BRAZIL – CERTAIN MEASURES CONCERNING TAXATION AND CHARGES

(WT/DS472/497)

THIRD PARTY WRITTEN SUBMISSION OF THE UNITED STATES

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Italy – Agricultural Machinery (GATT)	GATT Panel Report, *Italian Discrimination Against Imported Agricultural Machinery*, L/833, adopted 23 October 1958

I. INTRODUCTION

1. The United States makes this third party submission because of its systemic interest in the correct interpretation and application of Articles III:2, III:4, III:5, III:8(b), and XX(a) of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and Articles 1.1(a)(1)(ii) and 1.1(b) of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").

2. The European Union and Japan assert that four Brazilian programs that provide tax advantages related to information and communication technology ("ICT") goods violate, *inter alia*, Articles III:2, III:4, and III:5 of the GATT 1994 and Articles 3.1(b) and 3.2 of the SCM Agreement.[1] Among other arguments, Brazil contends that the programs at issue do not fall within the scope of Article III because they provide subsidies paid exclusively to domestic producers under Article III:8(b) and, in the case of the PATVD program, because the program is justified under Article XX(a).

II. INTERPRETATION AND APPLICATION OF ARTICLE III:2, FIRST SENTENCE OF THE GATT 1994

3. The European Union and Japan assert that the disputed programs result in imported ICT products being taxed in excess of domestic ICT products, contrary to the first sentence of Article III:2 of the GATT 1994.[2]

4. The first sentence of GATT 1994 Article III:2 provides:

> The products of the territory of any Member imported into the territory of any other Member shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.

5. As confirmed by the Appellate Body in *Japan – Alcoholic Beverages II*, a determination of an internal tax's inconsistency with GATT 1994 Article III:2, first sentence is a two-step

[1] These programs are the Informatics program, the PADIS ("Program of Incentives for the Semiconductors Sector") program, the PATVD ("Program of Support to the Technological Developments of the Industry of Digital TV Equipment") program, and the Digital Inclusion program. *See* First Written Submission of Japan, para. 282; First Written Submission of European Union, paras. 7, 730.

[2] *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.

process: First, the imported and domestic products at issue must be "like." Second, the internal tax must be applied to imported products "in excess of" those applied to the like domestic products.[3] "If the imported and domestic products are 'like products', and if the taxes applied to the imported products are 'in excess of' those applied to the like domestic products, the measure is inconsistent with Article III:2, first sentence."[4]

A. Imported products taxed "in excess of" domestic products

6. Brazil claims that any differences in taxation between imported and domestic goods resulting from the disputed programs "do not relate to the origin of the goods, but rather to the participation of the producing company" in the programs.[5] In particular, Brazil argues that the tax rate differences resulting from these programs "are payments for domestic producers that commit to fulfill certain requirements related to the production and development of ICT goods in Brazil . . . ."[6]

7. However, if the Panel agrees with the facts as presented by complainants, the requirements imposed by the disputed programs would appear to limit the benefits of the programs to goods of Brazilian origin. For example, the programs at issue condition certain tax benefits on the sale of products that conform to a Brazilian Productive Process ("PPB").[7] Brazil does not dispute that these 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.[8] For example, the main PPB for IT products requires the following production steps take place in Brazil: (1) "assembly and soldering of all components on the printed circuit boards"; (2) "assembly of the electrical and mechanical parts, totally

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[3] *Japan – Alcoholic Beverages II (AB)*, Section H.l.
[4] *Japan – Alcoholic Beverages II (AB)*, Section H.l; *see also Canada – Periodicals (AB)*, Section V.
[5] *See* First Written Submission of Brazil (EU), paras. 204, 217, 332–333, 382–383, 481–482; First Written Submission of Brazil (JP), paras. 160, 172, 282–283, 324–325, 418–419.
[6] *See* First Written Submission of Brazil (EU), para. 207, 333, 383, 482; First Written Submission of Brazil (JP), paras. 163, 283, 325, 419.
[7] *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. The PADIS program also includes certain domestic manufacturing requirements that appear to be equivalent to those found in PPBs. *See* First Written Submission of European Union, para. 738; First Written Submission of Japan, paras. 389–390.
[8] *See* First Written Submission of Japan, para. 296 ("In addition, PPBs also indicate that some form of integration or final assembly must take place in Brazil . . . ."); *see also* First Written Submission of Japan, paras. 293–295; First Written Submission of European Union, paras. 521–524, 538, 541–543, 547–549; First Written Submission of Brazil (EU), paras. 137–141; First Written Submission of Brazil (JP), paras. 94–95.

