

Brazil could indeed devise a WTO-consistent rule that is effectively aimed at credit-accumulating companies, to avoid the problem of credit-accumulation.¹⁶⁰⁴

7.1237. In light of the above, the Panel concludes that the subsidies granted under the PEC and RECAP programmes are contingent upon export performance within the meaning of Article 3.1(a) of the SCM Agreement, and thus prohibited under Articles 3.1(a) and 3.2 of the SCM Agreement.

7.5.1.5 Conclusion

7.1238. In light of the foregoing, the Panel concludes 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, and thus are prohibited subsidies, inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement.

7.6 Final comments

7.1239. Article 12.10 of the DSU states that: "in examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation."

7.1240. Furthermore, Article 12.11 of the DSU requires that:

Where one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures.

7.1241. In adopting the timetable for the proceedings, the Panel took into account the need to give all the parties sufficient time to prepare and present their respective arguments. Furthermore, in the course of the proceedings, Brazil raised certain provisions of the Enabling Clause, with respect to preferential treatment through non-tariff measures and regional trade agreements. The Panel took account of these provisions by examining Brazil's arguments in detail, as set out in section 7.4.8 above.

8 CONCLUSIONS AND RECOMMENDATIONS

8.1 Complaint by the European Union (DS472)

8.1. With respect to Brazil's assertion that Implementing Order 257/2014 is outside the Panel's terms of reference, the Panel concludes that the rules on calculation of presumed tax credits under the INOVAR-AUTO programme, as contained in Implementing Order 257/2014, are within the Panel's terms of reference.

8.2. With respect to whether Article III of the GATT 1994, the TRIMs Agreement, and the SCM Agreement, are not applicable to measures that regulate pre-market production steps, the Panel concludes that Article III of the GATT 1994, the TRIMs Agreement, and the SCM Agreement, are not *per se* inapplicable to such measures, in particular "pre-market" measures directed at producers.

8.3. With respect to whether Article III of the GATT 1994 and the TRIMs Agreement are not applicable to the challenged measures, or aspects of the challenged measures, because they are payments of subsidies exclusively to domestic producers, pursuant to Article III:8(b) of the GATT 1994, the Panel concludes that measures in the form of subsidies provided exclusively to domestic

¹⁶⁰⁴ The European Union acknowledges that "Brazil could devise a general rule to prevent tax credit accumulation with respect to companies (as opposed to sectors) whereby e.g. companies accumulating a particular amount of tax credits in the preceding or preceding years could benefit from a suspension on taxes." European Union's second written submission, para. 510.

producers are not for that reason alone exempted from the disciplines of Article III of the GATT 1994 or Article 2.1 of the TRIMs Agreement.

8.4. With respect to whether the incentivised products that are the subject of certain challenged measures are "domestic products" for the purposes of Article III of the GATT 1994, Article 2.1 of the TRIMs Agreement, and Article 3.1(b) of the SCM Agreement, the Panel concludes that the incentivized products are Brazilian domestic products.

8.5. With respect to the European Union's claims in respect of the Informatics, PADIS, PATVD and Digital Inclusion programmes, the Panel concludes that:

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

8.6. With respect to the European Union's claims in respect of the INOVAR-AUTO programme, the Panel concludes that:

- a. Certain aspects of the accreditation process, the system of rules on accrual and calculation of presumed tax credits, and the rules on the use of presumed tax credits resulting from expenditure on strategic inputs and tools in Brazil, result in imported products being subject to internal taxes in excess of those applied to like domestic products, inconsistently with Article III:2 of the GATT 1994;
- b. Certain aspects of the accreditation process, the system of rules on accrual and calculation of presumed tax credits, and the rules on the use of presumed tax credits resulting from expenditure on strategic inputs and tools in Brazil; the accreditation requirement to perform a minimum number of manufacturing steps in Brazil; that aspect of the rules on accrual of presumed IPI tax credits pertaining to expenditure in strategic

inputs and tools; and those aspects of the accreditation requirements to invest in R&D in Brazil and make expenditures on engineering, basic industrial technology and capacity-building of suppliers in Brazil, pertaining to the purchase of Brazilian laboratory equipment; accord less favourable treatment to imported products than that accorded to like domestic products, inconsistently with Article III:4 of the GATT 1994;

