United States — Conditional Tax Incentives for Large Civil Aircraft

(WT/ DS487)

Third Party Submission of Australia

Geneva, 26 January 2015
Table of Contents

I. INTRODUCTION ...........................................................................................................5
II. AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES .................................5
A. The Characterisation of the Conditions Relating to the Provision of a Subsidy .................................................................5
B. The Legitimacy of the Provision of Certain Subsidies to Domestic Industry ........................................................................6
C. The Legitimacy of the Provision of Certain Subsidies Limited to Certain Beneficiaries or Activities .........................................................6
D. The Legitimacy of the Provision of Subsidies Based on Geographical Location .................................................................7
III. CONCLUSION ...........................................................................................................8
<table>
<thead>
<tr>
<th>Short Title</th>
<th>Full Case Title and Citation</th>
</tr>
</thead>
</table>
I. INTRODUCTION

1. Australia considers that these proceedings initiated by the European Union (under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) raise significant systemic issues relating to legal interpretation of obligations under the Agreement on Subsidies and Countervailing Measures (SCM) and the General Agreement on Tariffs and Trade 1994 (GATT).

2. The issues which Australia addresses in this submission are:
   
   (a) The characterisation of conditions relating to the provision of a subsidy;
   
   (b) The legitimacy of the provision of certain subsidies to domestic industry;
   
   (c) The legitimacy of the provision of certain subsidies limited to certain beneficiaries or activities; and
   
   (d) The legitimacy of the provision of subsidies based on geographical location.

II. AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

A. THE CHARACTERISATION OF THE CONDITIONS RELATING TO THE PROVISION OF A SUBSIDY

3. At issue is this dispute is an amendment to Washington State’s legislation, providing tax incentives to the aerospace industry (SSB5952). The EU considers that the measures contained in the modified subsidy program “constitute subsidies that are contingent on the use of domestic over imported goods”, and therefore constitute prohibited subsidies within the meaning of SCM Article 3.1(b). Australia understands that the EU bases this on two conditions placed on the concessional taxation treatment by Washington State, which it has characterised as the ‘programme-siting condition’ and the ‘exclusive-production condition’.

4. Australia understands that subsection 2(1) of the Washington State legislation relating to the 777X program requires that the extension of the previous taxation arrangements “takes effect contingent upon the siting of a significant commercial airplane manufacturing program in the state of Washington.”

5. The phase, “significant commercial airplane manufacturing program”, is defined to mean:

   … an airplane program in which the following products, including final assembly, will commence manufacture at a new or existing location within Washington state on or after the effective date of this section:

   (i) The new model, or any version or variant of an existing model, of a commercial airplane; and

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1 EU First Submissions paras 42 – 52.
2 Exhibit EU-003, page 4 (3 as labelled).
(ii) Fuselages and wings of a new model, or any version or variant of an existing model, of a commercial airplane.

6. Australia further understands that subsection 6(11)(e)(ii) of the Washington State legislation provides:

With respect to the manufacturing of commercial airplanes or making sales, at retail or wholesale, of commercial airplanes, this subsection (11) does not apply on and after July 1st of the year in which the department makes a determination that any final assembly or wing assembly of any version or variant of a commercial airplane that is the basis of a siting of a significant commercial airplane manufacturing program in the state under section 2 of this act has been sited outside the state of Washington. This subsection (11)(e)(ii) only applies to the manufacturing or sale of commercial airplanes that are the basis of a siting of a significant commercial airplane manufacturing program in the state under section 2 of this act.

(emphasis added)

7. Australia recalls that Article 3.1(b) prohibits “subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.” The question therefore before the Panel is whether the conditions for the receipt of the tax incentives are conditions which require the use of domestic over imported goods.”

B. THE LEGITIMACY OF THE PROVISION OF CERTAIN SUBSIDIES TO DOMESTIC INDUSTRY

8. Australia notes that there is a legitimate scope within the WTO system for subsidies to domestic industries. This is recognised in GATT Article III:8(b), which 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.

9. This was interpreted by the Panel in Indonesia – Autos to “confirm that subsidies to producers do not violate Article III, so long as they do not have any component that introduces discrimination between imported and domestic products.”

