before the Panel that legislative action is absolutely necessary, alleged that Brazil is not only equipped with provisional measures, but also with "other administrative acts at Brazil's disposal that would eliminate the discriminatory elements of the subsidy programmes found to be inconsistent in this case".[1236] As the Panel's description of the challenged programmes states, each of the programmes that were found to grant prohibited subsidies operated through various legal instruments including laws, decrees, implementing orders, interministerial implementing orders, and accreditations granted pursuant to the programmes.[1237] Determining whether it is possible to withdraw the relevant measures at issue through means other than Brazil's normal legislative process would therefore require us to study each of the legal instruments at issue and make our own factual findings about the means of implementation available to Brazil, which would be outside the scope of appellate review. Similarly, we find no undisputed facts on the record concerning the time periods for the legislative process in Brazil[1238], as well as on the issue of whether provisional measures by Brazil would result in a "permanent" or a "temporary" withdrawal of the measures at issue.[1239]

5.464. In such circumstances, we are unable to complete the legal analysis, as requested by Brazil, and cannot specify the time period within which the prohibited subsidies identified by the Panel must be withdrawn by Brazil. We note, however, that the Panel's recommendations, in paragraphs 8.10 and 8.21, that Brazil withdraw the subsidies identified by the Panel "without delay", stand undisturbed.

6 FINDINGS AND CONCLUSIONS

6.1. For the reasons set out in these Reports, the Appellate Body makes the following findings and conclusions.[1240]

6.1 Articles III:2 and III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement

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

6.2. Imported finished ICT products are not eligible for either tax reductions or exemptions because foreign producers cannot be accredited under the ICT programmes and, consequently, bear the full tax burden, as opposed to like domestic finished ICT products. In the case of an imported finished ICT product, when an importer sells the imported finished ICT product to a wholesaler, retailer, or distributor, the importer will charge the IPI tax to the wholesaler, retailer, or distributor and remit the tax to the Brazilian Government.[1241] In contrast, in the case of a like domestic finished ICT product that is subject to IPI tax exemption or reduction under the ICT programmes, the seller does not charge any tax or charges a reduced tax, as the case may be, to the wholesaler, retailer,

[1236] European Union's comments on Brazil's response to Panel question No. 83, para. 9.

[1237] Panel Reports, para. 2.38.

[1238] Brazil estimated before the Panel that, following the normal legislative process, "even under the most expeditious scenario the withdrawal of the measures at issue could not be accomplished in less than 18 months from adoption of the DSB recommendations and rulings in this dispute". (Brazil's response to Panel question No. 83) Japan contested the fact that Brazil's normal legislative process must necessarily take longer than 90 days, because "Brazil fails to explain why these processes cannot be accelerated in order to bring itself into compliance with its international legal obligations." (Japan's comments on Brazil's response to Panel question No. 83, para. 4)

[1239] According to Brazil, legislative action is required to withdraw the measures at issue because it must be the case that the term "withdraw the subsidy" in Article 4.7 requires the *permanent* withdrawal of the subsidies, and provisional measures would at most affect only "a *temporary* withdrawal of the measures at issue, and [would] not obviate the need to go through Brazil's ordinary legislative process". (Brazil's comments on the European Union's and Japan's responses to Panel question No. 83, para. 3 (emphasis original)) The European Union and Japan both contested Brazil's position, asserting that Brazil had used provisional measures to introduce or modify several of the prohibited subsidies at issue in this dispute and citing multiple factual examples of such modifications. (See European Union's response to Panel question No. 83, para. 4; Japan's comments on Brazil's response to Panel question No. 83, para. 5)

[1240] One Member of the Division expressed a separate opinion regarding the scope of the term "payment of subsidies" in Article III:8(b) of the GATT 1994. This separate opinion can be found in section 5.2.5 of these Reports.

[1241] Panel Reports, para. 2.14.

or distributor.[1242] At this last stage, the tax rate is thus higher for imported finished ICT products than for like domestic finished ICT products, and the tax burden on the former is necessarily in excess of that on the latter.

6.3. We therefore uphold the Panel's findings, in paragraphs 7.154, 8.5.a, and 8.16.a of the Panel Reports, that imported finished ICT products are subject to a higher tax burden than like domestic ICT products and are consequently taxed in excess of like domestic finished ICT products, contrary to Article III:2, first sentence, of the GATT 1994.