separated, at a basic component level"; and (3) "integration of the printed circuit boards and the remaining electrical and mechanical parts in the formation of the final product".[9] If the Panel finds that the facts are as presented by the complainants[10], it would appear that the number and type of manufacturing steps required to comply with such PPBs would lead to the resultant products being of Brazilian origin. It would not appear that imported products could meet the domestic manufacturing requirements of PPBs, and therefore imported products could not receive the same tax benefits that are available to domestic goods that comply with PPBs. Thus, only Brazilian products would be able to comply with a PPB and receive preferential tax treatment under these programs.

8. Insofar as the Panel finds that the programs at issue confer beneficial tax treatment on products manufactured in Brazil in conformance with a PPB, these programs would appear to tax imported products "in excess of" domestic products.

III. INTERPRETATION AND APPLICATION OF ARTICLE III:4 OF THE GATT 1994

9. The European Union and Japan assert that the disputed programs result in imported ICT products being accorded less favorable treatment than domestic ICT products contrary to Article III:4 of the GATT 1994, because they provide tax benefits for domestic ICT products that are unavailable to imported ICT products and because, in certain instances, they incentivize the purchase and use of domestic inputs over imported inputs.[11]

10. Article III:4 of the GATT 1994 provides in relevant part:

> The products of the territory of any Member imported into the territory of any other Member shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

11. In examining a claim under GATT 1994 Article III:4, the Appellate Body has identified three distinct elements that are required to establish a violation: (1) the imported and domestic

[9] First Written Submission of Brazil (EU), para. 138; First Written Submission of Brazil (JP), para. 99.
[10] *See* First Written Submission of European Union, paras. 521–524, 538, 541–543, 547–549, 596-606; First Written Submission of Japan, paras. 293–296.
[11] *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.

products are "like products"; (2) the measure is a law, regulation, or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution, or use of the imported and domestic like products; and (3) the imported product is accorded less favorable treatment than the domestic like product.[12]

A. Law, regulation, or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution, or use of the imported and domestic like products

12. Brazil claims that the requirements of the disputed programs do not affect products in the marketplace, and are therefore outside the scope of Article III:4.[13] In particular, Brazil argues that the disputed programs' requirements "deal with *pre-market* activities, which do not directly affect products."[14] According to Brazil, Article III:4 only covers market operations, which take place after a good has been produced, and requirements imposed upon production do not fall under this provision.[15]

13. The distinction that Brazil attempts to draw between measures that deal with "pre-market activities" and measures that affect "products" is not a useful one, nor is it a distinction that is found in the text of Article III:4. Simply because a measure imposes a so-called "pre-market" requirement does not mean it does not *affect* the "internal sale, offering for sale, purchase, transportation, distribution or use" of a product. As the Appellate Body has noted, "[t]he ordinary meaning of the word 'affecting' implies a measure that has 'an effect on', which indicates a broad scope of application."[16] Based in part on the breadth of this definition, panels and the Appellate Body have interpreted the scope of Article III:4 to "go[] beyond laws and regulations which directly govern the conditions of sale or purchase to cover also any laws or regulations which might adversely modify the conditions of competition between domestic and imported products."[17] Measures that otherwise fall within this scope should not be excluded

