BRAZIL – CERTAIN MEASURES CONCERNING TAXATION AND CHARGES

(WT/DS472)
(WT/DS497)

OTHER APPELLEE SUBMISSION OF BRAZIL

16 October 2017

Table of Contents

Table of Short Forms

OFFICIAL NAME	SHORT FORM
Dispute Settlement Body	DSB
Understanding on Rules and Procedures Governing the Settlement of Disputes	DSU
General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).	GATT 1994
Agreement on Subsidies and Countervailing Measures	SCM Agreement
Agreement on Trade-Related Investment Measures	TRIMs Agreement
Information and Communication Technology	ICT
Programme to Promote Technological Innovation and Densification of the Automotive Supply Chain	INOVAR-AUTO
Launch Aid/member State Financing	LA/MSF
Regime for predominantly exporting companies	PEC
Basic Productive Process	PPB
Special Regime for the Purchase of Capital Goods for Exporting Enterprises (*Regime Especial de Aquisição de Bens de Capital para Empresas Exportadoras*)	RECAP

Table of Reports

Short Title	Full Report Title and Citation
Argentina – Financial Services	Appellate Body Report, *Argentina – Measures Relating to Trade in Goods and Services*, WT/DS453/AB/R and Add.1, adopted 9 May 2016
Brazil – Retreaded Tyres	Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527
Canada – Wheat Exports and Grain Imports	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, p. 2739
China – GOES	Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012, DSR 2012:XII, p. 6251
Dominican Republic – Import and Sale of Cigarettes	Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, p. 7367
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, p. 591
EC – Fasteners (China)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
EC – Poultry	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, p. 2031
EC – Seal Products	Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014, DSR 2014:I, p. 7
EC and certain member States – Large Civil Aircraft	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
EC and certain member States – Large Civil Aircraft (Article 21.5 – US)	Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft – Recourse to Article 21.5 of the DSU by the United States*, WT/DS316/RW and Add.1, circulated to WTO Members 22 September 2016 (appeal by the European Union pending)
Guatemala – Cement I	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, p. 3767

Short Title	Full Report Title and Citation
Mexico – Anti-Dumping Measures on Rice	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, p. 10853
US – Certain EC Products	Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, p. 373
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475)
US – Large Civil Aircraft (2nd Complaint)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7
US – Tax Incentives	Appellate Body Report, *United States – Conditional Tax Incentives for Large Civil Aircraft*, WT/DS487/AB/R and Add.1, circulated to WTO Members 4 September 2017, adopted 22 September 2017
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323

I. Introduction

1. In their other appellant submission, the European Union and Japan argue that the Panel exercised false judicial economy by not making specific findings on the "in house" scenario in respect of the complainant´s claims under Article III:4 of the GATT 1994, Article 2.1 of the TRIMs Agreement, and Article 3.1(b) of the SCM Agreement in violation of Article 11 of the DSU. They also make a subordinate claim that the Panel erred in the application of these provisions. According to the complainants, the Appellate Body should reverse the Panel´s findings and complete the legal analysis on the "in house" scenario. As Brazil will explain, the Appellate Body should reject the other appellants' claims of error for two reasons.

2. The first reason for rejecting the other appellants' claims of error is that these claims are based on the erroneous premise that the Panel exercised "judicial economy" in respect of the complainants' claims under Article III:4 of the GATT 1994, Article 2.1 of the TRIMs Agreement, and Article 3.1(b) of the SCM Agreement. As Brazil will discuss in **Section II** of this submission, the Panel fully addressed and made findings in respect of the complainants' claims under these provisions. What the European Union and Japan take issue with is the fact that the Panel opted not to address certain *arguments* that they advanced in support of those claims, namely arguments pertaining to the "in-house" scenario under the ICT and INOVAR-AUTO programmes. It is well established, however, that panels are free to develop their own legal reasoning to support their findings and are not required to address every argument advanced by the parties. The Panel in the present dispute acted within its discretion to limit its findings to the outsourcing scenario, and the other appellants have failed to demonstrate that the Panel's exercise of this discretion was outside the bounds of Article 11 of the DSU. In Brazil's view, the Appellate Body must dismiss the other appellants' claims of error for this reason alone.