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

6.4. Under the credit-debit system, purchases of non-incentivized imported intermediate ICT products involve the payment of a tax upfront that is not faced by companies that purchase incentivized like domestic intermediate ICT products, which are exempted from the relevant taxes.[1243] Even in the case of tax reductions, companies purchasing incentivized like domestic intermediate ICT products have to pay a lower tax compared to companies purchasing non-incentivized imported intermediate ICT products. We fail to see how these situations do not have the effect of limiting the availability of cash flow for companies purchasing non-incentivized imported intermediate ICT products. The fact that purchasers of imported intermediate ICT products have to pay the relevant taxes under the ICT programmes, irrespective of the point in time, in comparison to purchasers of incentivized like domestic intermediate ICT products, who do not have to pay the relevant tax or pay a reduced amount, "limit[s] the availability of cash flow"[1244], resulting in a higher effective tax burden on imported intermediate ICT products. Moreover, the value of the tax credit that is generated upon the payment of the relevant tax on the sale of a non-incentivized imported intermediate ICT product will depreciate over time until it is used or adjusted. To that extent, in as much as there is a time lag between the accrual of the tax credit and the adjustment or use thereof, it necessarily results in the value of money (in the form of accrued tax credits) depreciating over time. Therefore, imported intermediate ICT products, the purchase of which is subject to a payment of tax upfront, bear a higher tax burden than that faced by the incentivized like domestic intermediate ICT products, which benefit from tax exemption or reduction.

6.5. We therefore uphold the Panel's findings, in paragraphs 7.172, 8.5.a, and 8.16.a of the Panel Reports, that imported intermediate ICT products are taxed in excess of like domestic incentivized intermediate ICT products contrary to Article III:2, first sentence, of the GATT 1994.

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

6.6. The aspect of the ICT programmes challenged by the complaining parties as being inconsistent with Article III:4 of the GATT 1994 concerned the accreditation requirements, the fulfilment of which enabled the obtaining of the relevant tax exemption, reduction, or suspension on the sales or purchases of ICT products. It is undisputed that in order to be eligible for the tax exemption, reduction, or suspension under the ICT programmes, companies must fulfil the accreditation requirements. The accreditation requirements under the ICT programmes therefore result in less favourable treatment for imported ICT products in the form of the differential tax burden that imported ICT products are subjected to by virtue of the fact that foreign producers cannot be accredited under the ICT programmes. The consequence being, as the Panel also noted, that foreign producers "can never qualify for the tax exemptions, reductions or suspensions".[1245] We note that the aspects of the ICT programmes found to be inconsistent with Article III:2, first sentence, and Article III:4 are distinct. In the case of Article III:2, first sentence, the aspect of the ICT programme found to be inconsistent is the differential tax treatment that results in a higher tax burden on imported ICT products, i.e. imported ICT products are taxed in excess of like domestic ICT products. Whereas, for the purposes of Article III:4, the aspect of the ICT programmes found to be

[1242] Panel Reports, para. 2.15.
[1243] Panel Reports, para. 7.170.
[1244] Panel Reports, para. 7.170.
[1245] Panel Reports, para. 7.223.

inconsistent is the accreditation requirements that result in less favourable treatment in the form of the differential tax treatment for imported ICT products.

6.7. We therefore uphold the Panel's findings, in paragraphs 7.225, 8.5.b, and 8.16.c of the Panel Reports, that the accreditation requirements of the ICT programmes, by restricting access to the tax incentives only to domestic products, modify the conditions of competition to the detriment of imported products and result in less favourable treatment being accorded to imported ICT products than to like domestic ICT products inconsistently with Article III:4 of the GATT 1994.

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

6.8. Under the credit-debit system, purchasers of imported intermediate ICT products that are not incentivized under the ICT programmes will have to anticipate and pay the full amount of tax due on such imported intermediate ICT products. Although any such tax paid on the purchase of imported intermediate ICT products will generate a corresponding tax credit in favour of the purchaser, nonetheless, offsetting this tax credit entails an *administrative burden* that is not faced, or faced to a lesser extent, by a purchaser of domestic intermediate ICT products that are incentivized.[1246] This is the case because under the credit-debit system, "if the tax credit cannot be offset by debits after three taxation periods", the process of compensating the tax credit with other federal taxes, or reimbursement thereof can "be burdensome for companies, and can take years."[1247]

6.9. We therefore uphold the Panel's findings, in paragraphs 7.255, 8.5.b, and 8.16.c of the Panel Reports, that the ICT programmes are inconsistent with Article III:4 of the GATT 1994, because they accord to imported intermediate ICT products treatment less favourable than that accorded to like domestic intermediate ICT products, due to the lower administrative burden imposed on firms purchasing incentivized domestic intermediate ICT products.

