

**WORLD TRADE ORGANIZATION**

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

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

**Third Participant Written Submission of Australia**

September 30, 2010

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

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## Table of Cases cited in this Submission

Short title	Full Case title and citation
Panel Report	Panel Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/R, 30 June 2010
<i>Australia – Automotive Leather II</i>	Panel Report, <i>Australia – Subsidies Provided to Producers and Exporters of Automotive Leather</i> , WT/DS126/R, adopted 16 June 1999, DSR 1999:III, 951
<i>Canada – Aircraft (AB)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377
<i>Canada – Aircraft (Panel)</i>	Panel Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/R, adopted 20 August 1999, as upheld by Appellate Body Report WT/DS70/AB/R, DSR 1999:IV, 1443
<i>China – Publications and Audiovisual Products (AB)</i>	Appellate Body Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/AB/R, adopted 19 January 2010
<i>EC – Bananas III (Article 21.5 – Ecuador II)/ EC – Bananas III (Article 21.5 – United States) (AB)</i>	Appellate Body Reports, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas - Second Recourse to Article 21.5 of the DSU by Ecuador</i> , WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr.1 / <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas - Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008
<i>EC – Biotech (Panel)</i>	Panel Report, <i>European Communities – Measures Affecting the Approval and Marketing of Biotech Products</i> , WT/DS291/R, WT/DS292/R, WT/DS293/R, Add.1 to Add.9, and Corr.1, adopted 21 November 2006, DSR 2006:III-VIII
<i>EC – Chicken Cuts (AB)</i>	Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , WT/DS269/AB/R; WT/DS286/AB/R, adopted 27 September 2005 and Corr.1, DSR 2005:XIX, 9157
<i>Korea – Commercial Vessels</i>	Panel Report, <i>Korea – Measures Affecting Trade in Commercial Vessels</i> , WT/DS273/R, adopted 11 April 2005, DSR 2005:VII, 2749
<i>US – Continued Zeroing (AB)</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 19 February 2009

<i>US – Export Restraints (Panel)</i>	Panel Report, <i>United States – Measures Treating Exports Restraints as Subsidies</i> , WT/DS194/R and Corr.2, adopted 23 August 2001, DSR 2001:XI, 5767
<i>US – Upland Cotton (Article 21.5 – Brazil) (AB)</i>	Appellate Body Report, <i>United States - Subsidies on Upland Cotton - Recourse to Article 21.5 of the DSU by Brazil</i> , WT/DS267/AB/RW, adopted 20 June 2008
<i>US – Upland Cotton (AB)</i>	Appellate Body Report, <i>United States - Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, 3
<i>US – Wheat Gluten (AB)</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717
<i>US –Zeroing (EC) (Panel)</i>	Panel Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")</i> , WT/DS294/R, adopted 9 May 2006, as modified by Appellate Body Report WT/DS294/AB/R, DSR 2006:II, 521

## **Table of Abbreviations**

<b>Abbreviation</b>	<b>Description</b>
LA/MSF	Launch Aid/Member State Financing
1992 Agreement	<i>1992 Agreement concerning the application of the GATT Agreement on Trade in Civil Aircraft on trade in large civil aircraft, between the European Communities and the United States</i>
SCM Agreement	<i>Agreement on Subsidies and Countervailing Measures</i>
US FWS	First Written Submission of the United States
Vienna Convention	<i>Vienna Convention on the Law of Treaties 1969</i>

## A. INTRODUCTION

1. These proceedings raise significant systemic issues as well as important questions of legal interpretation. In its written submission, Australia will focus on a select few issues. However, the fact that Australia has not commented on a particular issue should not be taken as an indication that Australia accepts the views of either party on that issue. The issues which Australia will address in this submission are:

- a. the relevance of the 1992 Agreement;
- b. the applicability of the SCM Agreement to pre-1995 subsidies;
- c. the proper interpretation of Article 3.1(a) (including footnote 4) of the SCM Agreement;
- d. the application of Part III of the SCM Agreement to the facts as found by the Panel;
- e. the existence of “the Launch Aid Program”; and
- f. whether the infrastructure measures constitute subsidies within Article 1 of the SCM Agreement.

2. Australia reserves the right to raise other issues at the oral hearings before the Appellate Body.

## B. RELEVANCE OF THE 1992 AGREEMENT

3. The European Union argues that the Appellate Body must examine, as a threshold issue, whether the 1992 Agreement is a “relevant rule of international law applicable in the relations between the parties” within the meaning of Article 31(3)(c) of the Vienna Convention.<sup>1 2</sup>

Australia notes that the interpretation of Article 31(3)(c) is important in determining the relevance of the 1992 Agreement to the present case. It also has significant systemic implications for the WTO dispute settlement regime.

4. The Appellate Body has not previously considered the meaning of “the parties” in Article 31(3)(c) of the Vienna Convention. However, the term was considered by the panel in *EC – Biotech (Panel)*, which found that Article 31(3)(c) of the Vienna Convention should be interpreted to “mandate consideration of rules of international law which are applicable in the relations between all parties to the treaty which is being interpreted”.<sup>3</sup> Australia submits that this is the correct interpretation – it is supported by the text of Article 31(3)(c), and by the broader context of Article 31.

5. The European Union argues that the text of Article 31(3)(c) is open to two possible interpretations.<sup>4</sup> One is to interpret “the parties” as a reference to the parties to the treaty being interpreted i.e. the approach taken by the panel in *EC – Biotech (Panel)*. The other is to interpret “the parties” as referring to “the parties to the treaty *that is being proposed as an interpretative tool*”.<sup>5</sup> Australia submits that there is no basis in the text of the Vienna Convention for this second interpretation.

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<sup>1</sup> *Appellant Submission of the European Union*, paragraph 701 (footnote 878).

<sup>2</sup> Article 31(3)(c) provides: “There shall be taken into account, together with the context: any relevant rules of international law applicable in the relations between the parties”.

<sup>3</sup> *EC – Biotech (Panel)*, paragraph 7.71 (emphasis added) (footnote omitted).

<sup>4</sup> *Appellant Submission of the European Union*, paragraph 703.

<sup>5</sup> *Appellant Submission of the European Union*, paragraph 703 (original emphasis).

6. Article 2(1)(g) of the Vienna Convention defines “party”, for the purposes of the Convention, to mean “a State which has consented to be bound by the treaty and for which the treaty is in force”. Article 2(1)(a) of the Vienna Convention defines “treaty”, for the purposes of the Convention, to mean “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”. Applying these definitions, the reference to “the parties” in Article 31(3)(c) of the Vienna Convention covers those States which have consented to be bound by the treaty under interpretation and for which that treaty is in force.