3. Were the Appellate Body nevertheless to address the substance of the other appellants' claims of error concerning the "in-house" scenario, the Appellate Body would once again need to reject these claims of error in full. The arguments advanced by the European Union and Japan as to why the ICT and INOVAR-AUTO programmes are contingent upon the use of domestic over imported goods are based entirely on the proposition that a requirement to produce certain goods domestically as a condition of receiving a subsidy is sufficient to establish the prohibited contingency. As Brazil will discuss in **Section IV** of this submission, the Appellate Body expressly rejected this proposition in its report in *US – Tax Incentives*. It is quite telling that neither the European Union nor Japan have bothered to even *cite* the Appellate Body's report in *US – Tax Incentives*, nor have they attempted to demonstrate that the ICT and INOVAR-AUTO programmes meet the standard for a prohibited import substitution subsidy that the Appellate Body articulated in that report.

4. While the Appellate Body must reject the other appellants' claims of error for the reasons set forth in this submission, Brazil considers that the claims of error advanced by the European Union and Japan highlight the errors of interpretation and application that Brazil identified in its principal appeal. As Brazil explained in its appellant's submission, the Panel in the present dispute did not undertake a coherent and harmonious interpretation of Articles III:2 and III:4 of the GATT 1994, Article III:8(b) of the GATT 1994, and Article 3.1(b) of the SCM Agreement. All parties

appear to agree with this assessment; they differ only as to *how* the Panel erred. For the reasons that Brazil set forth in its appeal, the critical error underlying the Panel's findings was its application of a *per se* standard under which a requirement to produce goods domestically gives rise to a prohibited contingency upon the use of domestic over imported goods. The Appellate Body correctly rejected this proposition in *US – Tax Incentives*, and the rejection of this proposition provides a sufficient basis to dismiss the complainants' arguments in respect of both the "in-house" and "outsourcing" scenarios under the ICT and INOVAR-AUTO programmes.

II. The Complainants Failed To Establish that the Panel Acted Inconsistently with Article 11 of the DSU in Examining Their Claims under Article III.4 of the GATT 1994, Article 2.1 of the TRIMs Agreement, and Article 3.1(b) of the SCM Agreement

5. The European Union and Japan claim that the Panel acted inconsistently with its duty to conduct an objective assessment of the matter under Article 11 of the DSU by purportedly exercising "judicial economy" and failing to find that the ICT and INOVAR-AUTO programmes give rise to a requirement to use domestic over imported goods under Article III:4 of the GATT 1994, Article 2.1 of the TRIMs Agreement, and Article 3.1(b) of the SCM Agreement, in a scenario where the subsidy recipient directly undertakes all the relevant production steps (the so-called "in-house" scenario).

6. In its appellant's submission, Brazil requested that the Appellate Body reverse a number of the Panel's findings and legal interpretations. Brazil, however, does not consider that the Panel's decision not to make findings in respect of the in-house scenario may properly be characterized as an exercise of "judicial economy". The principle of judicial economy "allows a panel to refrain from making multiple findings that the same measure is inconsistent with various provisions [of the covered agreements] when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute."[1] Panels therefore exercise judicial economy when they decide to refrain from addressing multiple legal claims that a complaining WTO Member has raised in respect of the same measure, when the findings that the panel does make in respect of other legal claim(s) are sufficient to provide a positive resolution to the dispute. In short, as stated by the Appellate Body in *EC – Fasteners (China)*, "the issue of judicial economy is only relevant to the manner in which a panel deals with a party's *claims*."[2]

7. In the present case, it is undisputed that the Panel duly examined and made findings in respect of *all* of the legal claims raised by the European Union and Japan in respect of the ICT programmes and INOVAR-AUTO under Article III:4 of the GATT, Article 2.1 of the TRIMs Agreement, and Article 3.1(b) of the SCM Agreement. When the Panel decided to exercise judicial economy, considering it unnecessary to make findings in respect of legal claims raised by the complainants, it

[1] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133. See also Appellate Body Report, *US – Wool Shirts and Blouses*, p. 18, DSR 1997:I, 323, at p. 339.