10. In Australia’s view, it is important that the distinction is retained between the permitted payment of a subsidy to domestic producers and a subsidy which is contingent on the use of domestic over imported goods.

C. THE LEGITIMACY OF THE PROVISION OF CERTAIN SUBSIDIES LIMITED TO CERTAIN BENEFICIARIES OR ACTIVITIES

11. The amendment to the legislation in SSB5952 provides a definition of the scope of the beneficiary or beneficiaries of the subsidy, namely a manufacturer of a significant commercial airplane manufacturing program. It further defines that what constitutes a significant commercial airplane manufacturing program as the manufacture or

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3 Exhibit EU-003, p 14 (13 as labelled).
assembly of a commercial airplane and fuselages and wings of a commercial airplane, ie. major components in the construction of a commercial airplane.

12. The Panel needs to consider whether the amendment to the legislation, and specifically, the definition of the beneficiary or beneficiaries of the subsidy, could be characterised as providing the scope of the beneficiaries of the subsidies; or in the alternative, as the EU argues, whether the inclusion of the requirement to manufacture wings and fuselages amounts to a requirement to use domestic over imported goods as a condition of the tax incentive.

13. The amendment to the legislation also provides that the tax incentive is conditioned on the siting of the significant manufacturing program in Washington State. The Panel needs to assess whether the right to provide subsidies to domestic producers includes the right to require that the manufacturing activity occurs within the territory of the subsidising authority; and whether such a requirement could be characterised as one requiring the use of domestic over imported goods.

D. THE LEGITIMACY OF THE PROVISION OF SUBSIDIES BASED ON GEOGRAPHICAL LOCATION

14. Australia considers that careful consideration should be given to whether the scope of a subsidy for manufacture and assembly based on geographical locations amounts to the requirement to use domestic products over imported goods.

15. Careful consideration should also be given to the requirement to site the activity within the jurisdiction of the granting authority amounts to a local content requirement. The Panel needs to clarify whether the beneficiary of the tax incentive would receive benefits for manufacture and assembly regardless of the source of the inputs to manufacture and assembly.

16. Relevant context to consider the ability to limit or target subsidies to specific regions or within designated geographical regions within the jurisdiction of a granting authority is provided within the SCM. For example, the notification obligation under Article 25.2 covers any specific subsidy granted or maintained within a Member’s territory. Article 8.2(b) refers to assistance to disadvantaged regions within the territory of a Member. Further, Article 2.2 defines regional specificity of subsidies. This suggests the ability of jurisdictional authorities to provide subsidies to specific geographic regions within the territory of the Member.

17. The Panel therefore also needs to assess whether the distinction made in the Washington legislation is between domestic and international goods, as claimed by the EU, or whether it is the geographical scope of a tax incentive to a business activity conducted within the geographic region of the jurisdictional authority.

18. The legislation in question conditions the concessional tax arrangements on certain activities taking place in Washington State.

19. The EU has claimed that the concessional tax arrangements are made conditional by the ‘programme-siting condition’ and ‘exclusive-production condition’ on the use of
domestic over imported goods. Australia suggests that the Panel consider whether these conditions are more properly interpreted to be measures designed to attract a particularly significant element of the manufacture of an airplane to Washington State. The outcome may be that Boeing chooses to use wings manufactured in Washington State, but this is a result of choosing to site wing manufacture in Washington rather than choosing to use domestic over imported wings.

III. CONCLUSION

20. For the reasons outlined above, Australia’s view is that the Panel should consider, within the recognised scope of subsidies to domestic industries, whether the conditions placed on the modified subsidy program are conditional on the use of domestic over imported goods.

21. In considering whether the tax incentive provided under the legislation SSB5952 constitutes a prohibited local content requirement, a distinction needs to be maintained by the Panel between the permitted payment of a subsidy to producers and a prohibited subsidy requiring local content.

22. Where a Member provides subsidies designed to encourage manufacturing activities within its territory, including for specific industry sectors, it must do so consistent with SCM Article 3.1(b), that is, it must not require the use of domestic products.

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5 EU First Submissions para. 76.