6.1.5 Whether the Panel erred in finding that the PPBs and other production-step requirements under the ICT programmes are contingent upon the use of domestic goods, inconsistently with Article III:4 of the GATT 1994

6.10. We agree with the Panel that the PPBs and other production-step requirements under the Informatics, PATVD, PADIS, and Digital Inclusion programmes provide an incentive to use domestic ICT products. We therefore uphold the Panel's findings, in paragraphs 7.299, 7.301-7.302, 7.308, 7.311, 7.313, 7.317, 7.319, 8.5.b, and 8.16.c of the Panel Reports, that the Informatics, PATVD, PADIS, and Digital Inclusion programmes accord less favourable treatment to imported intermediate ICT products than that accorded to like domestic products.

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

6.11. On appeal, Brazil does not make any specific arguments in connection with the Panel's finding under Article 2.1 of the TRIMs Agreement. Rather, Brazil's request for reversal of the Panel's finding under that provision is premised on us reversing the Panel's findings under Article III:4 of the GATT 1994.[1248] We have, however, for the reasons stated above, upheld the Panel's findings that certain aspects of the ICT programmes are inconsistent with Article III:4 of the GATT 1994.

[1246] We note that purchasers of incentivized intermediate domestic ICT products, in most cases, will not need to anticipate the tax due on the purchase of such intermediate ICT products since the Informatics, PATVD, PADIS, and Digital Inclusion programmes provide for tax exemptions, through zero rates, to accredited companies selling domestic intermediate ICT products. It is only in the context of the IPI tax reduction provided under the Informatics programme that purchasers of domestic intermediate ICT products may have to anticipate and pay the reduced amount of IPI tax due.

[1247] Panel Reports, para. 7.251 (referring to Brazil's first written submission to the Panel, para. 702 (DS497)).

[1248] Brazil's appellant's submission, para. 172.

6.12. Consequently, we uphold the Panel's findings, in paragraphs 7.363, 8.5.d, and 8.16.e of the Panel Reports, that those aspects of the ICT programmes found to be inconsistent with Article III:4 of the GATT 1994 are also inconsistent with Article 2.1 of the TRIMs Agreement.

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

6.13. It is undisputed that, in order for companies to obtain any sort of accreditation under the INOVAR-AUTO programme, which entitles them to accruing and using presumed IPI tax credits, they must either be located and operate in Brazil, in the case of domestic manufacturers and importers/distributors, or be in the process of establishing in the country as domestic manufacturers, in the case of investors.[1249] The only viable way for foreign manufacturers to be able to enjoy the benefit of the presumed IPI tax credits in reducing their IPI tax liability under the INOVAR-AUTO programme is to become accredited as importers/distributors. However, in order to do so, foreign manufacturers must, first and foremost, be located and operate in Brazil.[1250] This indicates that foreign manufacturers seeking accreditation as importers/distributors face a corresponding burden that necessarily comes with having to operate in, or establish themselves in, Brazil, unlike domestic manufacturers, who already operate or are established in Brazil. Moreover, we note that in order to become accredited as importers/distributors, a company shall comply with the following three specific requirements: (i) investments in R&D in Brazil; (ii) expenditure on engineering, basic industrial technology, and capacity-building of suppliers in Brazil; and (iii) participation in the vehicle-labelling programme by INMETRO.[1251] A fourth requirement also exists, which calls for the performance in Brazil of certain manufacturing steps.[1252] These activities cannot be considered to be typical for foreign manufacturers seeking to import motor vehicles into Brazil. The fact that foreign manufacturers have to undertake these activities to get accredited as importers/distributors implies that foreign manufacturers face a burden that domestic manufacturers do not face. Almost all of these requirements can be considered to be typical of the nature of activity carried out by a domestic manufacturer. Indeed, any domestic manufacturer will carry out and perform a minimum number of manufacturing activities in Brazil, and, in that process, it is likely to make investments in R&D in Brazil and make expenditures in the categories indicated in the INOVAR-AUTO programme. The INOVAR-AUTO programme is thus designed in such a manner that the accreditation requirements thereunder adversely modify the competitive conditions for imported products in comparison to like domestic products.

6.14. We therefore uphold the Panel's findings, in paragraphs 7.772, 8.6.b, and 8.17.c of the Panel Reports, that, under the INOVAR-AUTO programme, the conditions for accreditation in order to receive presumed tax credits accord less favourable treatment to imported products than that accorded to like domestic products inconsistently with Article III:4 of the GATT 1994.