[2] Appellate Body Report, *EC – Fasteners (China)*, para. 511.

did so explicitly. This much is evident, for example, in the Panel's decision to exercise judicial economy in respect of the complainants' claims that the ICT programmes and INOVAR-AUTO are inconsistent with Article III:5 of the GATT 1994, and Japan's claims that the ICT programmes and INOVAR-AUTO are inconsistent with Article III:2, second sentence, of the GATT 1994.[3]

8. The fact that the Panel considered that it was "unnecessary" to address or make findings in respect of the European Union and Japan's *arguments* that the in-house scenario gave rise to a contingency upon the use of domestic over imported goods cannot be read as suggesting that the Panel somehow exercised "judicial economy" in respect of the European Union and Japan's *claims* that 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 Panel did examine and make findings in respect of *all* of the claims advanced by the complainants, and concluded that the ICT programmes and INOVAR-AUTO give rise to a requirement to use domestic over imported goods.[4] In Brazil's view, therefore, it is clear that the allegation that the Panel somehow exercised judicial economy in the present dispute is unfounded.

9. In any event, the complainants have failed to establish that the Panel exceeded the bounds of its discretion under Article 11 of the DSU in not finding that the in-house scenario gave rise to a requirement to use domestic over imported goods. It is well established in Appellate Body jurisprudence that Article 11 of the DSU requires a panel to "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence."[5] Within these parameters, it is generally within the panel's discretion "to determine that certain elements of evidence should be accorded more weight than others", such that the Appellate Body will not "interfere lightly" with the panel's exercise of its discretion unless it is convinced that a panel exceeded the bounds of its discretion as the trier of facts.[6]

10. In respect of the *arguments* submitted by the parties, it is likewise well established in Appellate Body jurisprudence that a panel retains the discretion to freely use the arguments submitted by any of the parties, and to develop its own legal reasoning to support its own findings and conclusions on the matter under consideration.[7] The Appellate Body further clarified that under Article 11 of the DSU

[3] See Panel Report, paras. 7.347, 7.691, 7.792, 8.5(c), 8.6(c), 8.16(b), 8.16(d), 8.17(b), and 8.17(d).

[4] Neither could the Panel's reference in interim review to the measures "as challenged by the complainants" be read as suggesting that the Panel somehow "implicitly" made findings in respect of the in-house scenario, as the European Union erroneously suggests. The Panel unquestionably did *not* make findings in respect of the in-house scenario, and declined to do so once again in response to the complainants' request to that effect at the interim review stage. See European Union's other appellant's submission, paras. 101-116.

[5] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 185.

[6] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 186.

[7] See Appellate Body Report, *EC – Hormones*, para. 156; Appellate Body Report, *US – Certain EC Products*, para. 123; and Appellate Body Report, *US – Gambling*, para. 280.

"there is no obligation upon a panel to consider each and every argument put forward by the parties in support of their respective cases".[8] This is because, according to the Appellate Body:

> Just as a panel has the discretion to address only those *claims* which must be addressed in order to dispose of the matter at issue in a dispute, so too does a panel have the discretion to address only those *arguments* it deems necessary to resolve a particular claim. So long as it is clear in a panel report that a panel has reasonably considered a claim, the fact that a particular argument relating to that claim is not specifically addressed in the "Findings" section of a panel report will not, in and of itself, lead to the conclusion that that panel has failed to make "an objective assessment of the matter before it" required by Article 11 of the DSU.[9]

11. In this respect, Brazil is particularly troubled by the European Union's suggestion that the *arguments* concerning the in-house scenario that were developed during the course of the proceedings are somehow part of the "matter" referred to the DSB. The "matter" referred to the DSB in this dispute comprised the specific measures at issue (INOVAR-AUTO, ICT programmes, and PEC/RECAP), and the legal claims raised by the European Union and Japan in respect of those measures.[10] Neither Article 6.2 nor Article 7.1 of the DSU requires that a complaining WTO Member include in its panel request any *argument* in support of its legal claims,[11] or impose on a panel an obligation to address every conceivable "factual situation" in which that WTO Member considers that the measures at issue violate the covered agreements, as the European Union incorrectly argues.[12] Nor was the Panel's decision not to address the in-house scenario internally contradictory with any interpretative finding made by the Panel, as Japan incorrectly posits.[13]

12. As an argument developed in later stages of the panel proceedings, the in-house scenario was properly addressed and dismissed by the Panel within the bounds of its discretion. The Panel therefore did not act inconsistently with Article 11 of the DSU by not addressing the European Union and Japan's *argument* that in the in-house scenario, the ICT programmes and INOVAR-AUTO gave rise to a requirement to use domestic over imported goods within the meaning of Article III: 4 of the GATT 1994, Article 2.1 of the TRIMs Agreement, and Article 3.1(b) of the SCM Agreement. Consistent with its duties under Article 11 of the DSU, the Panel considered all of the arguments put forward by the parties in respect of the alleged contingency, but

---

[8] Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 125.