[12] *Korea – Various Measures on Beef (AB)*, para. 133.
[13] *See* First Written Submission of Brazil (EU), para. 239, 338–339, 341, 395–396, 398, 487–488, 490; First Written Submission of Brazil (JP), paras. 192, 288–289, 291, 333–334, 336, 424–425, 427.
[14] *See* First Written Submission of Brazil (EU), paras. 232, 339, 396, 488; First Written Submission of Brazil (JP), paras. 186, 289, 334, 425.
[15] *See* First Written Submission of Brazil (EU), paras. 227, 339, 396, 488; First Written Submission of Brazil (JP), paras. 180, 289, 334, 425.
[16] *EC – Bananas III (AB)*, para. 220; *see also US – FSC (Article 21.5 – EC) (AB)*, para. 210.
[17] *India – Autos (Panel)*, para. 7.196; *see also US – FSC (Article 21.5 – EC) (AB)*, paras. 210–213; *Italy – Agricultural Machinery (GATT)*, para. 12.

simply because they impose requirements on production or development. To the extent that any such measures "affect" the "internal sale, offering for sale, purchase, transportation, distribution or use" of products, the text of Article III:4 clearly would cover those measures.

14. In this case, for example, PPBs require that a number of production steps take place in Brazil, including intermediate manufacturing steps and final assembly.[18] Although Brazil claims that PPBs "are not related to the product, but to production,"[19] PPBs do appear to relate to products. Specifically, PPBs define the "minimum set of operations performed at a manufacturing facility that characterises the actual industrialisation *of a given product*."[20] Under the disputed programs, such products may be exempt from certain taxes when they are sold,[21] thereby modifying the conditions of competition in the marketplace to the benefit of covered products and to the detriment of non-covered products. Moreover, since companies cannot obtain these tax advantages until the product is sold on the market,[22] Brazil's characterization of the disputed measures as strictly "pre-market" would not seem to be accurate.

15. The disputed programs also affect the purchase and use of inputs that are used in the production of certain covered products. As all the parties agree, certain PPBs require the use of inputs that themselves conform to another PPB.[23] As discussed above, if the Panel finds that the facts are as presented by the complainants, foreign inputs would not appear to be able to satisfy

[18] *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.
[19] First Written Submission of Brazil (EU), para. 145; *see also* First Written Submission of Brazil (JP), para. 98.
[20] First Written Submission of European Union, para. 521 (emphasis added); *see also* First Written Submission of Japan, para. 293; First Written Submission of Brazil (EU), para. 128 ("[C]ompanies under the Informatics Law must commit to perform a minimum set of operations in Brazil, called PPBs, established by the Government in order to characterize the effective 'production' *of a certain product*.") (emphasis added); First Written Submission of Brazil (JP), para. 85.
[21] *See* First Written Submission of European Union, paras. 562, 753, 908–910, 1044; First Written Submission of Japan, paras. 323, 392, 395, 453, 455, 509; First Written Submission of Brazil (EU), paras. 60, 156–160, 323, 373, 470; First Written Submission of Brazil (JP), paras. 24, 105–109, 274, 316, 405.
[22] *See* First Written Submission of European Union, paras. 562, 753, 908–910, 1044; First Written Submission of Japan, paras. 323, 392, 395, 453, 455, 509, 596–606; First Written Submission of Brazil (EU), paras. 60, 156–160, 323, 373, 470; First Written Submission of Brazil (JP), paras. 24, 105–109, 274, 316, 405.
[23] *See* First Written Submission of Brazil (EU), para. 145 ("It is true that some PPBs include reference to other PPBs whose compliance is required in order to characterize the industrialization of the covered product."); 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.

the relevant PPBs, because they would not have been produced and assembled in Brazil.[24] By providing tax benefits for products that are manufactured according to these "nested" PPBs, the disputed programs incentivize the purchase and use of products made in Brazil as inputs into the production process, thereby modifying the conditions of competition to the detriment of imported inputs.

16. Insofar as the Panel finds that the programs at issue (i) exempt Brazilian products from taxes that would otherwise be due upon sale, and/or (ii) provide tax benefits to Brazilian products manufactured in conformance with a PPB that itself requires the use of Brazilian goods produced in Brazil according to another PPB, 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 between imported and domestic products.