7. This interpretation is borne out by the broader context of Article 31.

8. Article 31(3)(a) of the Vienna Convention refers to “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions”. In *EC – Bananas III (Article 21.5 – Ecuador II)/ EC – Bananas III (Article 21.5 – United States)*, the Appellate Body recognised that “the parties” in this context encompassed all WTO Members:

“... we do not believe that the Doha Article I Waiver qualifies as a “subsequent agreement” within the meaning of Article 31(3)(a) of the *Vienna Convention* between all WTO Members regarding the application of the tariff quota concession in Part I, Section I-B of the European Communities' Schedule”.<sup>6</sup>

9. Article 31(3)(b) of the Vienna Convention refers to “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”. The Appellate Body recognized in *EC – Chicken Cuts* that it is not necessary that “each [treaty] party” has engaged in a practice, only that all have accepted it, albeit tacitly.<sup>7</sup>

10. If all parties are required to have entered into an agreement for the purposes of Article 31(3)(a) or to have accepted, albeit tacitly, a subsequent practice for Article 31(3)(b) to apply, Australia submits that it would be unlikely that the drafters of Article 31 would have intended, by the use of the identical term “the parties” in Article 31(3)(c), that rules of international law which are only applicable in relations between a subset of the parties to a treaty could be taken into account under that provision.

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<sup>6</sup> *EC – Bananas III (Article 21.5 – Ecuador II)/ EC – Bananas III (Article 21.5 – United States) (AB)*, paragraph 391 (underlining added) (footnote omitted).

<sup>7</sup> *EC – Chicken Cuts (AB)*, footnote 515 (paragraph 272) (emphasis added).



11. The European Union argues that the context of the Vienna Convention – in terms of the alternative usage of the terms “the parties” and “all the parties” – indicates an intention not to narrow Article 31(3)(c) to cases where the relevant rules of international law are applicable in the relations between “*all the parties*”.<sup>8</sup> On this point, the European Union refers to Article 31(2)(a), which provides that the context for the purposes of interpreting a treaty shall include “any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty”. Australia submits that the panel in *EC – Approval Biotech (Panel)* correctly dealt with this argument, when it stated:

“We are aware that Article 31(2)(a) of the *Vienna Convention* refers to “all the parties”. However, we do not consider that Article 31(2)(a) rules out our interpretation of the term “the parties” in Article 31(3)(c). In our view, the reference to “all the parties” is used in Article 31(2)(a) to make clear the difference between the class of documents at issue in that provision (namely, agreements relating to a treaty which were made between “all the parties”) and the class of documents at issue in Article 31(2)(b) (namely, instruments made by “one or more parties” and accepted by “the other parties” as related to a treaty”).<sup>9</sup>

12. The use of “one or more parties” in Article 31(2)(b) also shows that, when the drafters intended to refer to a subset of the parties to a treaty, this was done expressly.

13. Thus, “the parties” in Article 31(3)(c) is a reference to all the parties to the treaty being interpreted.

14. After examining the context of Article 31(3)(c), the European Union moves to a discussion of the object and purpose of the provision. Australia submits that, in examining the object and purpose of Article 31(3)(c) itself, as opposed to the treaty, the European Union has misapplied Article 31(1) of the Vienna Convention. Article 31(1) provides that:

“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.

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<sup>8</sup> *Appellant Submission of the European Union*, paragraphs 704-705 (emphasis added).

<sup>9</sup> *EC – Biotech (Panel)*, footnote 242 (paragraph 7.68).

15. Australia submits that the ordinary meaning of “its” in this paragraph, in context, refers to the “treaty” as opposed to any specific term of the treaty. Therefore, Article 31(1) requires consideration not of the object and purpose of an individual term of a treaty, but of the treaty overall. This interpretation is consistent with the findings and approach of the Appellate Body in *China – Publications and Audiovisual Products (AB)*.<sup>10</sup>

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<sup>10</sup> *China – Publications and Audiovisual Products (AB)*, paragraph 348.

C. APPLICABILITY OF THE SCM AGREEMENT TO PRE-1995 SUBSIDIES

16. Australia disagrees with the European Union argument that the Panel erred by “concluding that all alleged actionable subsidies granted by the European Union prior to 1 January 1995 were not excluded from the temporal scope of this dispute, and thereby fall under the obligation contained in Article 5 of the *SCM Agreement*.”<sup>11</sup>

17. Australia recalls that Article 28 of the Vienna Convention provides that:

“Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party”.

18. In applying Article 28 to the facts of this dispute, Australia considers it relevant that:

- a. under Article 1.1 of the SCM Agreement, a subsidy is deemed to exist if “there is a financial contribution by a government” and “a benefit is thereby conferred”;
- b. the “benefit” that is “thereby conferred” under Article 1.1(b) of the SCM Agreement can continue to be conferred after the “financial contribution” has occurred under Article 1.1(a)(1) of the SCM Agreement; and
- c. the “effect of the subsidy” under Article 6.3 of the SCM Agreement can continue to exist after the “financial contribution” has occurred under Article 1.1(a)(1) of the SCM Agreement.

19. Thus, while the “act” or the “fact” of the provision of the “financial contribution” may have occurred prior to 1 January 1995 in respect of some of the subsidies provided to Airbus, the “benefit” that was “thereby conferred” and the “effect” of the subsidies may well continue after that date.<sup>12</sup>

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<sup>11</sup> *Appellant Submission of the European Union*, paragraph 27.

<sup>12</sup> Australia notes that paragraph 7 of Annex IV to the SCM Agreement provided that: “Subsidies granted prior to the date of entry into force of the WTO Agreement, the benefits of which are allocated to future production, shall be included in the overall rate of subsidization” for the purposes of Article 6.1(a) of the SCM Agreement (now lapsed).

20. Australia therefore disagrees with the European Union’s assertion that “[w]hen an individual subsidy is granted, disbursed or brought into existence and ended, it is “completed””<sup>13</sup> and that “[a]ny effects derived from that government conduct are separate and should be distinguished from the “act” or “situation” attributed to the government”.<sup>14</sup>

21. The “benefit” that is “thereby conferred” under Article 1.1(b) of the SCM Agreement and the effect of the subsidies on the United States under Article 5 of the SCM Agreement have not necessarily “ceased to exist” under Article 28 of the Vienna Convention simply because the “financial contribution” has already occurred under Article 1.1(a)(1) of the SCM Agreement. The provisions of Article 5 of the SCM Agreement (which are concerned with the effects caused through the use of a subsidy) can thus apply with respect to a subsidy granted prior to 1 January 1995.

22. Finally, Australia notes that the conclusion the European Union draws from its review of the principle of retroactivity in international law - that the “economic effects of government [conduct] are irrelevant for a legal discussion about the principle of retroactivity [because] every government act will turn into a “continuing” (or even “neverending”!) situation since it may have triggered a causal chain of events with longstanding economic effects”<sup>15</sup> - fails to acknowledge that the “economic effects of government [conduct]” are precisely what is disciplined by Part III of the SCM Agreement.

