Third Participant Oral Statement of Australia

Geneva, 14 March 2013
A. INTRODUCTION

Members of the Division.

1. Thank you for the opportunity to present Australia’s views on this appeal. Australia’s views on a broader range of issues raised by the appellants are set out in our third participant submission lodged on 27 February 2013. I will confine my remarks to a key issue which is critical in this appeal.

2. That key issue is how to determine whether a financial contribution confers a "benefit", in the context of a highly regulated market geared towards achieving certain policy objectives. Australia has two submissions on this question.

3. First, Australia submits that the relevant inquiry for determining "benefit" under Article 1.1(b) of the Agreement on Subsidies and Countervailing Measures (hereafter the SCM Agreement) is whether the financial contribution is provided on terms that confer an advantage on the recipient. Second, Australia submits that the dissenting panelist’s analysis of benefit in the context of Ontario’s electricity market is consistent with this approach.
4. I will elaborate upon these two propositions in a few moments, but would first like to make some general opening remarks.

B. SUBSIDIES ARE ONLY PROBLEMATIC IN CERTAIN CIRCUMSTANCES

5. Australia begins by emphasizing that there is nothing inherently wrong with a subsidy. The SCM Agreement does not prevent Members from providing subsidies; it requires simply that Members avoid recourse to subsidies that are prohibited or cause adverse trade effects. If subsidy programmes are well designed and have minimal negative impact on trade, then they will not be found inconsistent with the SCM Agreement.

6. Australia submits that this is not a dispute about the ability of governments to provide environmental programmes to help achieve goals in policy areas such as climate change abatements. This is a dispute about a discriminatory local content requirement attached to an otherwise reasonable feed-in tariff programme. In short, the fact that Canada’s Feed-In-Tariff (hereafter FIT) Programme is a subsidy is not the problem. The problem is that by providing that subsidy with a local-content requirement, Canada’s FIT Programme breaches Article 3.1(b) of the SCM Agreement.

7. For government programmes or measures to be captured and therefore disciplined in the context of the SCM Agreement, it must first be established that the programmes or measures are subsidies. In Australia's view, if the burden of establishing the
existence of a subsidy is too high, arguably many egregious government programmes
which were intended to be disciplined by the SCM Agreement would escape WTO
scrutiny.

8. Australia submits that if the decision of the panel majority stands, then it could be
difficult for any government support programme regardless of the industry or sector,
including in the electricity sector, to be captured by SCM disciplines. In fact, in any
market where the government intervenes on price, the determination of a market
benchmark would become difficult and the finding of a subsidy could be unduly
constrained. Such an outcome would seem to have considerable systemic risk.

9. I will now make some observations in relation to the legal standard for calculating
benefit.

C. LEGAL STANDARD FOR CALCULATING A BENEFIT

10. Australia considers that the fundamental legal question facing the Panel with respect
to "benefit" was this: did the terms of the remuneration paid to FIT contractors to
supply electricity provide an advantage\(^1\). In other words, did the FIT programme
make FIT contractors "better off" than they would otherwise have been, absent the
government action.\(^2\)

\(^1\) *Canada – Aircraft*, para. 9.112
\(^2\) *EC and Certain Member States – Large Civil Aircraft*, para 973
11. Australia has two submissions on this question. First, Australia submits that the guidance in Article 14(d) of the SCM Agreement is not the exclusive standard for determining whether a benefit is conferred. Second, Australia submits that the dissenting panelist’s analysis of benefit in the context of Ontario’s electricity market is consistent with this approach.

(a) Article 14(d) is not the exclusive standard for benefit

12. In terms of the role of Article 14(d) in determining whether a benefit is conferred, Australia’s view is that, in examining whether the financial contribution conferred a "benefit", the Panel erred by relying on the guidance contained in Article 14(d), rather than the jurisprudence on Article 1.1(b).

13. As has been repeated often, the Appellate Body in Canada – Aircraft has said that the "ordinary meaning of benefit clearly encompasses some form of advantage" and that the second element in Article 1.1 is concerned with the "benefit conferred on the recipient by the governmental action". The Appellate Body in EC–Aircraft further explained that, in identifying such advantage, a comparison is required to determine whether a recipient of the financial contribution is made "better off" than it would otherwise have been, absent the government action. In Australia’s view, this jurisprudence sets the appropriate standard for determining whether a benefit is conferred and should have been the panel’s principle inquiry, rather than seeking to

3 EC and Certain Member States – Large Civil Aircraft, para 973
determine whether FIT generators were given more than adequate remuneration under Article 14(d) of the SCM Agreement.

14. In this dispute, the Panel found that FIT Generators received an advantage under the Chapeau of paragraph (1)(a) to the Trade Related Investment Measures Agreement (TRIMS). As we have explained, the Appellate Body has made clear that the concept of "advantage" is critical in determining whether a financial contribution confers a benefit. Given the Panel's finding of advantage in the context of the TRIMS inquiry, Australia submits that a finding of "benefit" under Article 3.1(b) of the SCM Agreement should have been made with little difficulty.

(b) The FIT Programme confers a benefit because without it there would be no market for electricity generated by wind and solar sources in Ontario.

15. Turning to Australia’s second submission on this point, Australia agrees with the dissenting panelist’s approach to determining benefit in this case, which Australia submits is consistent with the approach just outlined. Australia agrees that the FIT Programme confers a benefit because electricity generators supplying wind or solar sourced electricity would not be able to enter the market unless the government purchased this electricity at elevated prices through FIT contracts. Market forces

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4 We agree with the complainants that, on the basis of these conditions, mere participation in [the] FIT Programme may be viewed as obtaining an "advantage". Panel Report para 7.165.
alone would not engender participation in this sector by wind and solar electricity
generators.

16. In other words, the very purpose of the FIT programme, which is to enable renewable
energy generators to enter the market when they would otherwise not be able to,
establishes that the FIT programme made FIT contractors "better off" than they would
otherwise have been, absent the government action.\(^5\) As such, the FIT programme
confers an advantage on FIT providers, constituting a benefit under Article 1.1(b) of
the SCM Agreement.

\textbf{D. CONCLUSION}

17. Members of the Division, Australia would be pleased to provide answers to any
questions on these or any other matters related to the appeal.

\(^5\) \textit{EC and Certain Member States – Large Civil Aircraft, para 973}