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

6.15. On appeal, Brazil does not make any specific arguments in connection with the Panel's finding under Article 2.1 of the TRIMs Agreement. Rather Brazil's request for reversal of the Panel's finding under Article 2.1 of the TRIMs Agreement is premised on us reversing the Panel's findings under Article III:4 of the GATT 1994.[1253] We have, however, for the reasons stated above, upheld the Panel's findings that certain aspects of the INOVAR-AUTO programme are inconsistent with Article III:4 of the GATT 1994.

6.16. Consequently, we uphold the Panel's findings, in paragraphs 7.804, 8.6.d, and 8.17.e of the Panel Reports, that those aspects of the INOVAR-AUTO programme found to be inconsistent with Article III:4 of the GATT 1994 are also inconsistent with Article 2.1 of the TRIMs Agreement.

[1249] Panel Reports, para. 7.657 (referring to Brazil's responses to Panel questions Nos. 28 and 57).
[1250] Panel Reports, para. 7.660 (referring to Brazil's response to Panel question No. 57).
[1251] Panel Reports, para. 7.658.
[1252] Panel Reports, fn 1056 to para. 7.658.
[1253] Brazil's appellant's submission, para. 294.

6.2 Article III:8(b) of the GATT 1994[1254]

6.17. Insofar as the payment of subsidies exclusively to domestic producers of a given product affects the conditions of competition between such a product and the like imported product, the resulting inconsistency with the national treatment obligation under Article III is justified under Article III:8(b), provided that the conditions thereunder are met. Moreover, conditions for eligibility for the payment of subsidies that define the class of eligible "domestic producers" by reference to their activities in the subsidized products' markets are also justified under Article III:8(b). By contrast, a requirement to use domestic over imported goods in order to have access to the subsidy is not covered by the exception in Article III:8(b) and would therefore continue to be subject to the national treatment obligation in Article III. Furthermore, an examination of the text and context of Article III:8(b), in light of its object and purpose and as confirmed by the negotiating history, suggests that the term "payment of subsidies" in Article III:8(b) does not include within its scope the exemption or reduction of internal taxes affecting the conditions of competition between like products. Instead, as noted by the Appellate Body in *Canada – Periodicals*, Article III:8(b) "was intended to exempt from the obligations of Article III only the payment of subsidies which involves the expenditure of revenue by a government".[1255]

6.18. The Panel's interpretation and application of Article III:8(b) to the measures at issue obfuscate the distinction between the effects of the payment of a subsidy to a domestic producer on the conditions of competition in the relevant product markets and the conditions for eligibility attaching thereto, on the one hand, and any other effects arising from requirements to use domestic over imported inputs in the production process, on the other hand. Moreover, at no stage did the Panel undertake an assessment of whether the measures at issue constitutes the "payment of subsidies exclusively to domestic producers" within the meaning of Article III:8(b).

6.19. Because of these shortcomings in the Panel's reasoning, we reverse the Panel's overly broad and unqualified findings, in paragraphs 7.87-7.88 of the Panel Reports, that "subsidies that are provided exclusively to domestic producers pursuant to Article III:8(b) … are not *per se* exempted from the disciplines of Article III" and that "aspects of a subsidy resulting in product discrimination (including requirements to use domestic goods, as prohibited by Article 3.1 of the SCM Agreement) are not exempted from the disciplines of Article III pursuant to Article III:8(b)." Under a proper interpretation of Article III:8(b), none of the measures at issue in this dispute are capable of being justified under that provision because they all involve the exemption or reduction of internal taxes affecting the conditions of competition between like products and therefore cannot constitute the "payment of subsidies" within the meaning of Article III:8(b).

6.3 Article 3.1(a) of the SCM Agreement

6.20. In its identification of the benchmark treatment for the three categories of the treatments under the PEC and RECAP programmes, the Panel sought to determine the existence of a general rule for companies that structurally accumulate credits. The Panel limited its analysis to seeking to identify the existence of a general rule of taxation to which the challenged treatment would be an exception. Instead of doing so, however, the Panel should have determined the tax treatment of comparably situated taxpayers, as the legal standard under Article 1.1(a)(1)(ii) of the SCM Agreement requires.