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<sup>13</sup> *Appellant Submission of the European Union*, paragraph 48.

<sup>14</sup> *Appellant Submission of the European Union*, paragraph 49.

<sup>15</sup> *Appellant Submission of the European Union*, paragraph 46.

**D. “IN FACT” EXPORT CONTINGENCY**

23. One of Australia’s primary concerns in this appeal is the proper assessment of “in fact” export contingency under Article 3.1 of the SCM Agreement. In summary, Australia considers that:

- a. the Panel placed undue emphasis on the motivations of the European Union when considering whether it could be inferred from the total configuration of the facts that the “granting of [LA/MSF]” was “in fact tied to actual or anticipated exportation or export earnings”;
- b. the Panel did not convincingly explain why the facts that it found in this dispute were not sufficient to support a finding that the “granting of [LA/MSF]” was “in fact tied to actual or anticipated exportation or export earnings” in respect of the French A380, French A340-500/600, Spanish A340-500/600 and French A330-200 LA/MSF contracts;
- c. the European Union misinterprets footnote 4 to the SCM Agreement; and
- d. the Appellate Body should not develop reasoning in this dispute that would discriminate against small or export dependent economies.

**1. The test for “in fact” export contingency**

24. Article 3.1 of the SCM Agreement relevantly provides:

“Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:

(a) subsidies contingent, in law or in fact<sup>4</sup>, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I

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<sup>4</sup>This standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.”

25. In respect of the legal standard set out in footnote 4, the Panel correctly stated that:
- a. the three distinct elements in the legal standard are: “(i) the granting of a subsidy; (ii) that is tied to; (iii) [actual or] anticipated exportation or export earnings”;<sup>16</sup>
  - b. the second element (“tied to”) is “at the heart of this legal standard”;<sup>17</sup>
  - c. “that mere anticipation of export performance on the part of a granting authority – that is, the expectation or consideration that exportation or export earnings will take place in the future – is not enough to show that a subsidy was granted *contingent* upon anticipated export performance”;<sup>18</sup> and
  - d. “the mere fact that an enterprise exports cannot, alone, be used to establish the required contingency”.<sup>19</sup>

## 2. The facts that may be considered

26. Australia notes that the Appellate Body has also stated that “the existence of this relationship of contingency, between the subsidy and export performance, must be *inferred* from the total configuration of the facts constituting and surrounding the granting of the subsidy, none of which on its own is likely to be decisive in any given case”.<sup>20</sup> However, in Australia’s view, the Panel placed undue emphasis on one fact in the “total configuration of the facts” - the motivation of the grantor of the subsidy.

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<sup>16</sup> Panel Report paragraph 7.648.

<sup>17</sup> Panel Report paragraph 7.648.

<sup>18</sup> Panel Report paragraph 7.648 (original emphasis).

<sup>19</sup> Panel Report paragraph 7.648.

<sup>20</sup> *Canada – Aircraft (AB)*, paragraph 167 (original emphasis). Australia notes that the Panel stated that: “[F]or the purpose of establishing a case of *in fact* contingency, each of the three elements identified above must be separately *inferred* from the total configuration of facts constituting and surrounding the granting of the subsidy, none of which is likely to be decisive in any given case” (paragraph 7.648 of the Panel Report, quoting paragraph 167 of *Canada-Aircraft (AB)*) (original emphasis). However, the Appellate Body in *Canada-Aircraft (AB)* (at paragraph 167) in fact stated that: “[T]he existence of this relationship of contingency, between the subsidy and export performance, must be *inferred* from the total configuration of the facts constituting and surrounding the granting of the subsidy, none of which on its own is likely to be decisive in any given case” (original emphasis). That is, it is the relationship of contingency, not the “granting of a subsidy” or the “actual or anticipated exportation or export earnings” that the Appellate Body stated must be inferred from the “total configuration of the facts”.

27. For example, the Panel stated that:

- a. “a government’s motivation for granting a particular subsidy, to the extent it can be established from the evidence and arguments presented by the parties in dispute, will be highly relevant when evaluating whether a subsidy has been granted contingent in fact upon export performance”;<sup>21</sup>
- b. “...the required contingency may be demonstrated where the subsidy was granted because the granting authority anticipated export performance”;<sup>22</sup> and
- c. “even if we were to accept the “countervailing explanations” advanced by the European Communities [as to why the LA/MSF contracts contained delivery-dependent repayment provisions], this would not necessarily preclude a finding of export contingency, if it could be inferred from the “total configuration of the facts” that at least one of the conditions or reasons for the provision of LA/MSF was the anticipation of export performance”.<sup>23</sup>

28. Further, the Panel found that:

- a. the German, Spanish and UK A380 LA/MSF contracts were prohibited export subsidies because they were “in fact, concluded at least in part on the *condition* or because of the ... government’s anticipation of exportation”;<sup>24</sup> and
- b. the French A380, French A340-500/600, Spanish A340-500/600 and French A330-200 LA/MSF contracts were not prohibited export subsidies because the United States had “failed to demonstrate that the ... government provided the LA/MSF ... even in part, on the *condition* or because of its anticipation of exports”.<sup>25</sup>

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<sup>21</sup> Panel Report paragraph 7.675 (emphasis added).

<sup>22</sup> Panel Report paragraph 7.644 (underline added).

<sup>23</sup> Panel Report paragraph 7.677 (emphasis added).

<sup>24</sup> Panel Report paragraphs 7.680-7.683 (underline added).

<sup>25</sup> Panel Report paragraphs 7.685-7.688 (underline added). Australia notes that in paragraph 7.687 the Panel states “failed to establish” while the other relevant paragraphs state “failed to demonstrate”. Australia assumes the Panel did not intend a different meaning.

29. In Australia’s view, a consideration of the “facts” should go beyond a consideration of whether or not “the subsidy was granted *because* the granting authority anticipated export performance”. A government’s motivations for granting a subsidy may be relevant, but will not necessarily be “highly relevant” to the question of contingency.

30. On the use of a “because” or a “reason” test, Australia recalls that the panel in *Canada-Aircraft (Panel)* stated that “we can examine most effectively whether there exists the requisite conditionality ... by determining whether the facts demonstrate that [the] assistance would not have been granted ... but for anticipated exportation or export earnings”.<sup>26</sup> In respect of this “but for” test, the Appellate Body in *Canada-Aircraft (AB)* stated that “[w]hile we consider that the Panel did not err in its overall approach to *de facto* export contingency, we, and panels as well, must interpret and apply the language actually used in the treaty”.<sup>27</sup>

31. The word “because” does not appear in footnote 4. The language “actually used” in footnote 4 requires a consideration of whether “the facts demonstrate that the granting of a subsidy ... is in fact tied to actual or anticipated exportation or export earnings”. By using the term “because”, the Panel appears to be moving away from the interpretation of footnote 4 espoused by the Appellate Body in *Canada-Aircraft (AB)*.