- c. It is not necessary to make findings with respect to the complaining parties' claims under Article III:5 of the GATT 1994 in order to secure a positive solution to this dispute, and the Panel therefore exercises judicial economy with respect to these claims;
- d. The INOVAR-AUTO programme constitutes a trade-related investment measure, and those aspects of the programme found to be inconsistent with Article III:2 and III:4 of the GATT 1994 are also inconsistent with Article 2.1 of the TRIMs Agreement;
- e. The tax reductions through presumed tax credits granted under the INOVAR-AUTO programme are subsidies within the meaning of Article 1.1 of the SCM Agreement and contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b) of the SCM Agreement, and thus are prohibited subsidies, inconsistent with Article 3.1(b) and 3.2 of the SCM Agreement;
- f. Those aspects of the INOVAR-AUTO programme found to be inconsistent with the GATT 1994 and the TRIMs Agreement are not justified under Article XX(b) or XX(g) of the GATT 1994;
- g. The tax reductions accorded to imported products from MERCOSUR members and Mexico under the INOVAR-AUTO programme are advantages granted by Brazil to products originating in those countries, which are not accorded immediately and unconditionally to like products originating in other WTO Members, inconsistently with Article I:1 of the GATT 1994;
- h. The complaining parties were not under a burden to invoke the Enabling Clause in their panel requests, and their claims under Article I:1 of the GATT 1994 are therefore within the Panel's terms of reference; and
- i. The tax reductions accorded to imported products from Argentina, Mexico and Uruguay and found to be inconsistent under Article I:1 of the GATT 1994 are not justified under paragraph 2(b) or 2(c) of the Enabling Clause.

8.7. With respect to the European Union's claims under Article 3.1(a) of the SCM Agreement, in respect of the PEC and RECAP programmes, the Panel concludes 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, and thus are prohibited subsidies, inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement.

8.8. Pursuant to Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits accruing under the agreement in question. The Panel therefore finds that, to the extent that Brazil has acted in a manner inconsistent with the provisions of the GATT 1994, TRIMs Agreement, and SCM Agreement, it has nullified or impaired benefits accruing to the European Union under those agreements.

8.9. Pursuant to Article 19.1 of the DSU, to the extent that those aspects of the challenged programmes are WTO-inconsistent, the Panel recommends that Brazil bring the challenged measures into conformity with its obligations under the covered agreements.

8.10. Pursuant to Article 4.7 of the SCM Agreement, the Panel recommends that Brazil withdraw the subsidies identified above without delay.

8.11. Article 4.7 further provides that "the panel shall specify in its recommendation the time-period within which the measure must be withdrawn." In other words, the Panel is required to

specify what period would represent withdrawal "without delay". Taking into account the procedures that may be required to implement our recommendation on the one hand, and the requirement that Brazil withdraw its subsidies "without delay" on the other, the Panel recommends that Brazil shall withdraw the subsidies identified in paragraphs 8.5(e), 8.6(e), and 8.7 above within 90 days.

8.2 Complaint by Japan (DS497)

8.12. With respect to Brazil's assertion that Implementing Order 257/2014 is outside the Panel's terms of reference, the Panel concludes that the rules on calculation of presumed tax credits under the INOVAR-AUTO programme, as contained in Implementing Order 257/2014, are within the Panel's terms of reference.

8.13. With respect to whether Article III of the GATT 1994, the TRIMs Agreement, and the SCM Agreement, are not applicable to measures that regulate pre-market production steps, the Panel concludes that Article III of the GATT 1994, the TRIMs Agreement, and the SCM Agreement, are not *per se* inapplicable to such measures, in particular "pre-market" measures directed at producers.

8.14. With respect to whether Article III of the GATT 1994 and the TRIMs Agreement are not applicable to the challenged measures, or aspects of the challenged measures, because they are payments of subsidies exclusively to domestic producers, pursuant to Article III:8(b) of the GATT 1994, the Panel concludes that measures in the form of subsidies provided exclusively to domestic producers are not for that reason alone exempted from the disciplines of Article III of the GATT 1994 or Article 2.1 of the TRIMs Agreement.

8.15. With respect to whether the incentivised products that are the subject of certain challenged measures are "domestic products" for the purposes of Article III of the GATT 1994, Article 2.1 of the TRIMs Agreement, and Article 3.1(b) of the SCM Agreement, the Panel concludes that the incentivized products are Brazilian domestic products.

8.16. With respect to Japan's claims in respect of the Informatics, PADIS, PATVD and Digital Inclusion programmes, the Panel concludes that:

- a. The production-step requirements under the Informatics, PADIS, PATVD, and Digital Inclusion programme; and the requirement for products to obtain the status of "developed" in Brazil, under the Informatics, PATVD and Digital Inclusion programmes; result in imported products being subject to internal taxes in excess of those applied to like domestic products, inconsistently with Article III:2, first sentence, of the GATT 1994;
- b. It is not necessary to make findings with respect to Japan's claims under Article III:2, second sentence, of the GATT 1994, and the Panel therefore exercises judicial economy with respect to these claims;
- c. The production-step requirements under the Informatics, PADIS, PATVD, and Digital Inclusion programme, and the requirement for products to obtain the status of "developed" in Brazil, under the Informatics, PATVD and Digital Inclusion programmes; the aspect of the mechanism for the calculation of the amount of resources required to be invested in R&D under the Informatics and PADIS programmes relating to the deductible part; and the lower administrative burden on companies purchasing domestic incentivised *intermediate* products under the Informatics and PADIS programmes; accord to imported products treatment less favourable than that accorded to like domestic products, inconsistently with Article III:4 of the GATT 1994;
- d. It is not necessary to make findings with respect to the complaining parties' claims under Article III:5 of the GATT 1994 in order to secure a positive solution to this dispute, and the Panel therefore exercises judicial economy with respect to these claims;
- e. The Informatics, Digital Inclusion, PATVD and PADIS programmes constitute trade-related investment measures, and the aspects of these programmes found to be

inconsistent with Article III:2 and III:4 of the GATT 1994 are also inconsistent with Article 2.1 of the TRIMs Agreement;