[9] Appellate Body Report, *EC – Poultry*, para. 135. (emphasis original)

[10] See Appellate Body Report, *Guatemala – Cement I*, para. 72.

[11] See Appellate Body Report, *EC – Bananas III*, para. 141.

[12] See European Union's other appellant's submission, para. 77.

[13] See Japan's other appellant's submission, para. 21 (referring to Appellate Body Report, *Colombia – Textiles*, para. 5.27).

effectively decided to attribute to the in-house scenario the weight and significance it considered appropriate. In doing so, the Panel acted squarely within the bounds of its discretion as the trier of fact under Article 11 of the DSU, and the complainants have failed to establish otherwise.

13. For these reasons, both the European Union and Japan have failed to establish the predicates of their "principal" and "alternative" appeal claims, which for this reason alone should be dismissed by the Appellate Body.

III. The European Union's "Subordinate" Appeal Claim Is Directed at the Panel's Appreciation of the Facts, and Therefore Should Have Been Brought under Article 11 of the DSU

14. Given the fact that the complainants have failed to establish the predicate of their principal and alternative claims, the only other appeal claim that remains to be addressed by the Appellate Body is the European Union's "subordinate" claim that the Panel erred in its application of Article III:4 of the GATT 1994, Article 2.1 of the TRIMs Agreement, and Article 3.1(b) of the SCM Agreement in failing to address its arguments concerning the in-house scenario.

15. However, the only rationale articulated by the European Union in support of its "subordinate" appeal claim is that the Panel erred in "failing to consider those provisions *in light of all the relevant facts of the case*, i.e. the in-house scenario."[14] In Brazil's view, this claim is clearly directed at the Panel's assessment of the facts, and therefore should have been raised under Article 11 of the DSU in order to properly fall within the scope of appellate review.

16. It is now a well-established principle in the jurisprudence of the Appellate Body that "an issue will either be one of application of the law to the facts or an issue of the objective assessment of facts, and not both."[15] Whereas claims of consistency or inconsistency of a given set of facts with the requirements of a treaty provision is a legal question subject to appellate review, allegations implicating a panel's appreciation of facts and evidence fall under Article 11 of the DSU.[16] In *EC – Seal Products*, for example, the Appellate Body noted that where claims relate to a panel's weighing and appreciation of the evidence, they are primarily factual in nature, and such claims are properly assessed under Article 11 of the DSU as challenges to the objectivity of the panel's assessment of the facts.[17]

17. The Appellate Body further recognized that a failure to make a claim under Article 11 of the DSU when challenging a factual assessment made by the Panel will have "serious consequences" for the appellant, because the claim will not fall within

[14] European Union's other appellant's submission, para. 122. (emphasis added)

[15] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 872.

[16] See Appellate Body Report, *China – GOES*, para. 183.

[17] See Appellate Body Report, *EC – Seal Products*, para. 5.243.

the scope of appellate review.[18] As early as *Mexico – Anti-Dumping Measures on Rice*, the Appellate Body declined to make findings with respect to claims related to a panel's assessment of the evidence when the appellant failed to properly bring claims under Article 11 of the DSU.[19] More recently, in *US – Large Civil Aircraft (2nd Complaint)*, the Appellate Body declined to consider an appeal related to the panel's appreciation of the facts in the absence of a claim under Article 11 of the DSU.[20] Similarly, in *Argentina – Financial Services*, the Appellate Body dismissed various claims raised by Panama in respect of the panel's appreciation of the facts, by virtue of Panama's failure to bring those claims under Article 11 of the DSU.[21]

18. In Brazil's view, the same outcome is warranted here. The European Union's "subordinate" claim of error relates to the Panel's appreciation of the arguments concerning the in-house scenario. In fact, beyond the bald allegation that the Panel failed to consider "all the relevant facts of the case", the European Union fails to articulate a single reason why the Panel erred in its application of Article III:4 of the GATT 1994, Article 2.1 of the TRIMs Agreement, and Article 3.1(b) of the SCM Agreement to the facts of this dispute. Therefore, the European Union's failure to bring its "subordinate" appeal claim under Article 11 of the DSU should be dispositive, and the Appellate Body should dismiss this claim for this reason alone.