IV. INTERPRETATION AND APPLICATION OF ARTICLE III:5 OF THE GATT 1994

17. The European Union and Japan assert that the disputed programs violate the first and second sentences of Article III:5 of the GATT 1994,[25] which provide:

> No contracting party shall establish or maintain any internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions which requires, 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. Moreover, no contracting party shall otherwise apply internal quantitative regulations in a manner contrary to the principles set forth in paragraph 1.

18. If the Panel determines that the programs at issue violate Articles III:2 and III:4 of the GATT 1994, the United States does not see the value of addressing the complainants' additional claims under Article III:5.[26]

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[24] *See* First Written Submission of European Union, paras. 521–524, 538, 541–544, 547–550; 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.

[25] *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.

[26] *See China – Auto Parts (Panel)*, paras. 7.275–7.276 (exercising judicial economy with respect to claims under Article III:5 where violation of Articles III:2 and III:4 had been found).

19. However, to the extent that the Panel makes findings under Article III:5, the United States provides the following comments. Based on the terms of Article III:5, regulations that relate to the "use of products in specified amounts 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" are prohibited. As discussed above, certain PPBs require the use of a specified proportion of inputs that themselves conform to a PPB. For example, the PPB for "Tablet PCs with a Touch Screen" requires that 90% of the motherboards used during production comply with the PPB for printed circuit boards.[27] If the Panel finds that goods produced in accordance with a PPB are necessarily domestic products,[28] and insofar as these programs condition preferential tax treatment on compliance with such PPBs, the disputed programs would appear to require the use of specified amounts or proportions of domestic products.

20. To the extent that the Panel finds that the programs at issue provide tax benefits to products manufactured in conformance with a PPB that requires the use of a certain percentage of Brazilian goods, these programs would appear to relate to the "use of products in specified amounts 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."

V. INTERPRETATION AND APPLICATION OF ARTICLE XX(a) OF THE GATT 1994

21. Brazil has raised an additional defense with respect to the PATVD program, which provides tax exemptions to producers of digital TV transmitters who commit to invest in research and development in Brazil and to manufacture digital TV transmitters that either conform to the corresponding PPB or contain technology developed in Brazil.[29] Brazil asserts that PATVD is necessary to protect public morals because it provides access to culture, information, and

[27] *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.
[28] *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.
[29] *See* First Written Submission of Brazil (EU), paras. 369, 373; First Written Submission of Brazil (JP), paras. 312, 316; First Written Submission of European Union, paras. 888–889, 901, 908; First Written Submission of Japan, paras. 445, 447, 453–455.

education through digital television in Brazil, and is thus justified by the exception under paragraph (a) of Article XX of the GATT 1994.[30]

22. GATT 1994 Article XX provides in relevant part:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
>
> (a) necessary to protect public morals

23. In considering whether a GATT-inconsistent measure is provisionally justified under Article XX(a), a panel must determine first, whether the measure protects public morals, and second, whether the measure is "necessary" to do so.[31] With respect to the second element, the Appellate Body has found that there is no "pre-determined threshold of contribution in analysing the necessity of a measure under Article XX of the GATT 1994."[32] Rather, this analysis involves determining whether a measure contributes to a covered objective and, if so, whether that contribution is such that the measure is "necessary" to achieving the objective. Contribution to a covered objective exists when there is "a genuine relationship of ends and means between the objective pursued and the measure at issue."[33] In terms of the level of contribution required, a "necessary" measure is "significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to' [its objective]."[34] Generally, the analysis may also entail consideration of whether a complaining party has identified a reasonably available, less trade-restrictive alternative.[35]

24. The United States will speak below to the "necessity" test and, in particular, the purported contribution of PATVD to the objective of providing access to culture, information, and education through digital television in Brazil, and the consideration of alternate measures.

