

**BEFORE THE APPELLATE BODY  
OF THE WORLD TRADE ORGANIZATION**

**EUROPEAN COMMUNITIES AND CERTAIN MEMBER STATES –  
MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT**

**(AB-2010-1/DS316)**

**Additional Written Memorandum of Australia  
Following the First Oral Hearing**

November 26, 2010

**EUROPEAN COMMUNITIES AND CERTAIN MEMBER STATES –  
MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT**

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**SERVICE LIST**

BCI-APPROVED PERSONS

PARTIES TO THE DISPUTE

Mr Mikko Huttunen, Permanent Delegation of the European Union, Geneva

Mr James Kelleher, Permanent Mission of the United States, Geneva

THIRD PARTICIPANTS

Mr Marcus Vinicius Ramalho, Permanent Mission of Brazil, Geneva

Ms Kirsten Hillman, Permanent Mission of Canada, Geneva

Ms ZHAO Hong, Permanent Mission of the People's Republic of China, Geneva

Mr Koji Saito, Permanent Mission of Japan, Geneva

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1. Australia welcomes this opportunity to address some of the issues raised in the first oral hearing in this appeal.

A. CONTINUITY OF BENEFIT

2. The European Union (“EU”) relies in part on the Appellate Body report in *US – CVDs on Certain EC Products*<sup>1</sup> to support the argument in its Appellant Submission that “removing subsidised value – by indirect means (extinction) or directly (extraction) – needs to be taken into account in the establishment of the existence of subsidisation or the aggrieved Member’s right to a remedy”.<sup>2</sup> Australia notes that the situation before the Appellate Body in that dispute consisted of the privatization of “all, or substantially all” of the government’s ownership interest “on arm’s-length terms and for fair market value”.<sup>3</sup> However, none of the entities to which subsidies were allegedly granted in the present dispute were subject to such a privatization.

3. Australia further notes that the EU argues in its Appellant Submission that “[i]f a subsidy does not confer any present benefit ... it simply cannot cause any present adverse effects”.<sup>4</sup> However, the EU does not appear to argue that the “benefit” from any of the alleged financial contributions has been fully extinguished (see paragraph 147 of the EU’s Appellant Submission).

4. In any event, *US – CVDs on Certain EC Products* was concerned with Part V of the *Agreement on Subsidies and Countervailing Duties* (“SCM Agreement”) – which is not before the Appellate Body in this dispute. As stated by the Appellate Body in *US – Upland Cotton*, the provisions of Part V “must not be automatically transposed into Part III”.<sup>5</sup>

5. The question under Part III of the SCM Agreement is whether the EU or its member States “cause[d], through the use of any subsidy ... adverse effects to the interests of” the United States within the terms of Article 5 of the SCM Agreement. In the circumstances of this dispute, this will include a consideration of “the effect of the subsidy” under Article 6.3 of the SCM

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<sup>1</sup> Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, adopted 8 January 2003, DSR 2003:I, 5 (“*US – CVDs on Certain EC Products*”).

<sup>2</sup> Appellant Submission of the European Union, paragraph 127.

<sup>3</sup> Appellate Body Report, *US – CVDs on Certain EC Products*, paragraph 2 and footnote 4.

<sup>4</sup> Appellant Submission of the European Union, paragraph 224.

<sup>5</sup> Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, 3 (“*US - Upland Cotton*”), paragraph 438.

Agreement. The Panel therefore correctly focussed on the effect of the subsidies that it found had been granted to Airbus.

6. The EU has not explained how the transactions referred to at paragraph 147 of its Appellant Submission mean that the Panel was wrong to conclude that: (a) “but for the subsidies, Airbus would not have had the market presence it did have during the period we examined”;<sup>6</sup> and (b) “[h]ad Airbus successfully entered the LCA industry without subsidies, it would be a much different, and ... much weaker LCA manufacturer ... with at best a more limited offering of LCA models”.<sup>7</sup>

7. Put another way, the EU has not explained how those transactions mean that, if the subsidies had never been granted: (a) Airbus would nevertheless have had the market presence it did during the period the Panel examined; and (b) Airbus would nevertheless have successfully entered the LCA industry and been much the same LCA manufacturer with the same offering of LCA models.