32. In Australia’s view, the “facts” that may be considered could include, without limitation: the nature of the product; the design and form of the subsidy; the export propensity of the product; performance requirements or conditions attached to the granting of the subsidy; any distinction made between domestic and export sales in relation to repayment requirements; the level of sales requirements relative to domestic demand; and official statements by governments indicating the intention behind the granting of the subsidies.

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<sup>26</sup> *Canada — Aircraft (Panel)*, paragraph 9.332 (original emphasis).

<sup>27</sup> *Canada — Aircraft (AB)*, footnote 102 (paragraph 171) (underline added).



33. The Panel found that the following facts were insufficient to show that the “granting of [the] subsidy [i.e. the provision of LA/MSF to Airbus] ... [was] in fact tied to actual or anticipated exportation or export earnings”:

- a. “all of the seven challenged LA/MSF contracts were concluded for the purpose of financing the development of a globalized product manufactured by an export-oriented company for primarily a global market”;<sup>28</sup>
- b. “the EC member States ... knew that Airbus was a highly export-oriented company”;<sup>29</sup>
- c. “Airbus was required to repay the loaned principal plus any interest from the proceeds of the sale of a specified number of LCA developed with the financing provided by the EC member States”;<sup>30</sup>
- d. “achieving the level of sales needed to fully repay each loan would require Airbus to make a substantial number of exports”;<sup>31</sup>
- e. all of the seven challenged LA/MSF contracts were “subject to sales-dependent repayment terms that could only be satisfied through Airbus making an important number of exports”;<sup>32</sup>
- f. “exports were ... not merely incidental to full repayment of the loans; and they could not be replaced with domestic sales in order to achieve the number of sales necessary to fully repay the loans”;<sup>33</sup>
- g. “[although] the contracts impose no obligation on Airbus to make any sales at all, ... the EC member States expected their LA/MSF contributions would be fully repaid and achieve their target rate of return”;<sup>34</sup>

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<sup>28</sup> Panel Report, paragraph 7.690.

<sup>29</sup> Panel Report, paragraph 7.678.

<sup>30</sup> Panel Report, paragraph 7.678.

<sup>31</sup> Panel Report, paragraph 7.678.

<sup>32</sup> Panel Report, paragraph 7.690.

<sup>33</sup> Panel Report, paragraph 7.678.

<sup>34</sup> Panel Report, paragraph 7.678 (footnote omitted).

- h. “the EC member States must have been counting on Airbus to make LCA sales that necessarily included a substantial number of exports when concluding the LA/MSF contracts”;<sup>35</sup> and
- i. “the EC member States, fully expecting to be repaid, must have held a high degree of certainty that the provision of LA/MSF would result in Airbus making those export sales”.<sup>36</sup>

34. Australia considers that these facts demonstrate a close relationship between the granting of the subsidy and anticipated exportation or export earnings. In Australia’s view, the Panel does not convincingly explain why these facts were not sufficient to find that “the granting of [the] subsidy ... [was] in fact tied to actual or anticipated exportation or export earnings”. Nor does the Panel convincingly explain why the “additional evidence” in respect of the German, Spanish and UK A380 LA/MSF contracts meant that “the total configuration of the facts” demonstrated the relationship of contingency in respect of those contracts. In Australia’s view, it would also have been helpful if the Panel had distinguished the facts before it from those in respect of the Technology Partnerships Canada programme (TPC) in *Canada-Aircraft (Panel)* and those in respect of the grant contract in *Australia-Automotive Leather II*, both of which were found to constitute “in fact” export subsidies.

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<sup>35</sup> Panel Report. paragraph 7.678.

<sup>36</sup> Panel Report. paragraph 7.678.

### 3. The European Union's Submission on the Operation of Footnote 4

35. The European Union argues that footnote 4:

“comes into play when a panel does not have before it direct evidence of the “granting of a subsidy” “having been made legally contingent upon export”, that is, the text of the contingent/conditional measure itself. Nevertheless, the Panel has before it “indirect” evidence, that is, evidence establishing other facts, and those facts working together demonstrate the existence and precise content of an unwritten or undisclosed export contingency/conditionality”.<sup>37</sup>

36. In Australia's view, there is nothing in the text of footnote 4, or the jurisprudence, to limit its applicability to situations where there is no “direct evidence” of the granting of a subsidy made legally contingent upon export. Rather, footnote 4 comes into play where a complaining Member alleges that “that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings”.

37. The European Union submits that:

“the correct interpretation of footnote 4 is that the term “actual” means an export that exists (that is, has already taken place) at the moment when the measure is enacted and a subsidy is deemed to exist within the meaning of Article 1; whilst the term “anticipated” (juxtaposed to the meaning of the term “actual”) means an export in the future. In either case, what is prohibited is if-then contingency/conditionality, whether in the text of the measure or demonstrated by other facts”.<sup>38</sup>

38. Further, the European Union submits that:

“The term “actual” confirms that where individual subsidies are advanced because of “actual” (that is, past or present) exports, that can also be *indirect evidence* of the existence and operation of a subsidy contingent/conditional upon export (particularly if there is a repetitive pattern and an absence of other explanation). Here the because-relationship is *backward* looking, *indirect* evidence, in the context of an in fact claim relating to *actual* exports, positing the existence and precise content of an unwritten or undisclosed measure (especially a *programme*)”.<sup>39</sup>

39. The European Union states that “what the provision requires” is “the imposition by the granting Member of a requirement that the recipient export in order to obtain (or retain) the subsidy”.<sup>40</sup>

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<sup>37</sup> Appellant Submission of the European Union, paragraph 1323.

<sup>38</sup> Appellant Submission of the European Union, paragraph 1324.

<sup>39</sup> Appellant Submission of the European Union, paragraph 1332 (original emphasis).

<sup>40</sup> Appellant Submission of the European Union, paragraph 1331.

40. The European Union appears to be suggesting that “in fact” export contingency will only be shown where:

- a. the Panel has before it “indirect” evidence, that is, facts other than “the text of the contingent/conditional measure itself”;<sup>41</sup> and
- b. this “indirect” evidence demonstrates an “if-then contingency/conditionality”<sup>42</sup> i.e. “a requirement that the recipient export in order to obtain (or retain) the subsidy”.<sup>43</sup>

41. The European Union provides the following examples of “in fact” export contingency:

- a. “an unwritten or undisclosed measure or provision” that provides a subsidy “because of ... past or present ... exports ... particularly if there is a repetitive pattern and an absence of other explanation”;<sup>44</sup>
- b. “an unwritten or undisclosed measure or provision” that requires the repayment of a subsidy in the event that exports “anticipated” to occur in the future do not, in fact, occur;<sup>45</sup> and
- c. “other ways in which indirect evidence might establish facts that, working together in specific and explained ways, might logically demonstrate the existence or operation of an export contingent/conditional measure”.<sup>46</sup>

42. Australia considers that the European Union’s argument undermines the standard for “in fact” export contingency. There is no requirement in Article 3.1, footnote 4 or the jurisprudence that suggests a subsidy is contingent in fact upon export performance only if:

- a. it was “because of” an export that has occurred; or
- b. the subsidy must be repaid if an export that was “anticipated” fails to occur.

