Before the Appellate Body of the World Trade Organization

Brazil – Certain Measures Concerning Taxation and Charges
(WT/DS472) (WT/DS497)

Third Participant Written Submission of Australia to the Appellate Body

26 October 2017
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I. INTRODUCTION

1. Australia considers that the appeals lodged by Brazil, the EU and Japan in this dispute raise significant issues concerning the scope and application of provisions in the General Agreement on Tariffs and Trade 1994 (“GATT 1994”), the Agreement on Subsidies and Countervailing Measures, and the Agreement on Trade-Related Investment Measures; as well as the obligations of panels under the Understanding of the Rules and Procedures Governing the Settlement of Disputes (“DSU”).

2. In this submission, Australia addresses the proper interpretation of Article III:8(b) of the GATT 1994, as well as the proper exercise of judicial economy with respect to a panel’s obligations under the DSU.

3. Australia reserves the right to raise other issues in the hearings before the Appellate Body.

II. INTERPRETATION OF ARTICLE III OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

4. A significant question raised by this appeal is whether, by virtue of Article III:8(b) of the GATT 1994, a WTO Member may provide subsidies exclusively to domestic producers without violating the national treatment obligations laid down in Article III of the GATT 1994, even where those subsidies result in discrimination between domestic and imported products.

5. Article III:8(b) of the GATT 1994 provides:

   The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.

6. In Australia’s view, the Panel was correct in concluding that “at a minimum the text of Article III:8(b) makes clear that subsidies given exclusively to domestic producers, do not per se and for that reason alone violate Article III of the GATT.” 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.

7. The Panel went on to observe in paragraph 7.85 that:

   ... Article III:8(b) does not change the applicability of Article III to discriminatory application of a product tax, even where such a discriminatory application constituted a subsidy exclusively to domestic producers.

8. The Panel continued in paragraph 7.86:

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1 Panel Report, Brazil – Taxation, para. 7.77.
2 Panel Report, Brazil – Taxation, para. 7.85.
Nor are discriminatory non-tax regulation measures that involve the provision of a subsidy exclusively to domestic producers, for that reason alone, placed outside the disciplines of Article III.³

9. In that respect, Australia also agrees with the Panel’s conclusion that subsidies provided exclusively to domestic producers “are not per se exempted from the disciplines of Article III of the GATT”⁴ insofar as “aspects of a subsidy resulting in product discrimination ... are not exempted from the disciplines of Article III pursuant to Article III:8(b).”⁵

10. On this point, Brazil states in its Appellant’s Submission, at paragraph 18, that:

... Article III:8(b) makes clear that subsidies provided to domestic producers, including the effects that those subsidies might have on the conditions of competition for domestic versus imported products, are not a basis for finding a violation of the product-related disciplines of Article III. (emphasis in original)

11. Brazil goes on to note, at paragraph 26, that:

A harmonious interpretation of [Article III of the GATT 1994 on the one hand and Article XVI and the SCM Agreement on the other] requires any panel evaluating claims under Article III to determine, in the first instance, whether the measure at issue is a product-related measure subject to the disciplines of Article III or, conversely, whether that measure provides a subsidy to domestic producers and is therefore subject to the disciplines of the SCM Agreement.

12. In Australia’s view, these statements do not lead to a permissible interpretation of Article III:8(b), which should be read together with Articles III:2 and III:5.

13. Article III:2 of the GATT 1994 provides:

The products of the territory of any contracting party imported into the territory of any other contracting party 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. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.*

14. Article III:5 of the GATT 1994 provides:

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.*

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³ Panel Report, Brazil – Taxation, para. 7.86.
⁴ Panel Report, Brazil – Taxation, para. 7.87.
⁵ Panel Report, Brazil – Taxation, para. 7.88.
15. Read in the context of Articles III:2 and III:5, Australia considers that 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. This was confirmed by the Panel in Indonesia – Autos:

[S]ubsidies to producers are subject to the national treatment provisions of Article III when they discriminate between imported and domestic products.\(^6\)

16. While the Appellate Body in US – Tax Incentives found that "Article III:8(b) makes clear that the provision of subsidies to domestic producers only, and not to foreign ones, does not in itself constitute a breach of Article III",\(^7\) this finding does not stand for the proposition that any effects of those subsidies on the conditions of competition for domestic versus imported products cannot constitute a violation of a measure under Article III.

17. As to whether a panel should be required to undertake a threshold inquiry as to whether a measure is product-related or production-related, and thereafter subject the measure to the disciplines of Article III or the SCM respectively, Australia considers that such an interpretation would severely undermine the operation of the national treatment obligations of WTO members. In this respect, Australia notes its submission to the Panel, at paragraph 15:

Australia notes that 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 also the [WTO Agreement on Subsidies and Countervailing Measures (SCM)]. 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.

18. Australia reiterates this observation on this aspect of Brazil’s appeal.

III. JUDICIAL ECONOMY

19. The central issue raised by Japan and the EU as Other Appellants is whether the Panel exercised false judicial economy in making findings with respect to only one of the means of applying the challenged measures. In Australia’s view, the way in which the Panel structured its analysis and conclusions raises important questions about the proper exercise of judicial economy.

