Brazil – Certain Measures Concerning Taxation and Charges

(WT/DS472/DS497)

Third Party Oral Statement of Australia

Geneva, 24 February 2016
Mr Chairman, Members of the Panel

1. Thank you for the opportunity to make this oral submission.

2. Australia wishes to highlight some of the key points raised in its written submission.

3. Australia has systemic and commercial concerns with the design of Brazil’s assistance programs provided through tax preferences, in particular as they relate to the automotive sector.

4. Indeed, this dispute raises key issues of the nexus between the right of WTO Members to promote industrial development, including through the provision of assistance programs, and, in doing so, upholding the rules preventing discriminatory taxes or internal quantitative regulations.

5. In Australia’s view Brazil’s measure effectively created a framework or mechanism which has entrenched discrimination and affected competitive relationships in Brazil’s market.

Article III:4 of GATT 1994

6. Australia submits that in considering this issue and Brazil’s compliance with Article III:4 of General Agreement on Tariffs and Trade 1994 (GATT 1994), the Panel should have regard to the test for “less favourable treatment” used by the Appellate Body in Korea – Various Measures on Beef, that is, whether a measure modifies the conditions of competition in the relevant market to the detriment of imported like products1.

7. In addition, the Panel should note the jurisprudence provided by the Appellate Body in EC – Bananas III that Article III:4 of GATT 1994 does not require a separate examination of whether a measure affords protection to domestic production2.

8. Thus, as Australia outlined in its third party written submission the test for whether Brazil has breached its national treatment obligations under Article III:4 of GATT 1994 is whether Brazil has applied internal taxes and regulations in a manner which affects competitive relationships in the marketplace as between imported and domestic like products.3

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1 Appellate Body Report, Korea — Various measures on Beef, para. 113
2 Appellate Body Report, EC — Bananas III, para. 216
3 Australia’s third party written submission, paras 35-40
9. We note that a wide interpretation of “affecting” was found to be appropriate by the Panel in *Canada – Autos* and covers: “..any law or regulations which might adversely modify the conditions of competition between domestic and imported products”\(^4\). This finding was not reviewed by the Appellate Body.

10. Given the jurisprudence supporting a broad interpretation of “affecting”, and the broad and encompassing nature of Brazil’s measures, as Australia outlined in paragraphs 45 to 48 of its first written submission, in its view, it is likely that Brazil’s measures adversely “affect” conditions of competition in the market for imported products.

**Article III:5 of GATT 1994**

11. In assessing a measure’s compliance with Article III:5 of GATT 1994 Australia submits that a distinction needs to be maintained between the payment of subsidies exclusively to domestic producers, which are covered by Article III:8(b) of the GATT 1994 on the one hand, and the payment of subsidies to manufacturing activities contingent on the use of domestic products, which are effectively local content requirements on the other.

12. It is the latter category of payments of subsides which, in Australia’s view, could fall with the scope of Article III:5 of GATT 1994. In particular, the first sentence of Article III:5 discipless the application of quantitative regulation. It provides, any internal regulation which requires the mixture, processing or use of products based on domestically sourced products is inconsistent with Article III:5 of GATT 1994. As result, in Australia’s view, this provision prohibits local context requirements.

13. Australia is further of the view that setting a minimum number of stages in manufacturing activities in order to receive a benefit or qualify for a benefit, could amount to an internal quantitative regulation for the purposes of Article III:5 of the GATT 1994. As a result, such a measure may contravene GATT 1994 by, for example, indirectly requiring a portion of the product to be supplied by domestic sources.

14. Thank you for this opportunity to present Australia’s views in this dispute.

\(^4\) Panel report *Canada – Autos*, para. 6.256