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<sup>41</sup> *Appellant Submission of the European Union*, paragraph 1323.

<sup>42</sup> *Appellant Submission of the European Union*, paragraph 1340.

<sup>43</sup> *Appellant Submission of the European Union*, paragraph 1331.

<sup>44</sup> *Appellant Submission of the European Union*, paragraph 1332.

<sup>45</sup> *Appellant Submission of the European Union*, paragraph 1346.

<sup>46</sup> *Appellant Submission of the European Union*, paragraph 1333.

43. In Australia’s view the ordinary meaning of the term “actual” in the context of footnote 4 involves an element of certainty; that is, it refers to an exportation that does, in fact, occur.<sup>47</sup> For example, “the granting of a subsidy” may be “tied to actual ... exportation or export earnings” within the terms of footnote 4 where the grantor operates a programme without any legal conditions for the receipt of the subsidies but the facts demonstrate that all entities that exported more than \$100 worth of widgets in September 2010 received a \$10 grant in October 2010. In such a case, the granting of the \$10 may be found to be tied to the export of the \$100 worth of widgets that did, in fact, occur.

44. In Australia’s view, the ordinary meaning of the term “anticipate” in the context of footnote 4 involves an element of probability; that is, it refers to an exportation that is foreseen but that may not occur.<sup>48</sup> For example, “the granting of a subsidy” may be “tied to ... anticipated exportation or export earnings” within the terms of footnote 4 where the grantor operates a programme without any legal conditions for the receipt of the subsidies but the facts demonstrate that subsidies were provided in 2010 only to applicants that were in the process of developing products destined solely for export. In such a case, the granting of the subsidies may be found to be tied to the grantor’s anticipation that exports would occur. The fact that a grantee does not subsequently export a product does not mean that the granting of the subsidy in 2010 was not “tied to” the exportation or export earnings that were anticipated by the grantor in 2010.

45. This interpretation is consistent with the approach in *Canada-Aircraft (AB)*, where the Appellate Body upheld the panel’s finding that the TPC assistance to the Canadian regional aircraft industry was “contingent ... in fact ... upon export performance”.<sup>49</sup> This assistance was provided at a time when the grantor anticipated that exportation would occur.<sup>50</sup> There was no requirement that the assistance be repaid if the exportation or export earnings did not, in fact, eventuate.<sup>51</sup>

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<sup>47</sup> Or export earnings that are, in fact, earned.

<sup>48</sup> Or export earnings that are foreseen, whether or not the export earnings are, in fact, earned.

<sup>49</sup> *Canada-Aircraft (AB)*, paragraph 180.

<sup>50</sup> Or that export earnings would be earned: *Canada-Aircraft (Panel)*, paragraph 9.341.

<sup>51</sup> *Canada-Aircraft (Panel)*, paragraph 9.343.

#### **4. Discrimination against small or export dependent countries**

46. Australia notes that the European Union has raised a concern regarding potential discrimination “against small or export dependent economies” because “the relative smallness of a domestic market (that is, the necessary fact of export) could be determinative in a finding of export contingency”.<sup>52</sup>

47. Australia requests that the Appellate Body be mindful of these concerns in developing its reasoning in this dispute and considers that the second sentence of footnote 4 (“The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision”) has relevance in this regard.

48. Australia considers that export propensity is only one element in demonstrating the requisite relationship of conditionality or dependence between the granting of a subsidy and export performance. Contingency must still be established. Export propensity must not be confused with export contingency, which must be assessed on an analysis of the total configuration of the facts.

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<sup>52</sup> *Appellant Submission of the European Union*, paragraph 1359.

## E. ADVERSE EFFECTS

### 1. The “subsidized product”

49. The United States argued that the “subsidized product” for the purpose of its claim under Part III of the SCM Agreement was the “family of Airbus large civil aircraft”.<sup>53</sup> The European Union “appeals the Panel’s findings ... that as a matter of law it had no discretion to divide a broad single “subsidized product” as alleged in a complaining Member’s request for establishment and that it need not independently and objectively assess the scope of the “subsidized product”, as defined by the United States”.<sup>54</sup>

50. Australia notes that in *Korea – Commercial Vessels* the panel indicated that it is “always for the complaining party to determine the basis and nature of its own complaint” and that it “will then be the complainant’s burden to demonstrate the causal relationship between the subsidy and the particular ... effects that it alleges”.<sup>55</sup> Thus, in this dispute, it was for the United States to determine the basis and nature of its complaint and then to establish the required causal relationship.

51. In the context of a claim under Part III of the SCM Agreement, if the complaining Member (in this case, the United States) frames its complaint in such a way that it is unable to show that the other Member (in this case, the European Union) has caused “through the use of any subsidy ... adverse effects” to its interests (either because of its choice of the “subsidized product” or otherwise) then its claim will fail. There is no requirement in the SCM Agreement that a panel “make the case” for the complainant.

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<sup>53</sup> Panel Report, paragraph 7.1625, and US FWS, paragraph 724.

<sup>54</sup> *Appellant Submission of the European Union*, paragraph 298.

<sup>55</sup> *Korea – Commercial Vessels*, paragraphs 7.559-7.560.

## 2. Causation

52. The European Union argues that the Panel “improperly presumed causation, and failed to complete the required “chain of causation” under the ... counterfactual scenarios it posited”.<sup>56</sup>

53. Australia recalls that the Appellate Body in *US – Upland Cotton (Article 21.5 – Brazil)*, in the context of Brazil’s claim under Articles 5(c) and 6.3(c) of the SCM Agreement, stated that it must be determined:

- a. “that price suppression is the effect of the subsidy and that there is a "genuine and substantial relationship of cause and effect"”;<sup>57</sup> and
- b. that “[t]he effect ... must result from a chain of causation that is linked to the impugned subsidy”.<sup>58</sup>

54. Australia considers that as each of the enumerated subparagraphs in Article 6.3 of the SCM Agreement begins with “the effect of the subsidy is”, it is appropriate to regard the Appellate Body’s statements in *US – Upland Cotton (Article 21.5 – Brazil)* as having application to each of those subparagraphs.

55. Therefore, in order for it to be found that a Member has caused “through the use of any subsidy ... serious prejudice to the interests of another Member”, the effects set out in Article 6.3 must result from a chain of causation that is linked to the impugned subsidy and there must be a "genuine and substantial relationship of cause and effect" between the impugned subsidy and the effect.