A. THE PANEL’S FINDINGS IN THIS DISPUTE

20. Specifically, Japan, in its Other Appellant Submission, stated at paragraph 2:

... that the Panel appears to have applied judicial economy with respect to two sets of measures challenged by the Complainants – the Programme to Promote Technological Innovation and Densification of the Productive Chain of Motor Vehicles ("INOVAR-AUTO programme") and the Information and Communication Technology ("ICT") programmes (i.e., Informatics, PADIS, PATVD, and Digital Inclusion). More particularly still, the Panel, on its own

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\(^7\) Appellate Body Report, US – Tax Incentives, para. 5.16. (emphasis added)
initiative, decided to distinguish between two scenarios in which the accreditation requirements under these two measures can be imposed. And then, again on its own initiative, the Panel appears to have limited its findings to one of those scenarios, rather than make findings on the relevant measures as a whole, encompassing both scenarios, as would have been consistent with the unitary nature of the requirements under Brazilian law (which does not distinguish between them in any explicit way) and the way the Complainants had formulated their requests. Further, because the Panel appears to have applied judicial economy, it appears as if the requirements under the scenario that was not addressed in the Panel’s finding would survive as it is.

21. Japan continues at paragraph 3:

In the preceding paragraph, Japan used the term “appears” because it is also possible to read the Panel’s report as including a finding concerning the accreditation requirements under both measures as a whole, but simply based on an analysis of one of the two factual scenarios only. However, given the potential consequences of the Panel’s decision in this respect for the further resolution of this dispute, Japan has decided to submit this Other Appellant Submission.

22. The EU makes a similar contention.

23. Australia shares the perspective of Japan and the EU with respect to the Panel’s exercise of judicial economy on the “in-house” scenario. While both claimants originally challenged the ICT and INOVAR-AUTO programmes in their entirety, the way in which the Panel framed its analysis and conclusions leads to doubt as to whether the Panel found violations with respect to the measures in their entirety, or merely as they operated in the outsourcing scenario.

24. For example, with respect to the INOVAR-AUTO programme, the Panel made legal findings only in respect of the “outsourcing method.” The Panel concluded at paragraph 7.748 that:

... in the outsourcing scenario, the production step requirements under the INOVAR-AUTO programme require the use of domestic goods in the sense covered by Article III:4 and Article 3.1(b) of the SCM Agreement.\(^8\)

25. The Panel continued at paragraph 7.749 that:

... the Panel does not need to consider whether under the ‘in-house’ scenario the production step requirements also would constitute a requirement to use domestic goods.\(^9\)

26. Finally, the Panel concluded at paragraph 7.751:

Therefore, in the view of the Panel, with respect to the outsourcing provisions, the aspect of the accreditation requirements for domestic manufacturers that requires compliance with a minimum number of manufacturing steps in Brazil results in a requirement to use domestic

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\(^8\) Panel Report, *Brazil – Taxation*, para. 7.748.
over imported goods in the sense covered by Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement.\textsuperscript{10} (emphasis added)

27. In framing its analysis and conclusions in such a manner, the Panel appears to have refrained from making any determination concerning the violation (or lack thereof) arising from Brazil’s current application of the in-house method.

28. In Australia’s view, such a lack of clarity is problematic insofar as it calls into question whether the Panel found the entire challenged measure, or only aspects thereof, in violation of Brazil’s WTO commitments. Consequently, Australia considers it would be appropriate for the Appellate Body to take steps to clarify the Panel’s findings, either by completing the legal analysis with respect to the in-house method or by clarifying that the Panel’s findings apply to all methods employed by the measure.

B. THE PROPER EXERCISE OF JUDICIAL ECONOMY

29. 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.

30. Nevertheless, Article 11 of the Understanding on the Rules and Procedures for the Settlement of Disputes (DSU) mandates that panels:

... should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.

31. Article 3(4) of the DSU provides that recommendations or rulings made by the WTO’s Dispute Settlement Body "shall be aimed at achieving a satisfactory settlement of the matter".

32. Article 3(7) of the DSU further provides that "the aim of dispute settlement is to secure a positive solution to a dispute".

33. In Australia’s view, the mandate to make an objective assessment of the matter, with a view to its resolution and settlement, limits the degree to which a panel may elect to exercise judicial economy. In this respect, the Appellate Body has on many occasions recognised a panel’s obligation to make adequate findings.\textsuperscript{11} Where a panel’s findings provide only partial resolution of a claim, or where its “recommendations and rulings are not sufficiently precise so as to allow for prompt compliance by a Member”\textsuperscript{12}, the effectiveness of the WTO’s dispute settlement mechanism is undermined.

34. Overuse of judicial economy can lead to such outcomes. Consequently, in the exercise of judicial economy, Australia considers that panels should be especially cautious in ensuring that findings can lead to a satisfactory settlement of the dispute at hand.

\textsuperscript{10} Panel Report, Brazil – Taxation, para. 7.751.


\textsuperscript{12} Appellate Body Report, Australia – Salmon, para. 223.
IV. CONCLUSION

35. Central to this dispute is the scope and application of Article III:8(b) of the GATT 1994. Australia is of the view that, by virtue of Article III:8(b), subsidies provided exclusively to domestic producers are not per se and by that fact alone inconsistent with national treatment obligations. However, Article III:8(b) must be read together with Articles III:2 and III:5, and does not excuse aspects of such subsidy measures that lead to discrimination between domestic and imported products. To adopt the contrary interpretation would undermine national treatment obligations that are central to the WTO system.

36. Australia is also of the view that panels must be exceptionally cautious when exercising judicial economy in the resolution of disputes to ensure that findings can lead to a satisfactory settlement of disputes. Lapses in this regard risk eroding the effectiveness of the WTO’s dispute settlement mechanism.