BRAZIL – CERTAIN MEASURES CONCERNING TAXATION AND CHARGES

(DS472 / DS497)

THIRD PARTY ORAL STATEMENT OF THE UNITED STATES OF AMERICA

February 24, 2016

Mr. Chairman, members of the Panel:

1. Thank you for this opportunity to present the views of the United States. In this statement, we will briefly address several interpretative issues with respect to Articles III:2, III:4, and III:5 of the GATT 1994,[1] as well as Article 3.1(b) of the SCM Agreement.[2] In particular, we will focus on the interpretation and application of these provisions to Brazil's Informatics, PATVD, PADIS, and Digital Inclusion programs, which provide tax advantages related to information and communication technology, or "ICT," goods.

I. The Interpretation and Application of Article III:2 of the GATT 1994

2. The complaining parties assert that the disputed programs result in imported ICT products being taxed in excess of domestic ICT products, in a manner inconsistent with the first sentence of Article III:2 of the GATT 1994.[3]

3. Article III:2 provides that imported products shall not be subject to internal taxes "in excess of" those applied to like domestic products. The programs at issue in this dispute condition certain tax benefits on the sale of products that conform to a Brazilian Productive Process, or "PPB."[4] PPBs require that a number of manufacturing steps take place in Brazil, including manufacturing of intermediate components and the assembly of various components into a final product.[5] Based on the facts presented by the complaining parties, it would appear that complying with a PPB would necessarily result in a domestic product benefitting from a

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[1] *General Agreement on Tariffs and Trade 1994* ("GATT 1994").
[2] *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").
[3] *See* First Written Submission of European Union, paras. 590–619, 770–785, 917–937, 1058–1081; First Written Submission of Japan, paras. 329–337, 396–403, 456–461, 510–517.
[4] *See* First Written Submission of European Union, paras. 519–550, 764, 884–886, 889, 1034–1041; First Written Submission of Japan, paras. 311, 391, 447, 450, 506–508; First Written Submission of Brazil (EU), paras. 108, 317, 369, 471; First Written Submission of Brazil (JP), paras. 80, 268, 312, 406.
[5] *See* First Written Submission of European Union, paras. 521–524, 538, 541–543, 547–549; First Written Submission of Japan, paras. 293–296; First Written Submission of Brazil (EU), paras. 137–141; First Written Submission of Brazil (JP), paras. 94–95.

lower tax on its sale. An imported product could not meet the domestic manufacturing requirements of a PPB, and therefore could not receive the same tax benefits that are available to a domestic product that complies with a PPB.

4. The United States therefore agrees that insofar as the disputed programs result in a tax applied to products manufactured in Brazil in conformance with a PPB lower than the tax for like imported products, these programs would appear to tax imported products "in excess of" like domestic products.

II. The Interpretation and Application of Article III:4 of the GATT 1994

5. The complaining parties assert that the disputed programs provide tax benefits for domestic ICT products that are unavailable to imported ICT products and, in certain instances, incentivize the purchase and use of domestic inputs over imported inputs.[6] The complaining parties allege that this situation results in imported products being accorded less favorable treatment than domestic products contrary to Article III:4.

6. Article III:4 provides that imported products "shall be accorded treatment no less favourable" than like domestic products with respect to "all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use." Panels and the Appellate Body have interpreted the scope of Article III:4 to include "any laws or regulations which might adversely modify the conditions of competition between domestic and imported products."[7] Under the disputed programs, products that are manufactured in Brazil in conformance with a PPB may be exempt from certain taxes when they are sold, whereas imported products would not receive such an exemption. Therefore, insofar as the programs at

[6] *See* First Written Submission of European Union, paras. 620–661, 786–821, 938–980, 1082–1110; First Written Submission of Japan, paras. 339–347, 405–413, 463–469, 519–524.
[7] *India – Autos (Panel)*, para. 7.196; *see also US – FSC (Article 21.5 – EC) (AB)*, paras. 210–213; *Italy – Agricultural Machinery (GATT)*, para. 12.

issue exempt domestic products from taxes that would otherwise be due upon sale, but do not provide the same exemption for like imported products, these programs would appear to "affect[] the internal sale, offering for sale, purchase, transportation, distribution, or use of the imported and domestic like products" by adversely modifying the conditions of competition for imported products compared to like domestic products.