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<sup>56</sup> *Appellant Submission of the European Union*, paragraph 393.

<sup>57</sup> *US – Upland Cotton (Article 21.5 – Brazil) (AB)* paragraph 374, quoting the *US – Upland Cotton (AB)*, paragraph 438 (who in turn quoted the *US – Wheat Gluten (AB)*, paragraph 69) (original footnote omitted).

<sup>58</sup> *US – Upland Cotton (Article 21.5 – Brazil)(AB)*, paragraph 372.



56. Australia considers that a legitimate tool to use in considering “the effect of the subsidy” is the “counterfactual” – that is, a consideration of the situation that would have existed in the absence of the impugned subsidy. Australia notes that the Panel found “that there are multiple possibilities for the LCA industry in the counterfactual world that would exist in the absence of subsidies to Airbus”:<sup>59</sup>

- a. the first scenario – “Airbus would not have entered the LCA market at all and Boeing would be in a monopoly position, holding 100 percent of the market”;
- b. the second scenario – “Airbus would not have entered the market, but there would nevertheless have been two players, which on the basis of the evidence before us, would most likely have been Boeing and McDonnell Douglas, the latter having merged with Boeing in 1997”;
- c. the third scenario - “Airbus might have entered the LCA market without subsidies ... in competition with Boeing alone”; or
- d. the fourth scenario – “Airbus might have entered the LCA market without subsidies ... in competition with a United States' industry comprising Boeing and another US producer”.

57. The Panel did state that it would be “unlikely ... that Airbus would have been able to enter the LCA market as a non-subsidized competitor”<sup>60</sup> and that it was “questionable” whether Airbus “might have been competing at all for [the sales that Boeing lost]”<sup>61</sup>. However, it did not base its findings on the conclusion:

- a. that Airbus would not “have been able to enter the LCA market as a non-subsidized competitor”;
- b. that Airbus would not “have been competing at all for [the sales that Boeing lost]” in the absence of subsidies;

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<sup>59</sup> Panel Report, paragraph 7.1984.

<sup>60</sup> Panel Report, paragraph 7.1984 (emphasis added).

<sup>61</sup> Panel Report, footnote 5758 (paragraph 7.1985) (emphasis added).

- c. that either the first or the second scenarios would have happened in the absence of the subsidies; or
- d. that either the first or the second scenarios were the most likely of the four scenarios to have happened in the absence of the subsidies.

58. Rather, the Panel compared the situation of the United States over the “reference period” with the situation it would have faced if the first and second scenarios had eventuated. It also considered the implication of that comparison to the issue of whether the EU had caused “through the use of any subsidy ... serious prejudice” to the United States:

- a. in respect of the first scenario: “Airbus would not have entered the LCA market at all ... [and] [a]ny market displacement and lost sales actually suffered by Boeing would be directly attributable to the subsidies granted to Airbus”;<sup>62</sup> and
- b. in respect of the second scenario: “Airbus would not have entered the market ... [T]here would ... be no question about the nexus between the subsidies which enabled ... Airbus to enter the LCA market and serious prejudice to the United States’ interests (displacement of Boeing and/or McDonnell Douglas LCA from the LCA markets and lost sales)”.<sup>63</sup>

59. And, in respect of the third and fourth scenarios, the Panel stated that:

- a. “Airbus could not conceivably have been present in the LCA market with the same aircraft and at the same times as it actually was”;
- b. “Airbus could [not] have undertaken the pace of aircraft development that would have enabled it to launch the range of LCA that it has successfully launched to date, which has resulted in its present position in the market for LCA”; and
- c. “Airbus ... would not have achieved the market presence it did over the [reference] period [of] 2001 to 2006.”<sup>64</sup>

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<sup>62</sup> Panel Report, paragraph 7.1984.

<sup>63</sup> Panel Report, paragraph 7.1984.

<sup>64</sup> Panel Report, paragraph 7.1984.

60. The Panel also found that:

- a. “the subsidies ... enabled Airbus to launch LCA that it otherwise would not have been [able] to launch when it did”;<sup>65</sup>
- b. “the ... subsidies ... had the effect of enabling Airbus to launch successive models of LCA at a pace it could not otherwise have achieved”;<sup>66</sup>
- c. “but for the subsidies, Airbus would not have had the market presence it did have during the period we examined”;<sup>67</sup> and
- d. “[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>68</sup>

61. Australia notes, in this regard, that each of these Panel findings contains the possibility that, even without subsidies, Airbus might have been selling LCA in competition with United States’ manufacturer(s) (albeit different LCA than it was able to sell having received the subsidies). Australia agrees with the European Union that a “finding that subsidies [resulted] in “different” competition ... raises fundamental further questions – namely, if not the *particular* LCA that Airbus *actually* launched, sold and delivered, *which* LCA, if any, could a non-subsidised Airbus have launched, sold, and delivered in each of the sales campaigns and markets at issue during the reference period?”<sup>69</sup>

62. The Panel did not determine which (if any) Airbus LCA would have been competing with Boeing in each of the markets and campaigns it considered if the third or fourth scenarios had eventuated. Nor did it determine what the result of that competition would have been.

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<sup>65</sup> Panel Report, paragraph 7.1967 (emphasis added).

<sup>66</sup> Panel Report, paragraph 7.1972 (emphasis added).

<sup>67</sup> Panel Report, paragraph 7.1986 (emphasis added).

<sup>68</sup> Panel Report, paragraph 7.1993 (emphasis added).

<sup>69</sup> *Appellant Submission of the European Union*, paragraph 399 (original emphasis)

63. The Appellate Body will need to carefully consider whether such determinations should have been undertaken by the Panel as part of its consideration of whether the EU had caused “through the use of any subsidy ... serious prejudice” to the United States. To the extent that the third and fourth scenarios suggest displacement or lost sales different to that found by the Panel, the Appellate Body will need to carefully consider whether the Panel was correct in concluding that:

- a. “under either scenario<sup>70</sup> ... the United States’ LCA industry, at a minimum, would not have lost sales to Airbus and would have had a larger market share in the EC and certain third country markets than it actually did over that period”;<sup>71</sup>  
and
- b. “the displacement of United States’ LCA from the EC and certain third country markets and the lost sales we have found ... are an effect of the specific subsidies”.<sup>72</sup>

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<sup>70</sup> Australia assumes that the Panel’s reference to “either scenario” is a reference to the third and fourth scenarios it posited for the counterfactual.

<sup>71</sup> Panel Report, paragraph 7.1993 (emphasis added).

<sup>72</sup> Panel Report, paragraph 7.1993 (emphasis added).

