BRAZIL – CERTAIN MEASURES CONCERNING TAXATION AND CHARGES

(DS472 / DS497)

THIRD PARTICIPANT ORAL STATEMENT
OF THE UNITED STATES OF AMERICA

June 19, 2018

I. INTRODUCTION

Mr. Chairman, members of the Division:

1. In this statement, the United States will address interpretative issues under Article III of the *General Agreement on Tariffs and Trade 1994* (GATT 1994) and Article 3.1 of the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement), in light of its systemic interest in the correct interpretation of those provisions.

2. On appeal, Brazil has argued that certain programs found by the Panel to be inconsistent with Article III of the GATT 1994 are not subject to that provision because they are subsidies to domestic producers. These include certain programs that provide tax advantages for information and communications technology (ICT) goods, conditioned on conformity with a "Basic Productive Process", or PPB. The PPBs set out minimum stages or steps of the manufacturing process, including with respect to manufacturing of components and assembly of components into a final good, that must be performed in Brazil.[1]

II. Brazil's Claims Regarding the Scope of Article III of the GATT 1994 and Article 3.1 of the SCM Agreement

3. Brazil argues that the Panel erred in finding that subsidies provided exclusively to domestic producers are not *per se* exempted from the disciplines of Article III of the GATT 1994 by virtue of Article III:8. According to Brazil, the Panel should have concluded that the measures are domestic production subsidies, exempt from Article III of the GATT 1994, and subject instead to the disciplines of Part III of the SCM Agreement.[2]

4. The Panel found that, under Article III:8, "the provision of subsidies only to domestic producers and not to foreign producers cannot in itself be inconsistent with Article III."[3] However, the Panel considered that, to the extent that aspects of a subsidy result in product discrimination – including requirements to use domestic goods – those aspects are not exempted from Article III by virtue of Article III:8.[4]

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[1] *See* Panel Report, paras. 2.61-2.62; *see also* Brazil's Appellant Submission, para. 158.
[2] *See* Brazil's Appellant Submission, para. 78.
[3] Panel Report, para. 7.79.
[4] *See* Panel Report, para. 7.88.

5. The United States agrees with the EU and Japan that Brazil is incorrect in its assertion that subsidies paid exclusively to domestic producers are *per se* exempted from Article III of the GATT 1994 and are instead subject solely to Part III of the SCM Agreement.

6. As the United States explained in its Third Participant Submission, such an argument is not supported by the text of the agreements. Both Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement discipline subsidies contingent on the use of domestic over imported goods. The overlap between Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement is confirmed by the negotiating history,[5] and has been acknowledged by a number of other past panel and Appellate Body reports.[6]

7. The overlap in scope between Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement calls for a degree of consistency in interpreting the two provisions. In particular, in light of Article III:8(b), Article III:4 must be interpreted as not prohibiting the provision of subsidies exclusively to domestic producers by reason of their production activities. In turn, subsidies provided exclusively to domestic producers by conditioning their receipt on domestic production activities must not be equated with conditioning their receipt on the use of domestic over imported goods for purposes of the SCM Agreement.

8. However, a subsidy that is conditioned not only on domestic production, but also on the use of domestic over imported products, is not covered by Article III:8(b)'s derogation. Rather, as the Panel explained, such a subsidy would be inconsistent with both Article III:4 of the GATT 1994 and Article 3.1 of the SCM Agreement.[7]

III. Brazil's Claims of Error Regarding the Panel's Analysis Under Article III:4 of the GATT 1994

9. The Panel found that, in order to obtain the benefits under the ICT programs at issue in this dispute, companies are required to produce goods in accordance with the terms of PPBs or

[5] *See* Note by the Secretariat, Meeting of 26-27 September 1989, GATT Doc. MTN.GNG/NG10/13 (Oct. 16, 1989), para. 6.
[6] *See, e.g.*, *US – Tax Incentives (AB)*, para. 5.16; *Canada – Autos (AB)*, para. 140; *Indonesia – Autos (Panel)*, para. 14.45; *EC – Commercial Vessels (Panel)*, para. 7.65.
[7] *See* Panel Report, para. 7.45.

other production step requirements.[8] Certain PPBs require the use of inputs that themselves conform to another PPB, which the Panel termed "nested" PPBs.[9] Based on the nature of the required manufacturing processes, the Panel found that all products produced in accordance with a PPB are domestic products and that, in turn, "every PPB with a nested PPB inside contains an explicit requirement to use domestic goods".[10] Accordingly, the Panel found the ICT programs inconsistent with Article III:4 of the GATT 1994.

10. While Brazil claims that the Panel erred in finding the ICT programs inconsistent with Article III:4 of the GATT 1994 in a number of respects, it has not challenged the Panel's factual findings regarding the operation of the PPBs.[11] Rather, Brazil suggests that the Panel's finding erroneously "impl[ies] that whenever the requirement to perform certain manufacturing steps in Brazil as a condition to receive the subsidy involves the production of a specific input, part or component that could have been sourced from foreign producers, there would be *ipso facto*, and without further examination, discrimination within the meaning of Article III:4."[12]

11. The United States agrees with Brazil that such an implication would raise serious concerns. But the United States does not understand this to be an implication of the Panel's findings regarding the ICT programs under Article III:4.

12. In support of its argument, Brazil attempts to rely on the Appellate Body findings in *US – Tax Incentives*. As noted in the U.S. Third Participant Submission, in that dispute, the Appellate Body found that domestic production subsidies contingent on the location of production activities – not on the use of domestic goods – were not inconsistent with Article 3.1 of the SCM Agreement.[13] In addition, in *EC and certain member States – Large Civil Aircraft*, the Appellate Body stated that, while subsidies for the production of both an input and a finished good are likely to affect imported inputs, "such effects cannot, in and of themselves, establish the

[8] *See* Panel Report, para. 2.61; *see also* Brazil's Appellant Submission, para. 158.
[9] Panel Report, para. 7.291.
[10] Panel Report, para. 7.300.
[11] Brazil's Appellant Submission, para. 121.
[12] Brazil's Appellant Submission, para. 159.
[13] *See US – Tax Incentives (AB)*, paras. 5.62, 5.75, 5.79, 5.81.

existence of a requirement to use domestic over imported goods within the meaning of Article 3.1(b)".[14]

13. In contrast, in this dispute, the Panel's finding that the ICT programs are inconsistent with Article III:4 is based on a finding that, with respect to the requirement to comply with nested PPBs, those programs expressly require the use of domestic goods. As noted earlier, a subsidy conditioned on a requirement to use domestic over imported goods would be inconsistent with Article III:4.

IV. Conclusion

14. This concludes the U.S. oral statement. The United States thanks the Appellate Body for consideration of its views.

[14] *EC and certain member States – Large Civil Aircraft (Article 21.5) (AB)*, para. 5.76.