6.21. We therefore reverse the Panel's conclusions, in paragraphs 7.1171-7.1172, 7.1186-7.1187, and 7.1199-7.1200 of the Panel Reports, that Brazil has not demonstrated that the tax suspensions are the benchmark for comparison and that the appropriate benchmark is, instead, the treatment applicable to purchases by non-accredited companies of the relevant products. As a result, we also reverse the Panel's findings, in paragraphs 7.1211, 7.1223, and 7.1238, as well as in paragraphs 8.7 and 8.18 of the Panel Reports, that the tax suspensions granted to registered or accredited companies under the PEC and RECAP programmes constitute financial contributions in the form of government revenue otherwise due that is foregone or not collected and are hence subsidies within the meaning of Article 1.1 of the SCM Agreement and contingent upon export performance within the meaning of Article 3.1(a) of the SCM Agreement.

[1254] For the separate opinion on this issue, see section 5.2.5 of these Reports.
[1255] Appellate Body Report, *Canada – Periodicals*, p. 34.

6.4 Article 3.1(b) of the SCM Agreement

6.22. With respect to Brazil's claim that the Panel erred in its comparison of the treatment of intermediate goods and inputs under the ICT programmes with the benchmark treatment by arbitrarily distinguishing between taxpayers within the benchmark, we disagree with Brazil's approach to comparing the challenged treatment to the selected benchmark treatment. As we see it, the Panel did not treat only one subset of taxpayers (i.e. those that are unable to offset the amount of the tax paid during the same taxation period) as the benchmark for the purposes of comparison. Rather, having explained in detail how the mechanism of credits and debits under the principle of non-accumulation works, the Panel concluded that, under the normal rule of general application of Brazil's tax system, there are two possible factual scenarios: one in which the buyer of non-incentivized products will be able to offset the amount of the tax paid during the same taxation period, and the other one when this would not be possible. We consider that, in comparing the challenged tax treatment to the benchmark treatment, the Panel correctly examined both possible factual scenarios that result from the application of the normal rules of Brazil's tax system.

6.23. With respect to Brazil's claim that the Panel erred in finding that cash availability and implicit interest constitute revenue "otherwise due" under Article 1.1(a)(1)(ii) of the SCM Agreement, we consider that, in the present dispute, when the tax exemptions and reductions apply, the Brazilian Government does not collect in full the tax revenue when it normally would, or collects it in part. The fact that, ultimately, the amount of the tax collected under the benchmark treatment and the challenged treatment may nominally be the same does not detract from the fact that, under the benchmark treatment, in the scenario when non-accredited companies are unable to offset their credits immediately, the Brazilian Government would collect and retain, for a certain period, the amount of tax payable to it. During this period of time, the Brazilian Government can enjoy the cash available to it and earn interest on it. By contrast, when tax exemptions and reductions are applied, the Brazilian Government collects the tax later in time and does not enjoy the availability of cash as it otherwise would under the benchmark treatment. Thus, under the challenged treatment, the Brazilian Government would not collect the tax at the time it normally would under the benchmark treatment. By doing so, in our view, the Brazilian Government would not collect the revenue that would be otherwise due to it.

6.24. In light of the above, we do not consider that the Panel erred in finding that the tax treatment of intermediate products and inputs under the ICT programmes constitutes a subsidy under Article 1.1 of the SCM Agreement. We thus uphold the Panel's findings, in paragraphs 7.436, 7.444, 7.454, 7.463, 7.473, 7.489-7.490, and 7.495 of the Panel Reports, that each of the challenged tax exemptions, reductions, and suspensions granted to accredited companies on (i) the sales of intermediate goods that they produce, and (ii) the purchases of raw materials, intermediate goods, and packaging materials (under the Informatics programme) and inputs, capital goods, and computational goods (under the PADIS and PATVD programmes) constitutes financial contributions where "government revenue that is otherwise due is foregone or not collected" under Article 1.1(a)(1)(ii) of the SCM Agreement.

6.25. With respect to the main PPBs that incorporate nested PPBs under the Informatics programme, we consider that they contain a condition requiring the use of domestic components and subassemblies, which must be fulfilled in order for the relevant products to benefit from the tax incentives. We therefore agree with the Panel's conclusion that the main PPBs that incorporate nested PPBs contain a requirement to use domestic goods, i.e. the components and subassemblies covered by the nested PPBs, under Article 3.1(b) of the SCM Agreement. Accordingly, we uphold the Panel's findings, in paragraphs 7.299-7.300, 7.302, 7.313, 7.319, 8.5.e, and 8.16.f of the Panel Reports, that the main PPBs that incorporate nested PPBs under the Informatics programme are inconsistent with Article 3.1(b) of the SCM Agreement.