## F. LAUNCH AID PROGRAMME

64. The United States seeks review of the Panel’s conclusion that it had not demonstrated the existence of “the Launch Aid Program”.<sup>73</sup> It argues that the Panel should have “followed the approach in the Appellate Body report in *US-Continued Zeroing*”.<sup>74</sup>

65. The Panel, with reference to the Appellate Body finding in *US-Continued Zeroing (AB)*, stated that it was “mindful that the distinction between “as such” and “as applied” claims “does not define exhaustively the types of measures that may be subject to challenge in WTO dispute settlement”” and that a “measure “need not fit squarely within one of these two categories” in order to be susceptible to WTO dispute settlement”.<sup>75</sup>

66. However, the Panel appears to have considered that the manner in which the United States had framed its submissions required it to effectively apply the test that was developed for “as such” claims in *US – Zeroing (EC) (Panel)*.<sup>76</sup> In particular, the Panel’s decision appears to have turned mainly on the fact that the United States had failed to prove that “the Launch Aid Program”, as described by the United States, would necessarily be continued into the future (i.e. that it did not have “general and prospective application”).<sup>77</sup>

67. If the Appellate Body finds that the Panel was incorrect in effectively applying the test that was developed for “as such” claims in *US – Zeroing (EC) (Panel)*, then the Appellate Body finding in *US-Continued Zeroing (AB)* will become relevant.

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<sup>73</sup> *Other Appellant Submission of the United States*, paragraph 41.

<sup>74</sup> *Other Appellant Submission of the United States*, paragraph 53.

<sup>75</sup> Panel Report, paragraph 7.519 (footnotes omitted), citing *US – Continued Zeroing (AB)* paragraph 179.

<sup>76</sup> Panel Report, paragraphs 6.91 – 6.96, 7.519 and 7.520.

<sup>77</sup> See, for example, Panel Report paragraphs 7.531, 7.532 and 7.578.

68. The Appellate Body in *US-Continued Zeroing (AB)* found that the “measures at issue” in that dispute were not “a rule or norm of general and prospective application”.<sup>78</sup> Nor were they “discrete applications of the zeroing methodology in particular determinations”.<sup>79</sup> It found that “the continued use of the zeroing methodology in successive proceedings in which duties resulting from the 18 anti-dumping orders are maintained, constitute “measures” that can be challenged in WTO dispute settlement”.<sup>80</sup>

69. Australia notes that the failure of the United States to prove that “the Launch Aid Program” would necessarily be continued into the future is of less relevance when considering an alleged measure that consists of “ongoing conduct” under *US-Continued Zeroing (AB)*:

- a. in *US-Continued Zeroing (AB)*, the Appellate Body recognised that the European Communities had framed “the subject of its challenge in such a way as to bring the ongoing conduct ... under the scrutiny of WTO dispute settlement” because it was “seeking the ... cessation of the use of the zeroing methodology by which the duties are calculated and maintained in these 18 cases”<sup>81</sup> – in so doing, it found that the European Communities did not have to show that there was a “rule or norm of general and prospective application”;<sup>82</sup> and
- b. in *US-Continued Zeroing (AB)*, the Appellate Body found that a “measure” existed even though “zeroing may not manifest itself [in each and every future determination] as a result of the particular factual circumstances of a case in which all export prices are below the normal value”.<sup>83</sup>

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<sup>78</sup> *US-Continued Zeroing (AB)*, paragraph 181.

<sup>79</sup> *US-Continued Zeroing (AB)*, paragraph 181.

<sup>80</sup> *US-Continued Zeroing (AB)*, paragraph 189.

<sup>81</sup> In much the same way as the United States is presumably seeking to prevent the granting of LA/MSF for the Airbus A350 (see *Other Appellate Submission of the United States of America*, footnote 48).

<sup>82</sup> *US-Continued Zeroing (AB)*, paragraph 181.

<sup>83</sup> *US-Continued Zeroing (AB)*, paragraph 192.

70. Australia also notes that, in *US-Continued Zeroing (AB)*, the “measures at issue” consisted of “the use of the zeroing methodology in successive proceedings, in ... 18 cases, by which duties are maintained over a period of time”.<sup>84</sup> The Appellate Body will need to consider whether the alleged measure before it now – “the consistent, up-front provision by the Airbus governments of a significant portion of the capital that Airbus needs to develop each new LCA model”<sup>85</sup> over a period of some 30 years - is amenable to the application of its reasoning in *US-Continued Zeroing (AB)*.

71. Finally, to the extent that the Appellate Body shares the Panel’s concern that future LA/MSF “would [not] necessarily involve the provision of loans ... at below-market interest rates”,<sup>86</sup> Australia notes that if a future round of LA/MSF was provided at market interest rates then this would mean that “the Launch Aid Program”, as described by the United States, had either not been used in that instance and/or no longer existed.<sup>87</sup> Any dispute settlement action in respect of that round of funding that relied on the existence of the “Launch Aid Program” would thus necessarily fail.

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<sup>84</sup> *US-Continued Zeroing (AB)*, paragraph 181.

<sup>85</sup> Panel Report, paragraph 7.501.

<sup>86</sup> Panel Report, paragraph 7.531.

<sup>87</sup> Australia is not suggesting that LA/MSF at “market interest rates” would necessarily not be a subsidy; rather, it would not be part of the “Launch Aid Program” as that term has been defined by the United States.

## G. INFRASTRUCTURE MEASURES

72. Australia notes that “a subsidy shall be deemed to exist” under Article 1.1 of the SCM Agreement if “there is a financial contribution by a government ... i.e. where ... a government provides goods or services ... other than general infrastructure ... and a benefit is thereby conferred”.

73. The European Union argues that:

- a. “the creation of infrastructure (such as the development of agricultural land into urban or industrial land, the creation of natural parks, the creation or improvement of infrastructures, such as roads, railways and land, etc) are not the type of actions which qualify as “financial contributions”; rather, and until provided to a particular recipient, they are government interventions that do not constitute measures covered by the *SCM Agreement*”;<sup>88</sup> and
- b. “[o]nly the *provision* to an economic operator (as opposed to creation) of infrastructures “other than general infrastructures” is captured by the notion of financial contribution since this government action is capable of distorting trade”.<sup>89</sup>

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<sup>88</sup> *Appellant Submission of the European Union*, paragraph 1029, quoting *US – Export Restraints (Panel)*, paragraphs 8.63 and 8.73.

<sup>89</sup> *Appellant Submission of the European Union*, paragraph 1030.



