1. Members of the Division, thank you for the opportunity to present Australia’s views in this appeal.

2. Australia will not comment on every issue raised in this appeal. Rather, I will confine my remarks in this opening statement to two points: the interpretation of Article III:8(b) of the GATT 1994; and the proper exercise of judicial economy with respect to a panel’s obligations under the DSU.

3. On the first point, Australia considers that subsidising domestic producers is an aspect of industrial development policy that has long been accepted under WTO law, provided such subsidies are otherwise WTO-consistent. Article III:8(b) of GATT 1994 is a central element of the relevant WTO rules.

4. In the course of its arguments, Brazil has characterised Article III:8(b) as clarifying that subsidies provided to domestic producers, including their effects, cannot be a basis for finding a violation of the product-related disciplines of Article III.

5. Australia disagrees with this characterisation. Read in the context of Articles III:2 and III:5 of the GATT 1994, Article III:8(b) does not prevent a subsidy provided exclusively to domestic producers from violating national treatment commitments if the subsidy is designed or applied in a manner that leads to product discrimination. Australia agrees with the Panel’s conclusion in this regard.

6. Brazil has also contended that, pursuant to paragraph 8(b), a panel evaluating claims under Article III must first determine whether the measure at issue is a product-related measure subject to the disciplines of Article III, or whether the measure provides a subsidy to domestic producers and is thereby subject to the disciplines of the Agreement on Subsidies and Countervailing Measures.

7. Again, Australia disagrees. Such an interpretation would severely undermine the operation of the national treatment obligations of WTO members. In Australia’s view, what is accepted to be a legitimate payment to domestic producers needs to be narrowly interpreted in line with the requirements of GATT 1994 and the Agreement on Subsidies and Countervailing Measures. If paragraph 8(b) was interpreted broadly, any discrimination against imports could be qualified as a
subsidy to domestic producers and thus render the discipline of Article III of GATT 1994 meaningless. Again, Australia agrees with the Panel’s conclusion on this point.

8. On the Panel’s exercise of judicial economy, Australia agrees with Japan and the EU. The Panel’s framing of its analysis and conclusions cast doubt over whether it found an entire challenged measure, or only aspects thereof, to be in violation of Brazil’s WTO commitments. Such a lack of clarity is problematic.

9. More broadly, Australia recognises the important role of judicial economy in maximising the efficiency of the WTO’s dispute settlement mechanism, particularly given the increasing number and complexity of disputes. However, overuse of judicial economy can undermine a panel’s mandate under the DSU to make an objective assessment of the matter before it and to achieve a satisfactory settlement of a dispute. Lapses risk eroding the effectiveness of the WTO’s dispute settlement mechanism. Consequently, in the exercise of judicial economy, it is Australia’s view that panels should be especially cautious.

10. Australia would be pleased to answer questions on these or other matters in the course of this appeal. Thank you, Members of the Division.