6.26. With respect to the main PPBs that do not contain nested PPBs under the Informatics programme, we consider that they do not provide for more than a collection of production steps, which must be carried out in Brazil, in order for a company to benefit from the tax incentives with respect to the product subject to the PPB under the relevant programme. Although compliance with the production steps set out in the PPBs is likely to result in the use of domestic components and subassemblies, such use of domestic products will be a consequence of the requirement to perform the production steps in Brazil. Accordingly, we reverse the Panel's findings, in paragraphs 7.301-7.302, 7.313, 7.319, 8.5.e, and 8.16.f of the Panel Reports, that the main PPBs without

nested PPBs under the Informatics programme are contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b) of the SCM Agreement.

6.27. With respect to the PATDV programme, we understand that the PPBs under that programme follow the same structure and logic as those under the Informatics programme. Accordingly, for the same reasons as under the Informatics programme, to the extent the main PPBs under the PATVD programme incorporate nested PPBs, we consider them to require the use of domestic over imported goods inconsistently with Article 3.1(b) of the SCM Agreement. However, we do not consider that the main PPBs that do not contain nested PPBs contain a condition requiring the use of domestic over imported goods. We thus uphold the Panel's findings concerning the PATVD programme, in paragraphs 7.308, 7.313, 7.317, 7.319, 8.5.e, and 8.16.f of the Panel Reports, to the extent they relate to the main PPBs that contain nested PPBs, and we reverse the Panel's findings, contained in the same paragraphs of the Panel Reports, to the extent they relate to the main PPBs that do not contain nested PPBs.

6.28. With respect to the PADIS programme, we do not consider that the eligibility requirements under that programme constitute a contingency requirement to use domestic over imported goods under Article 3.1(b) of the SCM Agreement.

6.29. With respect to the Digital Inclusion programme, our review of the Panel's findings demonstrates that the Panel did not have a proper basis to conclude that the Digital Inclusion programme contains a requirement to use domestic over imported goods inconsistent with Article 3.1(b) of the SCM Agreement.

6.30. In light of the above, we reverse the Panel's findings, in paragraphs 7.313, 7.317, 7.319, 8.5.e-f of the Panel Reports, that the PADIS and Digital Inclusion programmes require the use of domestic over imported goods inconsistently with Article 3.1(b) of the SCM Agreement.

6.31. With respect to the INOVAR-AUTO programme, we note that the requirement to perform a minimum number of manufacturing steps in Brazil under that programme operates in a way similar to the main PPBs that do not incorporate nested PPBs under the ICT programmes. Thus, having reversed the Panel's findings with respect to the main PPBs that do not incorporate nested PPBs under the ICT programmes, we also reverse the Panel's findings of inconsistency with Article 3.1(b) with respect to the manufacturing steps under the INOVAR-AUTO programme, contained in paragraphs 7.751, 7.823, 7.847, 8.6.e, and 8.17.f of the Panel Reports.

6.32. With respect to the European Union's and Japan's appeals of the Panel's findings concerning the in-house scenario, we note that, for purposes of establishing an inconsistency with Article 3.1(b) of the SCM Agreement, whether a company produces goods in-house or whether it outsources their production is not decisive. What matters, instead, is whether such measure reflects a condition requiring the use of domestic over imported goods. We thus consider that it did not matter, for purposes of the Panel's analysis, what factual scenarios were available for compliance with the requirements under the ICT and INOVAR-AUTO programmes. We thus reverse the Panel's findings, in paragraphs 7.303-7.304 and 7.314 of the Panel Reports, made in the context of its analysis under ICT programmes, to the extent that they can be understood as suggesting that the in-house scenario was not covered by the Panel's findings. We also reverse the Panel's findings, in paragraphs 7.749-7.750, and 7.770 of the Panel Reports, made in the context of INOVAR-AUTO programme and referring to the mentioned Panel's findings under the ICT programmes, to the extent that they can also be understood as suggesting that the in-house scenario was not covered by the Panel's findings. We thus consider that the Panel's findings, in paragraphs 7.319, 7.772-7.773, 8.5.e, 8.6.b, 8.6.e, 8.16.c, 8.16.f, 8.17.c, and 8.17.f of the Panel Reports, also apply the in-house scenario.

6.5 Article I:1 of the GATT 1994 and the Enabling Clause

6.5.1 Whether the Panel erred in finding that the claims raised by the European Union and Japan under Article I:1 of the GATT 1994 were within its terms of reference

6.33. Paragraph 4(a) of the Enabling Clause envisages a degree of specificity in the notification adopted thereunder. At a minimum, a notification pursuant to paragraph 4(a) should state under which particular provision of the Enabling Clause the differential and more favourable treatment has been adopted so as to put other Members on notice. A notification pursuant to paragraph 4(a) speaks

to and has a direct bearing on a complaining party's knowledge. Consequently, it speaks to whether the complaining party is required to raise the Enabling Clause and identify the relevant provision(s) thereof in its panel request and assert that an arrangement or a measure adopted by the responding party is inconsistent not only with Article I:1 of the GATT 1994, but also with the relevant provisions of the Enabling Clause. While it is for the complaining party to raise the Enabling Clause and identify the relevant provision(s) thereof in its panel request, the burden to prove that the measure satisfies the conditions set out in the Enabling Clause remains on the responding party relying on the Enabling Clause as a defence.