IV. The Complainants Failed to Establish that the In-House Scenario Gives Rise to a Requirement to Use Domestic Over Imported Goods under Article III:4 of the GATT 1994, Article 2.1 of the TRIMs Agreement, and Article 3.1(b) of the SCM Agreement

19. Regardless of the complainants' failure to articulate a cognizable appeal claim, for the sake of completeness Brazil will briefly address the complainants' failure to establish, before the Panel and on appeal, that in the in-house scenario both the ICT programmes and INOVAR-AUTO are contingent upon the use of domestic over imported goods under Article III:4 of the GATT 1994, Article 2.1 of the TRIMs Agreement, and Article 3.1(b) of the SCM Agreement.

20. With their other appeals, the European Union and Japan seek a sweeping finding by the Appellate Body that the conditioning of subsidies on the performance of certain manufacturing steps in country *per se* results in an impermissible requirement to use domestic over imported goods within the meaning of Article III:4 of the GATT 1994, Article 2.1 of the TRIMs Agreement, and Article 3.1(b) of the SCM Agreement.

21. As Brazil noted in its appellant's submission, this untenable position cannot be reconciled with the text of Article III:8(b) of the GATT 1994, which exempts from the product disciplines of Article III the "payment of subsidies exclusively to

[18] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 872.

[19] See Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 274.

[20] See Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 979.

[21] See Appellate Body Report, *Argentina – Financial Services*, para. 6.225.

domestic producers". A corollary of Article III:8(b) is that subsidies will be provided *exclusively for domestic production*. As Article III:8(b) offers a Member the possibility to grant subsidies contingent upon the location of productive activities in its territory, a Member should also be allowed to define the activities related to the production process in order to ensure that the subsidy recipients perform the production activities in its territory, and not abroad. Otherwise, it would be impossible for a Member to reach its national producers without extending the same incentives to foreign producers. Therefore, the conditioning of subsidies on the fulfilment of certain production steps in-country cannot, in and of itself, suffice to establish that the subsidy is contingent upon the use of domestic over imported goods. Article III:8(b) would be rendered entirely meaningless if a subsidy contingent on domestic production were *per se* tantamount to a prohibited import-substitution subsidy under Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement, as the complainants incorrectly suggest.[22]

22. Setting aside the manifestly absurd and unreasonable result that the complainants' interpretation entails, in their other appellants' submissions the complainants make no effort to explain why in their view the in-house scenario gives rise to a prohibited contingency upon the use of domestic over imported goods under Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement. In particular, the European Union and Japan do not even attempt to assess the in-house scenario against the legal standard for import-substitution articulated by the Appellate Body in *US – Tax Incentives*. In fact, Brazil considers that it is quite telling that in its other appellant's submission the European Union does not refer to the Appellate Body's ruling in *US – Tax Incentives* at all, while Japan refers to it only once, and only then in passing.[23]

23. To recall, the Appellate Body found in *US – Tax Incentives* that, in order to establish a prohibited import-substitution subsidy, a complaining WTO Member must demonstrate a condition requiring "the use of domestic goods in preference to, or instead of, imported goods."[24] As Brazil explained in its appellant's submission, the PPBs and other production step requirements under INOVAR-AUTO and the ICT programmes do not meet this standard in either the in-house or the outsourcing scenarios.[25] The PPBs and other production step requirements aim at ensuring that the subsidies foster domestic production in Brazil, but at the same time are entirely origin-neutral and do not preclude the use of imported inputs in the production process. Hence, it is entirely possible that a producer can meet the requirements of a PPB using 100 per cent imported inputs, while it is also entirely possible that a producer can fail to meet the requirements of a PPB using 100 per cent domestic inputs.[26]

[22] See Brazil's appellant's submission, paras. 126-137.

[23] See Japan's other appellant's submission, para. 56 and fn 68 thereto.

[24] Appellate Body Report, *US – Tax Incentives*, para. 5.14.

[25] See Brazil's appellant's submission, paras 157-170, 202-240, and 251-291.

