

AIRBUS (A/B Report May, 18, 2011)

On 18 May 2011, the Appellate Body Report was circulated to Members.

Summary of key findings

The Appellate Body today upheld the Panel's finding that certain subsidies provided by the European Union and certain Member state governments to Airbus are incompatible with Article 5(c) of the SCM Agreement because they have caused serious prejudice to the interests of the United States. The principal subsidies covered by the ruling include financing arrangements (known as "Launch Aid" or "Member state financing") provided by France, Germany, Spain, and the UK for the development of the A300, A310, A320, A330/A340, A330-200, A340-500/600, and A380 LCA projects. The ruling also covers certain equity infusions provided by the French and German governments to companies that formed part of the Airbus consortium. Additionally, it covers certain infrastructure measures provided to Airbus, namely, the lease of land at the Mühlenberger Loch industrial site in Hamburg, the right to exclusive use of an extended runway at Bremen airport, regional grants by the German authorities in Nordenham, and Spanish government grants and regional grants by Andalucia and Castilla-La Mancha in Sevilla, La Rinconada, Toledo, Puerto Santa Maria, and Puerto Real. The Appellate Body found that the effect of the subsidies was to displace exports of Boeing single-aisle and twin-aisle LCA from the European Union, Chinese, and Korean markets and Boeing single-aisle LCA from the Australian market. Moreover, the Appellate Body confirmed the Panel's determination that the subsidies caused Boeing to lose sales of LCA in the campaigns involving the A320 (Air Asia, Air Berlin, Czech Airlines, and easyJet), A340 (Iberia, South African Airways, and Thai Airways International), and A380 (Emirates, Qantas, and Singapore Airlines) aircraft.

However, for different reasons, the Appellate Body excluded certain measures from the scope of the finding of serious prejudice. In particular, the finding under Article 5(c) of the *SCM Agreement* no longer includes the 1998 transfer of a 45.76% interest in Dassault Aviation to Aérospatiale; the special purpose facilities at the Mühlenberger Loch industrial site in Hamburg, Aéroconstellation industrial site and associated facilities (taxiways, parking, etc.) in Toulouse, or the various research and technology development (R&TD) measures that had been challenged by the United States (Spanish PROFIT Programme, grants under Second, Third, Fourth, Fifth, and Sixth EC Framework Programmes; 1986-1993 R&TD grants by French government; *Luftfahrtforschungsprogramm* I, II, and III German grants; grants by Bavarian, Bremen, and Hamburg authorities; civil aircraft research and development and aeronautics research programmes by the UK government). The Appellate Body also reversed the Panel's findings of displacement in Brazil, Mexico, Singapore, and Chinese Taipei, and of threat of displacement in India.

Moreover, the Appellate Body *disagreed* with the Panel's views on when subsidies can be considered as being *de facto* contingent upon anticipated export performance. Consequently, the Appellate Body reversed the Panel's findings that the financing provided by Germany, Spain and the UK to develop the A380 was contingent upon anticipated exportation and thus a *prohibited export subsidy* under Article 3.1(a) and footnote 4 of the *SCM Agreement*. The Appellate Body also rejected the United States' cross-appeal of the Panel finding that it had not been established that certain other member State financing contracts constituted prohibited export subsidies. As a consequence, the Appellate Body reversed the Panel's recommendation that the European Union withdraw prohibited subsidies within 90 days. The Appellate Body also found that the United States' claims regarding an *alleged unwritten launch aid/member State financing programme were outside its jurisdiction*. In addition, the Appellate Body reversed the Panel's findings regarding the rate of return that a market lender would have demanded for launch aid/member State financing loans because they were not based on an objective assessment; but found that a benefit was conferred even on the basis of the European Union's calculations. Finally, with respect to the *actionable subsidies* that have been found to cause adverse effects to the interests of the United States, the Panel's recommendation that the European Union "take appropriate steps to remove the adverse effects or ... withdraw the subsidy" stands.

The Panel in this case was established in July 2005. The Panel circulated its Report to WTO Members on 30 June 2010; and the European Union filed a Notice of Appeal on 21 July 2010.

A separate dispute brought by the European Union against the United States for subsidies allegedly provided to *Boeing is currently before the Appellate Body*. The panel report in that dispute was circulated to WTO Members on 31 March 2011. Both the European Union and the United States have appealed aspects of that panel report.