6.34. With respect to whether the measure at issue (i.e. differential tax treatment under the INOVAR-AUTO programme in the form of internal tax reductions accorded to some but not other Members) was notified pursuant to paragraph 4(a) as having been adopted under paragraph 2(b) of the Enabling Clause, our review of the Panel's findings indicates that Brazil has not demonstrated that the differential tax treatment under the INOVAR-AUTO was notified to the WTO as adopted under paragraph 2(b), as required pursuant to paragraph 4(a) of the Enabling Clause.

6.35. We therefore uphold the Panel's finding, in paragraphs 7.1082-7.1083 of the Panel Reports, that Brazil has not demonstrated that the differential tax treatment under the INOVAR-AUTO programme was notified to the WTO as adopted pursuant to paragraph 2(b), and therefore, in the circumstances of this case, there was no burden on the complaining parties to raise and identify paragraph 2(b) of the Enabling Clause in their panel requests.

6.36. With respect to whether the measure at issue (i.e. the differential tax treatment under the INOVAR-AUTO programme in the form of internal tax reductions accorded to some but not other Members) was notified pursuant to paragraph 4(a) as having been adopted under paragraph 2(c) of the Enabling Clause, our review of the Panel's findings indicates that Brazil has not demonstrated that the 1980 Treaty of Montevideo and the ECAs notified to the WTO have a genuine link to the INOVAR-AUTO programme providing for the differential and more favourable treatment at issue, and consequently, the differential and more favourable treatment at issue was not notified to the WTO as adopted under paragraph 2(c), as required pursuant to paragraph 4(a) of the Enabling Clause.

6.37. We therefore uphold the Panel's finding, in paragraph 7.1119 of the Panel Reports, that the differential tax treatment under the INOVAR-AUTO programme was not notified as adopted under paragraph 2(c), as required pursuant to paragraph 4(a). Consequently, we also uphold the Panel's finding, in paragraph 7.1120 of the Panel Reports, that, in the circumstances of this case, there was no burden on the complaining parties to raise and identify paragraph 2(c) of the Enabling Clause in their panel requests.

6.38. For these reasons, we uphold the Panel's findings, in paragraphs 8.6.h and 8.17.i of the Panel Reports, that there was no burden on the complaining parties to raise and identify the relevant provisions of the Enabling Clause in their panel requests, and their claims under Article I:1 of the GATT 1994 were therefore within the Panel's terms of reference.

6.5.2 Whether the Panel erred in its interpretation of paragraph 2(b) of the Enabling Clause and in finding that the differential tax treatment under the INOVAR-AUTO programme was not justified under that provision

6.39. Paragraph 2(b) provides for the granting of "[d]ifferential and more favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT". Paragraph 2(b) provides for the adoption of a limited category of differential and more favourable treatment, namely treatment that concerns "non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices" of the GATT, as an institution. The phrase "non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT", at the time of the adoption of the Enabling Clause, concerned non-tariff measures taken pursuant to the S&D treatment provisions of the Tokyo Round Codes and not the provisions of the GATT 1947. Following the entry into force of the WTO Agreement, paragraph 2(b) of the Enabling Clause provides for the adoption of a limited category of differential and more favourable treatment, namely treatment that concerns non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the WTO. The GATT 1994, while an integral part of

the WTO Agreement, was not negotiated under the auspices of the WTO. These considerations read in light of the text, context, and circumstances surrounding the adoption of the Enabling Clause, and thereafter the establishment of the WTO, indicate that paragraph 2(b) does not concern non-tariff measures governed by the provisions of the GATT 1994. Instead, paragraph 2(b) speaks to non-tariff measures taken pursuant to S&D treatment provisions of "instruments multilaterally negotiated under the auspices of the [WTO]".