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[30] *See* First Written Submission of Brazil (EU), paras. 402–459; First Written Submission of Brazil (JP), paras. 340–396.
[31] *Korea – Various Measures on Beef (AB)*, para. 157; *US – Gambling (AB)*, para. 295.
[32] *See EC – Seal Products (AB)*, para. 5.213.
[33] *Brazil – Retreaded Tyres (AB)*, para. 210; *EC – Seal Products (AB)*, para. 5.180 (citing *EC – Seal Products (Panel)*, para. 7.633).
[34] *See Korea – Various Measures on Beef (AB)*, para. 161; *Brazil – Retreaded Tyres (AB)*, para. 141.
[35] *EC – Seal Products (AB)*, para. 5.214; *Korea – Various Measures on Beef (AB)*, para. 166.

25. Brazil claims that when it adopted a unique digital TV standard, it was not certain that foreign suppliers would develop and manufacture compatible digital TV transmitters, and that it therefore decided to facilitate "the development of the technological and industrial capacity necessary for the Brazilian population to maintain their access to culture and information."[36] Brazil argues that "PATVD effectively contributes to these objectives because it stimulates the development and the manufacture of digital TV transmitting equipment in Brazil, which is necessary to implement Brazil's digital TV system."[37]

26. In this case, Brazil's stated objective with respect to protecting public morals is to ensure "proper and timely access of the Brazilian population to information and education" via digital television.[38] However, Brazil fails to explain why digital TV transmitters must be developed and manufactured *in Brazil* in order to accomplish the objective of providing access to information and education via digital television. Making sure digital TV transmitters are available to Brazilians may be relevant to this objective, but there would not seem to be any reason why those transmitters must be developed or made in Brazil to provide such access. The public would have as much access to information and education if it were conveyed by imported transmitters as by domestic transmitters. Thus, there does not appear to be a genuine relationship between the provision of tax benefits to domestic producers of digital TV transmitters via PATVD and the goal of making digital television accessible in Brazil.

27. Brazil claims it "is not aware of a less trade restrictive alternative measure, which would be 'reasonably available' and would promote R&D and guarantee the conditions to implement the new television technology adopted in the country."[39]

28. As noted above, it is for the complainants to identify a reasonably available, less trade-restrictive alternative measure. As a general matter, there would appear to be a number of reasonably available alternative measures that would achieve the same end of ensuring access to digital television, while being less trade restrictive than the PATVD program. For example, Brazil could provide tax exemptions for sales of *all* digital TV transmitters that comply with Brazil's digital TV standards, regardless of whether they are imported or domestically produced.

[36] *See* First Written Submission of Brazil (EU), para. 424; First Written Submission of Brazil (JP), para. 362.
[37] First Written Submission of Brazil (EU), para. 425; First Written Submission of Brazil (JP), para. 363.
[38] *See* First Written Submission of Brazil (EU), para. 412; First Written Submission of Brazil (JP), para. 350.
[39] *See* First Written Submission of Brazil (EU), para. 434; First Written Submission of Brazil (JP), para. 372.

Alternatively, Brazil could eliminate tariffs on the importation of digital TV transmitters, or provide subsidies for producers of digital TV transmitters. Each of these measures would provide the Brazilian population with access to digital television, while avoiding the trade-restrictive impact of the PATVD program.

VI. INTERPRETATION AND APPLICATION OF ARTICLES 1.1(a)(1)(ii) AND 1.1(b) OF THE SCM AGREEMENT

29. The European Union and Japan assert that the tax exemptions and suspensions provided by the disputed programs constitute subsidies prohibited by Articles 3.1(b) and 3.2 of the SCM Agreement.[40]

30. Article 3.1(b) of the SCM Agreement prohibits "subsidies, within the meaning of Article 1," that are "contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods." Article 3.2 provides that members "shall neither grant nor maintain subsidies referred to in paragraph 1."

31. Article 1.1 of the SCM Agreement provides, in relevant part, that a subsidy shall be deemed to exist if:

> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where: . . .
>
> > (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits) . . .
>
> and
>
> (b) a benefit is thereby conferred.