- f. The tax exemptions, reductions and suspensions granted under the Informatics, PADIS, PATVD and Digital Inclusion programmes are subsidies within the meaning of Article 1.1 of the SCM Agreement which are contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b) of the SCM Agreement, and thus are prohibited subsidies, inconsistent with Articles 3.1(b) and 3.2 of the SCM Agreement; and
- g. Those aspects of the PATVD programme found to be inconsistent with the GATT 1994 and the TRIMs Agreement are not justified under Article XX(a) of the GATT 1994.

8.17. With respect to Japan's claims in respect of the INOVAR-AUTO programme, the Panel concludes that:

- a. Certain aspects of the accreditation process, the system of rules on accrual and calculation of presumed tax credits, and the rules on the use of presumed tax credits resulting from expenditure on strategic inputs and tools in Brazil, result in imported products being subject to internal taxes in excess of those applied to like domestic products, inconsistently with Article III:2 of the GATT 1994;
- b. It is not necessary to make findings with respect to Japan's claims under Article III:2, second sentence, of the GATT 1994, and the Panel therefore exercises judicial economy with respect to these claims;
- c. Certain aspects of the accreditation process, the system of rules on accrual and calculation of presumed tax credits, and the rules on the use of presumed tax credits resulting from expenditure on strategic inputs and tools in Brazil; the accreditation requirement to perform a minimum number of manufacturing steps in Brazil; and that aspect of the rules on accrual of presumed IPI tax credits pertaining to expenditure in strategic inputs and tools; accord less favourable treatment to imported products than that accorded to like domestic products, inconsistently with Article III:4 of the GATT 1994;
- d. It is not necessary to make findings with respect to the complaining parties' claims under Article III:5 of the GATT 1994 in order to secure a positive solution to this dispute, and the Panel therefore exercises judicial economy with respect to these claims;
- e. The INOVAR-AUTO programme constitutes a trade-related investment measure, and those aspects of the programme found to be inconsistent with Article III:2 and III:4 of the GATT 1994 are also inconsistent with Article 2.1 of the TRIMs Agreement;
- f. The tax reductions through presumed tax credits granted under the INOVAR-AUTO programme are subsidies within the meaning of Article 1.1 of the SCM Agreement and contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b) of the SCM Agreement, and thus are prohibited subsidies, inconsistent with Article 3.1(b) and 3.2 of the SCM Agreement;
- g. Those aspects of the INOVAR-AUTO programme found to be inconsistent with the GATT 1994 and the TRIMs Agreement are not justified under Article XX(b) or XX(g) of the GATT 1994;
- h. The tax reductions accorded to imported products from MERCOSUR members and Mexico under the INOVAR-AUTO programme are advantages granted by Brazil to products originating in those countries, which are not accorded immediately and unconditionally to like products originating in other WTO Members, inconsistently with Article I:1 of the GATT 1994;

- i. The complaining parties were not under a burden to invoke the Enabling Clause in their panel requests, and their claims under Article I:1 of the GATT 1994 are therefore within the Panel's terms of reference; and
- j. The tax reductions accorded to imported products from Argentina, Mexico and Uruguay and found to be inconsistent under Article I:1 of the GATT 1994 are not justified under paragraph 2(b) or 2(c) of the Enabling Clause.

8.18. With respect to Japan's claim under Article 3.1(a) of the SCM Agreement, in respect of the PEC and RECAP programmes, the Panel concludes 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, and thus are prohibited subsidies, inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement.

8.19. Pursuant to Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits accruing under the agreement in question. The Panel therefore finds that, to the extent that Brazil has acted in a manner inconsistent with the provisions of the GATT 1994, TRIMs Agreement, and SCM Agreement, it has nullified or impaired benefits accruing to Japan under those agreements.

8.20. Pursuant to Article 19.1 of the DSU, to the extent that those aspects of the challenged programmes are WTO-inconsistent, the Panel recommends that Brazil bring the challenged measures into conformity with its obligations under the covered agreements.

8.21. Pursuant to Article 4.7 of the SCM Agreement, the Panel recommends that Brazil withdraw the subsidies identified above without delay.

8.22. Article 4.7 further provides that "the panel shall specify in its recommendation the time-period within which the measure must be withdrawn." In other words, the Panel is required to specify what period would represent withdrawal "without delay". Taking into account the procedures that may be required to implement our recommendation on the one hand, and the requirement that Brazil withdraw its subsidies "without delay" on the other, the Panel recommends that Brazil shall withdraw the subsidies identified in paragraphs 8.16(f), 8.17(f), and 8.18 above within 90 days.