6.40. We therefore uphold the Panel's finding, in paragraph 7.1096 of the Panel Reports, that "a non-tariff measure within the scope of paragraph 2(b) must be governed by specific provisions on special and differential treatment, that are distinct from the provisions of the GATT 1994 incorporating the GATT 1947."[1256] We also uphold the Panel's findings, in paragraphs 7.1097, 8.6.i, and 8.17.j of the Panel Reports, that the tax reductions accorded under the INOVAR-AUTO programme to imported products from Argentina, Mexico, and Uruguay and found to be inconsistent under Article I:1 of the GATT 1994 are not justified under paragraph 2(b) of the Enabling Clause.

6.5.3 Whether the Panel erred in its interpretation of paragraph 2(c) of the Enabling Clause and in finding that the differential tax treatment under the INOVAR-AUTO programme was not justified under that provision

6.41. Paragraph 2(c) excepts differential and more favourable treatment accorded pursuant to "[r]egional or global arrangements entered into amongst" developing country Members from a finding of inconsistency with Article I:1 of the GATT 1994. To the extent that the Panel relied on its earlier analysis concerning whether or not the INOVAR-AUTO programme, according the differential and more favourable treatment (i.e. the differential tax treatment in the form of internal tax reductions accorded to some but not other Members), had a genuine link to "the arrangement notified to the WTO" in determining if the differential and more favourable treatment was substantively justified under paragraph 2(c), we find no error in the Panel's approach. Indeed, if there is no genuine link between the measure at issue according the differential and more favourable treatment and the arrangements notified to the WTO, we find it difficult to see how the measure at issue could be substantively justified under paragraph 2(c).

6.42. We therefore uphold the Panel's finding, in paragraph 7.1118 of the Panel Reports, to the extent that the Panel found that Brazil has not identified any arrangement with a genuine link to the differential tax treatment envisaged under the INOVAR-AUTO programme. Consequently, we also uphold the Panel's findings, in paragraphs 7.1121, 8.6.i, and 8.17.j of the Panel Reports, that the tax reductions accorded under the INOVAR-AUTO programme to imported products from Argentina, Mexico, and Uruguay and found to be inconsistent under Article I:1 of the GATT 1994 are not justified under paragraph 2(c) of the Enabling Clause.

6.6 Article 4.7 of the SCM Agreement

6.43. The term "without delay" in Article 4.7 is not used in the sense of requiring *immediate* compliance. Nor does the term "without delay", combined with the requirement that the panel specify a time period, impose a single standard or time period applicable in all cases. Instead, Article 4.7 requires a panel to specify a time period that constitutes "without delay" within the realm of possibilities in a given case and considering the domestic legal system of the implementing Member. In determining the time period under Article 4.7 that constitutes "without delay", a panel should typically take into account the nature of the measure(s) to be revoked or modified and the domestic procedures available for such revocation or modification. These domestic procedures include any extraordinary procedures that may be available within the legal system of a WTO Member. The Panel did not establish a sufficient link between the time period of 90 days specified by it for the withdrawal of the subsidies at issue and the domestic procedure within Brazil for such withdrawal. Instead, the Panel treated the practice of specifying 90 days by some prior panels as the *de facto* standard to be applied in all cases.

6.44. We, therefore, find that by failing to provide a "reasoned and adequate explanation" or a "basic rationale" in recommending a time period of 90 days under Article 4.7 of the SCM Agreement in the present case, the Panel acted inconsistently with Articles 11 and 12.7 of the DSU. Consequently, we reverse the Panel's conclusions, in paragraphs 8.11 and 8.22 of the Panel Reports,

[1256] Panel Reports, para. 7.1096. (fn omitted)

that Brazil withdraw the prohibited subsidies identified at paragraphs 8.5.e, 8.6.e, 8.7, 8.16.f, 8.17.f, and 8.18 of the Panel Reports within 90 days.

6.45. Furthermore, we are unable to complete the legal analysis, as requested by Brazil, and cannot specify the time period within which the prohibited subsidies identified by the Panel must be withdrawn by Brazil. We note, however, that the Panel's recommendations, in paragraphs 8.10 and 8.21 of the Panel Reports, that Brazil withdraw the subsidies identified by the Panel "without delay", stand undisturbed.

6.7 Recommendation

6.46. The Appellate Body recommends that the DSB request Brazil to bring its measures, found in these Reports, and in the Panel Reports as modified by these Reports, to be inconsistent with Articles I:1, III:2, and III:4 of the GATT 1994, Article 2.1 of the TRIMs Agreement, and Article 3.1(b) of the SCM Agreement into conformity with its obligations under those Agreements.

Signed in the original in Geneva this 15th day of October 2018 by:

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Thomas R. Graham
Presiding Member

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Peter Van den Bossche
Member

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Hong Zhao
Member