8. Australia does not consider that the EU has convincingly explained how the sale of, for example, 0.93% of EADS’s shares by the French State in 2001<sup>8</sup> or the sale of BAE’s 20% interest in Airbus SAS to EADS in 2006<sup>9</sup> in any way changes “the effect” (in 2001-2006) on Boeing and the United States of the subsidies provided by the EU and certain EU member States since 1969. Australia cannot agree with the EU assertion in its opening statement that “a sale involving a significant interest ... extinguishes the effects of past support”.<sup>10</sup>

## B. ARTICLE 14(B) OF THE SCM AGREEMENT

9. Article 14(b) of the SCM Agreement states that “a loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market”. Australia considers that the EU’s argument at the first oral hearing that a “comparable commercial loan”

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<sup>6</sup> Panel Report, *European Communities and Certain Member States – Measures Affecting Trade In Large Civil Aircraft*, DS316, 30 June 2010 (“Panel Report”) paragraph 7.1986.

<sup>7</sup> Panel Report, paragraph 7.1993.

<sup>8</sup> Appellant Submission of the European Union, paragraph 144.

<sup>9</sup> Appellant Submission of the European Union, paragraph 146.

<sup>10</sup> Opening Statement of the European Union, paragraph 23.

comprises a debt instrument offered by any market actor (including a government actor) could render Article 14(b) meaningless.

10. Using the EU's reasoning to determine whether "a loan by a government" conferred a benefit, Article 14(b) could be read as requiring a comparison between the "loan by a government" that was alleged to constitute a subsidy with "a comparable ... loan which the firm could actually obtain" from the government – this would make it very difficult, if not impossible, to ever find a benefit in respect of a loan provided by the government because the comparison would be between a government loan and a government loan.

11. Put another way, if a comparison is made of the interest rate charged on a loan provided to Airbus by an EU member State with a "comparable ... loan" it could have obtained from an EU member State, there is no comparison with the "market" within the meaning of Article 14(b) of the SCM Agreement.

### C. IN-FACT EXPORT CONTINGENCY

12. At the first oral hearing, the EU repeated the assertion at paragraph 1335 of its Appellant Submission that, in *Canada – Aircraft*,<sup>11</sup> Canada was "re-iteratively rewarding actual export, which ... could in certain circumstances be evidence of export contingency/conditionality". The EU argued that Article 3.1(a) and footnote 4 of the SCM Agreement set up an "if-then" construct – the obligation to grant the subsidy and the right to receive it had to be limited by the condition of export.<sup>12</sup> In addition, the EU maintained that Article 3.1(a) and footnote 4 of the SCM Agreement require "the imposition by the granting Member of a requirement that the recipient export in order to obtain (or retain) the subsidy".<sup>13</sup> In its questioning at the first oral hearing, the Appellate Body also explored the issue of whether, as asserted at paragraph 1318 of the EU's Appellant Submission, a subsidy must "favour[] exports and create[] an incentive for a company to prefer exports over domestic sales" in order to be found to be a prohibited export subsidy.

13. As Australia stated at the first oral hearing, the grants under the TPC programme in *Canada-Aircraft* did not depend on the ultimate mix between export sales and domestic sales of the subsidised products by the recipients of the grants, nor on whether any products were

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<sup>11</sup> Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377 ("*Canada – Aircraft*").

<sup>12</sup> Appellant Submission of the European Union, paragraph 1311.

<sup>13</sup> Appellant Submission of the European Union, paragraph 1331 (emphasis added).

ultimately exported at all. There was no requirement for a recipient to repay the subsidy if it did not ultimately export, or to pay back part of the subsidy if a portion of its sales were ultimately made on the domestic market.<sup>14</sup>

14. The award of grants under the TPC programme depended on a forward-looking assessment by the grantor – that is, the grants were not a reward for exports in the past. This is clear from the list of sixteen facts found by the Panel<sup>15</sup> and the Panel’s finding (confirmed by the Appellate Body) that the grants were “in fact tied to ... anticipated exportation or export earnings”, and therefore “contingent ... in fact ... upon export performance”.<sup>16</sup>

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<sup>14</sup> Panel Report in *Canada – Aircraft*, paragraph 9.343 – 9.344.

<sup>15</sup> Panel Report in *Canada – Aircraft*, paragraph 9.340.

<sup>16</sup> Panel Report in *Canada – Aircraft*, paragraph 9.341.