BEFORE A PANEL OF THE WORLD TRADE ORGANIZATION

United States — Conditional Tax Incentives for Large Civil Aircraft

(DS487)

Third Party Oral Statement of Australia

1. Mr Chairman, Members of the Panel, thank you for the opportunity to present Australia’s views on this dispute.

2. Prior to addressing substantive issues, Australia takes this opportunity to commend the Panel for agreeing to videotape this hearing, at the request of the US. Australia welcomes enhanced transparency in WTO disputes.

I. KEY ISSUES

3. In this statement, Australia will comment on the following issues:

   a. What is a prohibited subsidy under Article 3.1(b) of the Subsidies and Countervailing Measures (SCM) Agreement;

   b. The relationship between Article III:8(b) of the General Agreement on Tariffs and Trade (GATT 1994) and Article 3.1(b) of the SCM Agreement; and

   c. The scope for Members to provide subsidies to regions or beneficiaries within their territory.

II. WHAT IS A PROHIBITED SUBSIDY UNDER ARTICLE 3.1(B) OF THE SCM AGREEMENT?

4. To contravene the SCM Agreement in the way the EU alleges, the EU must prove, amongst other things, that the US legislation provides a subsidy “contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.” This is set out in Article 3.1(b) of the SCM Agreement.
5. We note that in Canada – Autos the Appellate Body found that Article 3.1(b) of the SCM Agreement extends to contingency in fact, because to not do so “would make circumvention of obligations by Members too easy.” Given this, a practical approach must be taken to interpreting what constitutes a breach of Article 3.1(b) of the SCM Agreement.

6. The EU notes in paragraph 76 of its submission that the two provisions are “expressly conditioned on the use of domestic over imported goods.” However, the EU does not clearly illustrate how it reaches that conclusion. It is also unclear whether the EU is suggesting that subsidies alleged to breach the SCM Agreement are contingent on the use of domestic goods in a de jure or de facto manner.

7. To make a claim that the legislation makes a subsidy contingent, de jure, on the use of domestic goods, the EU must point to the infringement set out in “the words actually used in the measure.” This standard was set by the Appellate Body in Canada-Autos. It is doubtful whether a case for a de jure breach of Article 3.1(b) has been made out.

8. To make a claim that the legislation makes a subsidy contingent, de facto, on the use of domestic goods requires greater consideration of the facts. The EC – Large Civil Aircraft Appellate Body report provides guidance in the context of Article 3.1(a). It states that:

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1 Canada – Autos, Appellate Body report, para 142.
2 Canada – Autos, Appellate Body report, para 123.
[t]he existence of de facto export contingency, as set out above, ‘must be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy’, which may include the following factors: (i) the design and structure of the measure granting the subsidy; (ii) the modalities of operation set out in such a measure; and (iii) the relevant factual circumstances surrounding the granting of the subsidy that provide the context for understanding the measure’s design, structure, and modalities of operation.3

9. Australia submits that the Panel can be guided by this approach in relation to Article 3.1(b). Accordingly, the Panel’s determination in this case will depend on the finding of facts.

III. THE RELATIONSHIP BETWEEN ARTICLE III:8(B) OF GATT 1994 AND ARTICLE 3.1(B) THE SCM AGREEMENT

10. As set out in paras 8 – 10 of Australia’s third party written submission, there is legitimate scope for subsidies to be paid to domestic producers, as recognised in GATT 1994, Article III:8(b), which reads:

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

3 EC – Large Civil Aircraft, Appellate Body report, para 1046.
Article and subsidies effected through governmental purchases of domestic products.

11. Assistance in interpreting Article III:8(b) of GATT 1994 was provided by the panel in *Indonesia – Autos*, where it stated that:

the purpose of Article III:8(b) is to confirm that subsidies to producers do not violate Article III of GATT, so long as they do not have any component that introduces discrimination between imported and domestic products.\(^4\)

12. This guidance from the panel confirms that the role of Article III:8(b) of GATT 1994 is to allow subsidies to be paid to producers which do not discriminate between imported and domestic products, such as by having local content requirements. In Australia’s view, it is important that the distinction is retained between the permitted payment of a subsidy exclusively to domestic producers, and a subsidy which is contingent on the use of domestic over imported goods.

IV. **THE SCOPE FOR MEMBERS TO PROVIDE SUBSIDIES TO BENEFICIARIES WITHIN THEIR TERRITORY**

13. Australia addresses the US legislation’s references to what the EU calls an “exclusive-production condition” in paragraphs 11 – 13 of our third party

\(^4\) Interim Review *Indonesia - Auto’s* para 14.43. The Interim Review is part of the findings of the Panel Report.
written submission. We would encourage the Panel to consider whether references to wings and fuselages in the legislation can be regarded as merely defining the beneficiary of a subsidy, rather than a requirement to use domestically produced goods.

V. THE SCOPE FOR MEMBERS TO PROVIDE SUBSIDIES TO REGIONS WITHIN THEIR TERRITORY

14. As set out in paragraphs 14 – 19 of Australia’s third party written submission, the provision of certain subsidies are permitted under the SCM Agreement. In particular, Articles 8.2(b) and 2.2 of the SCM Agreement demonstrate that provision of subsidies on a regional basis is permitted. Therefore, Australia suggests that the Panel could consider whether what the EU calls the legislation’s “programme-siting condition” merely incentivises conducting a significant business activity within a particular jurisdictional authority.

VI. CONCLUSION

15. This concludes Australia’s remarks. Australia thanks the Chairman and Members of the Panel for the opportunity to present its views.