above proceedings. In accordance with Rule 26 of the Working Procedures for Appellate Review (Working Procedures), a Working Schedule for Appeal was drawn up by the Appellate Body Division hearing this appeal and communicated to the participants and third parties on 29 September 2017.

2. On 9 October 2017, the Division 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). These third participants explained that some of them are also third parties in another pending appellate proceeding, namely, *Indonesia – Safeguard on Certain Iron or Steel Products* (DS490 / DS496), and that the third participants' submissions in that proceeding are due on the same day as the deadline for the filing of their third participants' submissions in the present proceedings, i.e. 19 October 2017. In their joint request, the four third participants also highlighted the length of the panel report, and of Brazil's appellant's submission in these appellate proceedings. Argentina, Australia, Canada and the United States therefore requested that the deadline for the filing of the third participants' submissions be extended by one week, until 26 October 2017.

3. On 9 October 2017, we invited the participants and third parties, if they so wished, to comment on the joint request by 12 noon on 11 October 2017. We received no objections to the joint request. Brazil indicated that it did not oppose the request and Japan stated it had no comments.

4. We consider the reasons identified by Argentina, Australia, Canada and the United States, in particular the fact that the deadlines for the filing of third participants' submissions in two separate appeal proceedings currently fall on the same day, to be relevant factors in our assessment of the joint request. We further note that Brazil, the European Union and Japan and the other third parties have not raised any objection to the joint request.

5. In these circumstances, the Division has decided, 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 Thursday, 26 October 2017.

Modified Dates for the Submission of Documents

Process	**Rule**	**Date**
Notice of Appeal	Rule 20	Thursday, 28 September 2017
Appellant's submission and executive summary	Rule 21(1)	Thursday, 28 September 2017
Notice of Other Appeal	Rule 23(1)	Tuesday, 3 October 2017
Other appellant's submission and executive summary	Rule 23(3)	Tuesday, 3 October 2017
Appellee's submission(s) and executive summary(ies)	Rules 22 and 23(4)	Monday, 16 October 2017
Third participants' submissions and executive summaries	Rule 24(1)	**Thursday, 26 October 2017**
Third participants' notifications	Rule 24(2)	**Thursday, 26 October 2017**