32. In determining whether a subsidy exists under Articles 1.1(a)(1) and 1.1(b) of the SCM Agreement, the Appellate Body has identified two distinct elements: (1) a financial contribution by a government; and (2) the financial contribution must confer a benefit.[41] The first element may be met if government revenue that is otherwise due is foregone or not collected, as provided in Article 1.1.(a)(1)(ii).

[40] *See* First Written Submission of European Union, paras. 709–727, 856–877, 1015–1026, 1135–1148; First Written Submission of Japan, paras. 372–377, 438–442, 497–501, 549–553.
[41] *US – Softwood Lumber IV (AB)*, para. 51.

A. "Government revenue that is otherwise due is foregone or not collected"

33. Brazil claims that the suspension or exemption of taxes on the sale of intermediate ICT goods is not revenue foregone by the government, and thus does not constitute a financial contribution by a government.[42] In particular, Brazil argues that the "suspensions and exemptions along the production chain are neutral in terms of tax collection, as the amounts not collected would otherwise offset the tax debit due at the next step of the productive chain."[43]

34. With respect to this element, the Appellate Body stated in *US – Large Civil Aircraft (2nd complaint)* that "the foregoing of revenue otherwise due implies that less revenue has been raised by the government than would have been raised in a different situation," and that "the word 'foregone' suggests that the government has given up an entitlement to raise revenue that it could 'otherwise' have raised."[44] The United States notes that insofar as the disputed programs *exempt* taxes that would otherwise have to be paid but for the program, a financial contribution has been provided: government revenue, otherwise due, is clearly foregone. In addition, to the extent the disputed programs *suspend* taxes that are later paid further down the production chain, a financial contribution has still been provided: at the moment in which government revenue would otherwise be due, it is foregone (albeit temporarily). Moreover, given the time-value of money, suspending the collection of a tax may also result in less revenue being raised.

B. "A benefit is thereby conferred"

35. Brazil claims that the purchasers of intermediate goods enjoy no "benefit" deriving from tax suspensions under the disputed programs, because "the amounts not collected are the exact amount they would otherwise receive in the form of tax credits (to be reimbursed) from the government should they be collected."[45]

36. As the Appellate Body explained in *Canada – Aircraft*, "there can be no 'benefit' to the recipient unless the 'financial contribution' makes the recipient 'better off' than it would otherwise have been, absent that contribution."[46] Under the programs at issue, producers whose

[42] *See* First Written Submission of Brazil (EU), paras. 294–295, 348; First Written Submission of Brazil (JP), paras. 244–245, 300.
[43] *See* First Written Submission of Brazil (EU), paras. 294, 350, 353; First Written Submission of Brazil (JP), paras. 244, 300, 303.
[44] *US – Large Civil Aircraft (2nd complaint) (AB)*, para. 806; *see also US – FSC (AB)*, para. 90.
[45] First Written Submission of Brazil (EU), para. 298; First Written Submission of Brazil (JP), para. 248.
[46] *Canada – Aircraft (AB)*, para. 157.

goods are tax-*exempt* are clearly better off than those who must pay taxes. A producer that does not have to pay a tax may be able to charge less, or earn a greater profit, for the same goods when compared with a producer whose goods are not tax-exempt. This is true even in the case of intermediate goods—while taxes might be charged later in the production chain, the intermediate producer still receives the benefit of an exemption on its own sales.

37. Moreover, there is a benefit even in the case of tax *suspensions*. A producer whose payment of taxes is suspended is better off than one who must pay the taxes, but receives a credit that can be redeemed later. In particular, funds that would otherwise be tied up by the payment of taxes are instead available for use and reinvestment.

38. To the extent that the Panel finds that the programs at issue exempt taxes that would otherwise have to be paid or suspend taxes that are paid later in the production chain, it would appear that "government revenue that is otherwise due is foregone or not collected" and "a benefit is thereby conferred."

VII. CONCLUSION

39. The United States thanks the Panel for providing an opportunity to comment on the issues raised in this proceeding.