74. Australia considers that, for the infrastructure in question, it is artificial to separate their “creation” from their “provision” - the infrastructure was “created” specifically for the entity (Airbus) to which it was to be “provided”:

- a. “the Hamburg authorities ... undertook the entire [Mühlenberger Loch site] project specifically in order to enable Airbus to expand its existing facilities”;<sup>90</sup>
- b. “the extension of the runway at Bremen airport, and the associated noise reduction measures, were undertaken by the Bremen city authorities specifically for Airbus’ needs”;<sup>91</sup> and
- c. “the development of the ZAC Aéroconstellation site and the construction of the EIG facilities was undertaken specifically to enable Airbus to situate an A380 final assembly line in an advantageous location in France”.<sup>92</sup>

75. The “goods or services” provided by “a government” were therefore:

- a. the Mühlenberger Loch site;
- b. the extension of the runway at Bremen airport (and the associated noise reduction measures); and
- c. the ZAC Aéroconstellation site and EIG facilities,

with each being specifically created for Airbus.

76. The issue then becomes whether a “benefit” was “thereby conferred” within Article 1.1(b) of the SCM Agreement by the provision of those particular “goods or services” to Airbus. The Panel correctly noted that “a benefit will be conferred whenever a financial contribution is granted to a recipient on terms more favourable than those available to the recipient in the market”.<sup>93</sup> Thus, the question before the Panel was whether those “goods or services” were “granted to [Airbus] on terms more favourable than those available to [Airbus] in the market”.

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<sup>90</sup> Panel Report, paragraph 7.1084 (emphasis added).

<sup>91</sup> Panel Report, paragraph 7.1116 (emphasis added).

<sup>92</sup> Panel Report, paragraph 7.1177 (emphasis added).

<sup>93</sup> Panel Report, paragraph 7.1182.

77. The European Union argues the Panel incorrectly applied Article 1.1(b) of the SCM Agreement “because it adopted what amounts to a “return-to-government” or “cost-to-government”, rather than a “benefit-to-recipient”, standard” in determining whether Airbus had received a “benefit”.<sup>94</sup>

78. In respect of the Mühlenberger Loch site, Australia notes that the Panel did refer to the benefit as “an amount equivalent to the extent of the difference between the actual rent paid by Airbus for the land and facilities in question, and a reasonable rate of return on the investment of the Hamburg authorities in creating that land and those facilities”.<sup>95</sup> However, as explained by the Panel, the “reasonable rate of return on the investment of the Hamburg authorities”<sup>96</sup> is a “reflection ... of the basis on which a market actor would determine the amount of rent to be charged for that particular parcel of land” and is thus the “appropriate “market” benchmark”.<sup>97</sup>

79. In respect of the extension of the runway at Bremen airport and the associated noise reduction measures, Australia notes that the Panel did suggest that the benefit consisted of the fact that “Airbus pays ... no additional charges for the use of the runway extensions ... [T]hus, it is clear that there is no return to the City of Bremen on its investment in the runway extension and noise reduction measures”.<sup>98</sup> However, as explained by the Panel, “the appropriate question to be addressed in resolving the question of benefit is whether a market actor would have provided the good or service to the recipient at the time, on the same terms and conditions as the government provision at issue”.<sup>99</sup> In Australia's view, it was reasonable to conclude that no market actor would have provided the runway extension and noise reduction measures at zero cost and hence on a zero return on its investment.

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<sup>94</sup> *Appellant Submission of the European Union*, paragraph 1052.

<sup>95</sup> Panel Report, paragraph 7.1096.

<sup>96</sup> Panel Report, paragraph 7.1096.

<sup>97</sup> Panel Report, paragraph 7.1188.

<sup>98</sup> Panel Report, paragraph 7.1133.

<sup>99</sup> Panel Report, paragraph 7.1182.

80. In respect of the development of the ZAC Aéroconstellation site and the construction of the EIG facilities, Australia notes that the Panel did state that “the price paid by Airbus for land in the ZAC Aéroconstellation, and the lease for the EIG facilities, does not provide a market rate of return on the investment by the French authorities to develop the site, including the EIG facilities”.<sup>100</sup> However, as explained by the Panel, “a market rate of return on the investment by the French authorities” is a “reflection ... of the basis on which a market actor would determine the price to be charged for the land to be sold, and thus the appropriate “market” benchmark”.<sup>101</sup>

81. Thus, Australia considers that the Panel correctly analysed whether a government had provided “goods or services other than general infrastructure” to Airbus and whether a “benefit [was] thereby conferred” (i.e. whether the financial contribution was received “on terms more favourable than those available to the recipient in the market”), as required by Article 1.1 of the SCM Agreement and the *Canada-Aircraft* decisions.

82. That is, the Panel correctly found that all of the “goods or services” in question were provided by governments to Airbus “on terms more favourable than those available to [Airbus] in the market”.

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<sup>100</sup> Panel Report, paragraph 7.1190.

<sup>101</sup> Panel Report, paragraph 7.1188.

## H. CONCLUSION

83. In conclusion, Australia submits that:

- a. the term “the parties” in Article 31(3)(c) of the Vienna Convention is a reference to all the parties to the treaty being interpreted, not a reference to the parties to the treaty that is being proposed as an interpretative tool;
- b. the provisions of Article 5 of the SCM Agreement (which are concerned with the effects caused through the use of a subsidy) can apply with respect to a subsidy granted prior to 1 January 1995;
- c. the Panel placed undue emphasis on the motivations of the European Union when considering whether it could be inferred from the total configuration of the facts that the “granting of [LA/MSF]” was “in fact tied to actual or anticipated exportation or export earnings”;
- d. in considering the United States’ claim under Part III of the SCM Agreement, two of the Panel’s four counterfactuals envisage that Airbus might have been selling LCA in competition with United States’ manufacturer(s) (albeit different LCA than it was able to sell having received the subsidies). However, the Panel did not determine which (if any) Airbus LCA would have been competing with Boeing in each of the markets and campaigns it considered if either of the two scenarios had eventuated. Nor did it determine what the result of that competition would have been. The Appellate Body will need to carefully consider whether such determinations should have been undertaken by the Panel as part of its consideration of whether the EU had caused “through the use of any subsidy ... serious prejudice” to the United States;

- e. if the Appellate Body finds that the Panel was incorrect in effectively applying the test that was developed for “as such” claims in *US – Zeroing (EC) (Panel)* to the United States’ argument that a “Launch Aid Program” existed, then the Appellate Body decision in *US-Continued Zeroing (AB)* will become relevant. The Appellate Body will need to consider whether the alleged measure before it now – “the consistent, up-front provision by the Airbus governments of a significant portion of the capital that Airbus needs to develop each new LCA model”<sup>102</sup> over a period of some 30 years - is amenable to the application of its reasoning in *US-Continued Zeroing (AB)*; and
- f. the European Union’s separation of the “creation” of infrastructure from its “provision” is artificial and should be rejected. The Panel correctly determined that the “goods or services” in question were “granted to [Airbus] on terms more favourable than those available to [Airbus] in the market”<sup>103</sup> and therefore that a “benefit” was “thereby conferred” within Article 1.1(b) of the SCM Agreement.

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<sup>102</sup> Panel Report, paragraph 7.501.

<sup>103</sup> Panel Report, paragraph 7.1182.