BEFORE THE APPELLATE BODY
OF THE WORLD TRADE ORGANIZATION

Canada – Certain Measures Affecting the Renewable Energy Generation Sector
Canada – Measures Relating to the Feed-in Tariff Program
(DS412, DS426)

Third Participant Written Submission of Australia

27 February 2013
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I. INTRODUCTION

1. The appeals in respect of certain aspects of the Panel's findings in Canada- Certain Measures Affecting the Renewable Energy Generation Sector and Canada – Measures Relating to the Feed-in Tariff Program, raises systemic issues concerning the substantive legal obligations and rights of WTO Members under the Agreement on Subsidies and Countervailing Measures (SCM Agreement), the General Agreement on Tariffs and Trade 1994 (GATT 1994) and the Agreement on Trade Related Investment Measures (TRIM).

2. Australia recognises and strongly supports the right of Members to develop environmental policies which seek to adapt to and mitigate the effects of climate change.

3. The matters submitted by the parties raise important systemic issues as to the proper assessment of “for governmental purposes” under Article III:8(a) of GATT 1994. Australia will briefly address this issue.

4. Australia reserves the right to raise other issues at the oral hearing before the Appellate Body. In particular, Australia foreshadows that it will address the Panel's findings relating to "benefit" under Article 1.1(b) of the SCM Agreement at the oral hearing.

II. AUSTRALIA'S SUBMISSION ON THE PANEL'S FINDINGS

"Governmental Purposes"

5. Australia agrees with the Panel's ultimate conclusion that the Feed-in Tariff (FIT) Programme and its related contracts, insofar as they include domestic content requirements, are inconsistent with Article 2.1 and 2.2 of the TRIMS Agreement and Article III:4 of the GATT 1994. However, Australia shares the concerns raised by the European Union with respect to errors of interpretation made by the Panel regarding the application of certain WTO provisions.

6. In particular, Australia considers that the Panel erred when stating that the ordinary meaning of the terms "governmental purposes" is relatively broad and may encompass the meaning proposed by Canada, i.e., that a purchase "for governmental purposes" may exist whenever a government purchases a product for a stated aim of the government. Australia shares the European Union's concern that this statement amounts to a legal error, and that it might be misused in the future.

7. Australia is not advocating an interpretation that is narrower and stricter than the ordinary meaning of the text in Article III:8(a). Australia requests that the Appellate

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1 Panel Report, paras. 7.167 and 8.6
2 Other Appellant Submission by the European Union, para 3
3 Panel Report, para 7.139
4 Other Appellant Submission by the European Union, para 6; Appellate Body Report, EC and certain Member States – Large Civil Aircraft, para 936. (“Given the potential that the Panel's statement could be misused in the future, we reverse this statement”)
5 The Appellate Body in EC- Hormones suggested that "merely characterizing a treaty provision as an "exception" does not by itself justify a "stricter" or "narrower" interpretation of that provision than
Body confirm the interpretation of Article III:8(a) that gives effect to the treaty's object and purpose. In Australia's view, the Panel's interpretation of the term "for governmental purposes" is not consistent with an ordinary meaning of the word "purposes", the authentic French and Spanish versions of the treaty text, and the negotiating history of Article XVII:2 of GATT 1994 all of which denote the concept of practical advantage or use by the government, rather than a purchase for an aim of the government.

8. As Australia explained before the Panel, if any purchase by a governmental agency for a stated aim of the government were to be subject to Article III:8(a), then WTO Members could circumvent the fundamental disciplines of Article III simply by inserting itself as an intermediary in any given market. Australia considers that the Panel's interpretation could significantly undermine the scope of the national treatment obligations set out in Article III and permit a wide range of protectionist measures, at odds with the important principle enunciated in Article III:1. As noted by the Appellate Body in Japan – Alcoholic Beverages II, Article III:1 constitutes part of the context for each of the other paragraphs of Article III.

9. Accordingly, Australia supports the European Union's request to reverse the Panel's statement in paragraphs 7.138 and 7.139 of its report, or at the very least declare it moot and of no legal effect.

III. CONCLUSION

10. In summary, Australia submits that the Panel erred in its findings that the ordinary meaning of the terms "governmental purposes" under Article III:8(a) of GATT 1994 is relatively broad and may exist whenever a government purchases a product for a stated aim of the government.