7. For the subset of PPBs that require the use of input products that themselves conform to another PPB,[8] a different analysis applies. For example, the PPB for "Tablet PCs with a Touch Screen" requires that 90 percent of the "motherboards" used during production of "tablet PCs with a touch screen" comply with the PPB for printed circuit boards.[9] To obtain tax benefits under the disputed programs, companies seeking to comply with these "nested" PPBs must therefore purchase and use the required amount of PPB-compliant input products. Input products produced in accordance with a PPB would be domestic products; imported input products cannot be produced in accordance with a PPB. Therefore, the requirement to use input products that conform to a PPB necessarily requires the use of domestic products. The United States therefore agrees that by providing tax benefits for products manufactured using input products meeting "nested" PPBs, the disputed programs incentivize the purchase and use of domestic products as inputs by downstream producers, thereby modifying the conditions of competition for those input products to the detriment of imports.

III. The Interpretation and Application of Article III:5 of the GATT 1994

8. The complaining parties also assert that the disputed programs are inconsistent with Article III:5, which prohibits regulations that relate to the "use of products in specified amounts

[8] *See* First Written Submission of Brazil (EU), para. 145; First Written Submission of Brazil (JP), para. 98; First Written Submission of European Union, paras. 543–544, 547–550; First Written Submission of Japan, para. 296.
[9] *See* First Written Submission of European Union, paras. 543–544; First Written Submission of Japan, para. 296; First Written Submission of Brazil (EU), paras. 148–150; First Written Submission of Brazil (JP), paras. 99–100.

or proportions" and "require[], directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources."[10]

9. If the Panel determines that the disputed programs are inconsistent with Articles III:2 and III:4, there would not seem to be value in addressing additional claims under Article III:5. That said, "nested" PPBs specifically require the use of a specified amount or percentage of inputs that are domestic goods produced in accordance with a PPB. The United States therefore agrees that insofar as the disputed programs condition preferential tax treatment on compliance with such PPBs, the programs would appear to require the use of "specified amounts or proportions" of products "from domestic sources."

IV. The Interpretation and Application of Article 3.1(b) of the SCM Agreement

10. The complaining parties assert that the tax exemptions and suspensions available under the disputed programs are contingent on "the use of domestic over imported goods" in part because PPBs may require the producer of the final product to produce certain components of that product domestically.[11]

11. As noted in Canada's third-party submission, interpreting Article 3.1(b) to cover situations in which subsidy recipients are required to produce goods domestically would be an improper expansion of the scope of that provision.[12] The SCM Agreement does not prohibit Members from granting subsidies that are contingent on the recipient producing goods domestically. Rather, Article 3.1(b) is directed to conditioning a subsidy on "use" of a domestic over an imported good.

[10] *See* First Written Submission of European Union, paras. 662–689, 822–840, 981–997, 1111–1117; First Written Submission of Japan, paras. 348–355, 414–421, 470–478, 525–532.
[11] *See, e.g.*, First Written Submission of European Union, paras. 724, 875, 977, 1024; First Written Submission of Japan, para. 375.
[12] *See* Third Party Submission of Canada, para. 4.

12. Moreover, GATT 1994 Article III:8(b), which the Appellate Body has noted provides relevant context for the interpretation of Article 3.1(b) of the SCM Agreement,[13] expressly permits the payment of subsidies exclusively to domestic producers. By necessity, the derogation in Article III:8(b) extends to subsidies to the productive activities or manufacturing steps that make the recipient a domestic producer. To the extent that these encompass the production of what might be considered intermediate components, a Member remains free to define the domestic producers receiving subsidies as those recipients also producing those components.

13. The United States therefore disagrees with the complaining parties to the extent they claim that a requirement to engage in specified production steps leading to the production of a finished good in the territory of a Member is a subsidy contingent on "the use of domestic over imported goods."

V. Conclusion

14. This concludes the U.S. oral statement. We thank the Panel for its consideration of the views of the United States.

[13] *Canada – Autos (AB)*, para. 140.