[26] See Brazil's appellant's submission, paras. 10, 32, and 229.

24. Given the complainants' failure to establish that the PPBs and other production step requirements are *de jure* contingent upon the use of domestic over imported goods, it was incumbent upon the complainants to explain why in the in-house scenario or otherwise the PPBs are *de facto* contingent upon the use of domestic over imported goods, in light of factors such as the "existence of a multi-stage production process, the level of specialization of the subsidized inputs, or the level of integration of the production chain in the relevant industry."[27] Neither the complainants nor the Panel undertook such an analysis.

25. Instead, the complainants seek to establish a condition requiring the use of domestic over imported goods on the following basis:

> By conditioning the granting of a subsidy to make (and thus use) an input locally to be incorporated later into the final product, the recipient is not free to source those inputs from elsewhere (i.e. through imports), thereby altering the competitive relationship between domestic and imported products in the market. In this sense, the subsidy would be contingent upon the use of domestic (inputs) over imported (inputs).[28]

26. However, as Brazil noted in its appellant's submission, this line of argument by the European Union has been expressly addressed—and rejected—by the Appellate Body in *US – Tax Incentives*. The Appellate Body explained that "[i]n the specific case of subsidies granted for the production of both an input and a final good, subsidy recipients would likely both 'produce' and 'use' the subsidized inputs in the production of the subsidized final good." According to the Appellate Body, such subsidies would have consequences for the subsidized producer's input-sourcing decisions because "having been required to produce an input domestically, and for reasons of production costs and efficiency, they would likely use at least some of these inputs in their downstream production activities." However, "while such subsidies may foster the use of subsidized domestic goods and result in displacement in respect of imported goods, such effects do not, in and of themselves, demonstrate the existence of a requirement to use domestic over imported goods."[29]

27. Accordingly, the "syllogism"[30] through which the complainants have sought to establish their case that the measures at issue are prohibited import-substitution subsidies has been categorically rejected by the Appellate Body as insufficient to establish the existence of a condition requiring the use of domestic goods in preference to, or instead of, imported goods as a condition for granting the subsidy.[31]

---

[27] Appellate Body Report, *US – Tax Incentives*, para. 5.48.

[28] European Union's other appellant's submission, para. 67 (referring to European Union's response to Panel question No. 6 to the third parties, para. 14).

[29] Appellate Body Report, *US – Tax Incentives*, para. 5.49.

[30] European Union's other appellant's submission, para. 107.

[31] Brazil is aware that the question of what constitutes a prohibited import substitution subsidy is also at issue in the appeal of the panel report in *EC and certain member States – Large Civil Aircraft (Article 21.5 – United States)*. The other appeal filed by the United

(continued)

Thus, the fact that both INOVAR-AUTO and the ICT programmes condition the granting of the subsidies on the performance of certain production steps in Brazil is insufficient, without more, to establish a condition upon the use of domestic over imported goods, in either the in-house or in the outsourcing scenarios.

28. For this reason, the complainants have likewise failed to establish that in the in-house scenario, INOVAR-AUTO and the ICT programmes are contingent upon the use of domestic over imported goods under Article III:4 of the GATT 1994, Article 2.1 of the TRIMs Agreement, and Article 3.1(b) of the SCM Agreement.

V. Conclusion

29. For all of the foregoing reasons, Brazil respectfully requests that the Appellate Body *reject* all of the claims raised by the European Union and Japan in their other appeals.

States in that case raises the question of whether LA/MSF subsidies provided to Airbus are contingent upon the use of domestic over imported goods in violation of Article 3.1(b) of the SCM Agreement. In its other appellee's submission in that proceeding, the European Union attempts to distinguish the LA/MSF production subsidies provided to Airbus from the production subsidies at issue in *US – Tax Incentives.* Whatever the merits of the distinctions that the European Union draws in that submission, Brazil notes that the European Union has not attempted in the present dispute—either before the Panel or now before the Appellate Body—to demonstrate that any subsidies resulting from the ICT and INOVAR-AUTO programmes constitute prohibited import substitution subsidies *even under the European Union's own framework.* The "per se" standard advocated by the European Union throughout the present dispute cannot be reconciled with its position in other disputes and, if accepted, would support the conclusion that LA/MSF subsidies are prohibited import substitution subsidies under Article 3.1(b).